REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

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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, } Associate Justices.
Hon. JOSEPH HOWARD, }

By a statute of 1852, c. 246, the District Court was abolished, and its powers and duties transferred to the Supreme Judicial Court, which, for the purpose of acting upon questions of law, was composed of three districts, called the Western, Middle and Eastern Districts. The counties of Cumberland, York, Oxford and Franklin, were made to compose the Western District; Kennebec, Lincoln, Somerset and Waldo, the Middle District; — Penobscot, Piscataquis, Hancock, Washington and Aroostook, the Eastern District.

By the same statute, provision was made for the addition to the Court of three members.

Accordingly, on the 11th day of May, 1852, the following gentlemen were appointed and qualified as Associate Justices of the Supreme Judicial Court, viz: —

Hon. RICHARD D. RICE, of Augusta,
Hon. JOSHUA W. HATHAWAY, of Bangor,
Hon. JOHN APPLETON, of Bangor.

By an Act of March 9, 1853, the county of Waldo was transferred from the Middle to the Eastern District.

ERRATA: — In the decision of Lee *v.* Oppenheimer, page 181, Appleton, J., having been of counsel, took no part.

In Cilley *v.* Cilley, page 162, the counsel were
S. H. Blake, for the appellant.
A. Sanborn, *contra*.

The reader is requested to correct with his pen, the following errors of the press.

PAGE 83, 7th line from top, substitute *never* for *now*.
" 135, 5th line from bottom, substitute *recover* for *receive*.
" 295, 2d line from bottom, substitute *or* for *a*.
" 370, 19th line from bottom, substitute *recovering* for *receiving*.

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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.

CLEAVES *versus* JORDAN.

A writ may lawfully be framed as an original summons, with or without an order to attach property ; —

Or, (with some exceptions as to contracts and judgments founded on contracts,) it may be framed to attach the property, and, for want of it, to arrest the body ; —

Or it may be framed merely to attach the property, without any order as to the arrest of the body.

In common acceptation, the term "highway" means a public way. But when used in a statute, its import is restricted to county roads or county ways, unless its connection should require some different construction.

The statute provides, that if swine be found going at large without a keeper on the *highways* or *town ways*, the owner shall be subject to a penalty.

In an action to recover the statute penalty for the rescuing of animals to prevent an impounding, an allegation in the writ that they were found in the *highway* cannot be treated as surplusage. It is a material averment, and must be proved as laid. Such an averment is not supported by proof that the animals were found upon a *town* way.

On Exceptions from the *District Court*, Cole, J.

Debt to recover the statute penalty for rescuing certain swine, which the plaintiff had found going at large and had taken up for the purpose of impounding. The writ was framed to attach the goods or estate of the defendant, but omitted to give any direction as to the taking of his body. For that omission, the defendant, at the trial before the justice, moved that the writ be quashed. The motion was overruled. After a trial upon the general issue, the defendant appealed, and renewed his motion in the District Court, where it was again overruled, and on the *plaintiff's* motion, the writ was amended by inserting the *capias* clause. The declaration alleged, that the swine were found going at large without a keeper in the *highways* of Saco. The proof was, that they were found in a street which had never been established by *county officers*, but was located as a *town way* by the *selectmen*.

The Judge instructed the jury, "that the word 'highways' in the declaration included town ways, and was a sufficient description of the place where the swine were taken; and that, if the swine were taken going at large without a keeper, in a town way of Saco," the verdict should be for the plaintiff. To that instruction and to the amendment of the writ, the defendant excepted.

Shepley & Hayes, for the defendant.

Emery & Loring, for the plaintiff.

Wells, J. — By statute, chap. 114, sect. 23, "the original writ may be framed either to attach the goods or estate of the defendant, and for want thereof to take his body; or it may be an original summons either with or without an order to attach the goods or estate." In accordance with this provis-

ion a party could frame his writ in either of the modes prescribed. And the plaintiff's writ in its original form was a summons, with an order to attach the defendant's goods or estate, and was duly served as such.

But this right of election as to the form of the writ is limited by chap. 148, sect. 1, which prohibits the arrest of any person on mesne process in suits on contracts and on judgments founded on them, with an exception when the debtor is about to depart and reside out of the State, &c. "and the writ or other process shall be so varied as not to require the arrest of the defendant.

By the ninth section of the same chapter it is provided, "that in all actions, not founded on contract, or on a judgment on such contract, the original writ or process shall run against the body of the defendant, and he may be thereon arrested," &c. And it is contended, that this provision is absolute and imperative, and that the plaintiff's writ should run against the body of the defendant. But taking the several provisions together, it may be fairly inferred, that it was the intention of the Legislature to provide, that the writ shall be permitted to run against the body of the defendant, when the action is not founded on contract or on a judgment on such contract. Upon the construction contended for by the defendant, the option as to the form of process would be taken away without any necessity for such deprivation. For why should the plaintiff be required to insert in his writ a command to arrest the body of the defendant, when he had no wish or desire to make such arrest, and when the process would be equally sufficient without it? The provision giving power to arrest the body was made for the benefit of the plaintiff, and the omission to insert it was no detriment but a favor to the defendant. It could not have been the purpose of the Legislature to compel a party to pursue a more rigorous course in the institution of his process than his disposition or his interests required. A mode of process having been given by which such severity could be avoided, the ninth section must be considered as not imperative, but potential in its

character, leaving the plaintiff at liberty, but not requiring him to insert a command to arrest the body of the defendant.

The amendment, therefore, which was made, was altogether unnecessary and unimportant, and of no benefit to the plaintiff nor detriment to the defendant.

By chap. 30, sect. 3, of the statute, provision is made, that "if any horse, &c., or swine shall, at any time, be found going at large, without a keeper, in the highways, roads, town ways or commons of the town, the owner thereof shall forfeit," &c.

The plaintiff in his declaration alleges, that the swine taken by him were found "going at large in the highways of said town of Saco," &c. At the trial it was proved, that the swine were taken by the plaintiff going at large in Storer street, which was a town way, located in the year 1823, by the selectmen of Saco, according to the provisions of the statute for locating town ways, and that it had been used since its location as a public way.

The defendant contends, that the proof does not support the declaration, and that a town way is not a highway, which must be laid out by the County Commissioners.

It does not affect the guilt of the defendant whether the swine were found going at large on a county or a town way, his liability would be the same. But still the plaintiff must prove his case as he has laid it in his declaration.

The word highway in popular language means public way, and a town way is a public way, all the citizens have a right to use it. *Jones* v. *Andrews*, 6 Pick. 59; *Commonwealth* v. *Hubbard*, 24 Pick. 98. But a definition has been given to this word by statute chap. 1, sect. 3, art. 6. It is as follows: "The word highway may be construed to include county bridges, and as equivalent to county road or county way." The meaning of the provision appears to be that, when the word is used in the statutes, its import should be that, which is mentioned in the article, unless the sense would require a different one. If the word *may* is not intended to restrict the signification, then the term might still be understood in its

broadest and most comprehensive sense, and the provision would be inoperative and useless.

There is no language in the thirtieth section before cited, which would authorize a different meaning to be given to the word *highway*, than that prescribed in this article. It must therefore be construed as meaning county way, and be taken to bear the same import in the plaintiff's declaration. And proof, that the swine were found in a town way, does not support the allegation, that they were found in a highway, which by the statute means a county way.

It is contended, that the declaration would be sufficient without containing the word highways, and that it might be rejected, and need not be proved. But the twenty-second section of the statute provides, that "whoever, in order to prevent the impounding of any beast, lawfully in the possession of any person, and taken for the causes, in this chapter mentioned, shall rescue the same," &c. The plaintiff's action is given by this section, and if the beasts were not taken for the causes mentioned, the forfeiture would not accrue. Although the defendant is not allowed by another provision of the statute to show, that the distress was illegal, yet the plaintiff must state in his declaration, and must also prove the cause of taking, for he would have no right to interfere with the beasts unless they were found in some highway, road, town way or commons.

The expression, "highways of said town of Saco," contained in the declaration, cannot be understood to be limited in its meaning so as to indicate town ways alone, but it more properly designates highways within the town.

In the opinion of a majority of the Court the exceptions must be sustained. *Exceptions sustained.*

INHABITANTS OF SACO *versus* GURNEY.

An unqualified repeal of a penal statute, upon which a pending action was founded, extinguishes the suit; and no costs are recoverable by either party.

HOWARD, J. — This suit was brought for the penalty provided by the Act of 1850, chap. 202, for the unlawful sale of spirituous liquors, and was pending at the passage of the Act of June 2, 1851, chap. 211. By section 18, of the Act last mentioned, the former was repealed, without any reservation or saving clause, as to actions then pending.

The right of the Legislature to repeal the Act without a saving clause is indisputable; nor can it be questioned, that the repeal operated as a bar to the further prosecution of all suits pending under that Act. It took from the Courts their power and jurisdiction, and from the parties all prospective rights to appear and continue the proceedings in such suits. *Miller's case*, 1 W. Black. 451; *Yeaton* v. *The United States*, 5 Cranch, 281; *The United States* v. *Preston*, 3 Peters, 57; *Springfield* v. *The Commissioners of Highways*, 6 Pick. 501; *Commonwealth* v. *Marshall*, 11 Pick. 350; *Commonwealth* v. *Kimball*, 21 Pick. 373; *Thayer* v. *Seavey*, 11 Maine, 284; *Cummings* v. *Chandler*, 26 Maine, 453.

The Judge of the District Court ordered the action to be dismissed, at the February term, 1852, without costs. The defendant filed exceptions, and the question now presented is, whether he was entitled to costs upon the dismissal of the action.

By the R. S. chap. 115, sect. 56, it is provided, that "the party prevailing shall be entitled to his legal costs."

If an action be dismissed for want of jurisdiction, or for any legal cause, in which a party finally prevails in the suit, he will be entitled to costs, under the statute, as the *prevailing party*. *Greenwood* v. *Fales*, 6 Maine, 405; *Reynolds* v. *Plummer*, 19 Maine, 22; *Harris* v. *Hutchins*, 28 Maine, 103; *Whitney* v. *Brown*, 30 Maine, 557; *Sweetser* v. *Kenney*, 31 Maine, 288; *Turner* v. *Putnam*, 31 Maine, 557;

Carey v. *Daniels*, 5 Met. 239; *Jordan* v. *Dennis*, 7 Met. 590; *Hunt* v. *Hanover*, 8 Met. 345; *Gray* v. *The Lowell and Lawrence Railroad Co.* 4 Cush. 609.

But when the Act, on which a suit pending is founded, is summarily repealed, and a complete bar to all further proceedings in the suit thereby interposed, by the Legislature, then all voluntary control or agency of the parties, in the disposition of the cause, is ended *vi majori*, and neither can be regarded as the prevailing party. In such case the Court cannot render judgment for either party, but can only dismiss the action from the docket. When the repealing act took effect neither party had a right to costs, and after that, neither was in a position to claim or receive them, legally. *Thayer* v. *Seavey*, 11 Maine, 284.

Exceptions overruled, — *Action dismissed.*

Emery & Loring, for the plaintiffs.

Shepley & Hayes, for the defendants.

HOWE *& al. versus* NEWBEGIN *& trustee.*

The adjudication of commissioners, appointed by the Court to determine, upon an examination of a debtor's affairs, whether the execution should or should not run against his body as well as against his property, has the character of a judgment, and cannot be set aside or vacated on motion to the Court.

An assignment of a debtor's property, made for the benefit of his creditors *pro rata*, and containing a provision by which the subscribing creditors released all claims except under the assignment, and having been subscribed by a part only of the creditors, will not be defeated, as to other creditors, by a counter release, subsequently made by the debtor, discharging such subscribing creditors from the obligation of their release contained in the assignment.

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

ASSUMPSIT.

The principal defendant, pursuant to R. S. chap. 148, sect. 10, moved that the execution, to be issued in this suit, should

be so framed as to run, not against his body, but against his estate only, and offered to submit himself to examination, as to his property affairs. The Court accordingly appointed commissioners, before whom the proposed examination was had, and they thereupon adjudged and determined that the execution should run against the property only, and made report thereof to the Court.

The plaintiffs, by a written motion, alleged that, in the doings of the commissioners, there was "accident, mistake, or gross error, or some other cause, unknown to the plaintiffs," by means of which the adjudication was wrongful, as the record of the commissioners' proceedings would show, inasmuch as they acted only upon uncontroverted facts; and, in the motion, the plaintiffs pointed out the supposed errors, and prayed the Court to examine said proceedings, and to revise, recommit, or set aside the report, and order that the execution should be so framed as to run against the body, as well as against the property of the defendant.

Luques, in support of the motion.

The commissioners derived their power from the Court or from the statute.

If from the Court, they are under its supervision, and it will, on suggestion, examine their proceedings, and see that no wrong is done; — if from the statute, the Court will take care that the power is not transcended or abused.

If the commissioners have any discretion, it is a limited one, to be governed by legal rules, and exercised only upon *controverted* facts. An error in judgment, arising from honest weakness or indistinct perceptions of duty, is equally prejudicial as fraud would be, and calls equally for the interposition of the Court. The reports of such commissioners cannot be conclusive. There must somewhere be a remedy against errors and misdoings. Awards of referees are not beyond the reach of the Court. And yet in the selection of referees, both parties have a voice. But the appointment of such commissioners, is by the Court only. Much more, then, are their proceedings revisable.

PER CURIAM. — The decision of commissioners, under the statute in question, is in the nature of a judgment by a judicial tribunal, and cannot be vacated or set aside on motion.

The trustee, to the general interrogatory, replied that he had in his hands and possession no goods, effects or credits of the defendant. He further disclosed *that* he had taken an assignment marked A, of the defendant's property for the benefit of creditors, dated *February* 26*th*, 1851, and had pursued the mode prescribed by the statutes in that behalf; *that* the assignment contained a provision, by which the subscribing creditors released all claims, except what would be paid upon a settlement and distribution of the property assigned; *that* several of the creditors had become parties to the assignment; and *that* he claimed to hold the property to be disposed of for the benefit of such creditors, and pursuant to the provisions of the assignment.

In reply to further interrogatories, he disclosed in substance, *that*, on the 11*th March*, 1851, the defendant executed an instrument, marked B, under seal, discharging all such of his creditors, as should become parties to the assignment, from the effect of their release to him, as contained in the assignment; so that the assignee should hold the assigned property for the benefit of creditors, in the same manner and to the same effect, as if the release-clause had not been contained in, or made a part of, the instrument of assignment; *that* said counter release, executed by the defendant, was placed in the hands of the assignee before any of the creditors had subscribed the assignment, and remained in his hands until after the three months allowed for them to become parties, had expired; and *that* it was exhibited to some of the creditors, to show them that the debtor waived any benefit to himself from the release-clause in the assignment.

The Judge ruled that the trustee should be discharged, and the plaintiffs excepted to that ruling.

D. Goodenow and *Luques*, for the plaintiffs.

Eastman and *J. M. Goodwin*, for the trustee.

Wells, J. — The assignment made by the principal defendant was executed February 26, 1851, and on the eleventh day of March following, he made an instrument under seal, in which he waived the release and discharge provided for him in relation to his debts by the assignment. It is contended that this instrument was a part of the assignment, and that the affidavit and notice required by the statute should have succeeded the making of it. But it was made several days after the assignment was completed, was not intended to be a part of it, and it does not by its provisions purport to be so, but speaks of the assignment as a transaction already finished. It cannot be regarded in any other light than a collateral stipulation, to waive a benefit provided for the assignor in the deed of assignment.

The facts contained in the disclosure, by which the case must be decided, in connection with the documents referred to, do not show that any fraud was practised, or intended to be by that instrument. It applies by its terms to all the creditors, who should become parties to the assignment. It is not a promise to a part, but to all of them. And it does not appear that the knowledge of it was concealed from any one. So far as can be perceived, its object was to induce all the creditors to come into the assignment. It is suggested that the purpose was to have a few only to become parties, so that after paying them, a balance would remain to the assignor. But no such conclusion can be drawn from the facts disclosed. And such balance would be subject to the claims of other creditors. No measures were taken to deter any one. All of the creditors were at liberty to become parties, and if they did, the assignor agreed to waive the release in favor of them.

If the instrument could be considered as giving a preference to some of the creditors to induce them to become parties, and should therefore be objectionable in reference to

others, who also became parties, it could not have the effect to defeat the assignment.

It does not appear but that the plaintiffs might have ascertained, that this instrument was in the hands of the assignee upon making inquiry, and what its provisions were, and they cannot justly complain, if they have met with any loss, by the want of due diligence.

If they have failed in obtaining a share of the property assigned, because as they allege, they were ignorant of this instrument, and supposed they should be bound to release the balance of their debt, the creditors, who have become parties, are not in any fault by acquiring the knowledge of a fact, which the plaintiffs did not ascertain, and which such creditors used no means to conceal. They ought not for this reason to be deprived of the benefit of the property holden for them by the trustee.

The exceptions are 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., }
HON. SAMUEL WELLS, } ASSOCIATE JUSTICES.
HON. JOSEPH HOWARD. }

HOBSON *versus* WATSON *& al.*

The lien for fees and disbursements, which an attorney has upon his client's interest in the subject matter of a suit, does not accrue until the judgment is entered.

It is not requisite, that an attorney, in order to perfect his lien upon the judgment, should give notice to the judgment debtor of his intent to retain it.

The attorney's lien is an ownership in the property of the judgment, and of the same efficiency, as would be created by an assignment of the judgment for collateral security, and entitles to the same remedies for its enforcement.

An arrest is one of the modes allowed for its enforcement.

A bond given pursuant to the statute for a release from the arrest, is a substitute for the custody of the debtor.

The property in the bond belongs to the several owners of the judgment, and any such owner may use the name of the obligee for the collection of it.

A judgment upon such a bond operates, to the amount recovered, as a discharge of the original judgment.

The lien which the attorney had upon the original judgment attaches to the bond, and cannot be defeated by the creditor's discharge of it.

In order that the surety in a poor debtor's relief bond should be held liable for the attorney's lien on the judgment and execution, upon which the bond arose, notwithstanding a discharge by the judgment creditor, if it be necessary that the surety have knowledge of the lien, *it seems*, that such knowledge, acquired, *pending the suit*, is sufficient.

On facts agreed.

Debt against principal and surety on a poor debtor's relief bond, taken on execution issued upon a judgment for cost.

Within the six months prescribed in the bond for the performance of its conditions, the judgment creditor received payment of the judgment, interest and expenses, and discharged both the *judgment* and the *bond.* After the giving of that discharge, the attorney, who had aided in obtaining the judgment, brought this action, to recover the amount of his fees and disbursements, being something more than half of amount of the judgment, for which he claims a lien on the *bond.*

L. De'M. Sweat, who had been attorney to the judgment creditor, *pro sese.*

McArthur, for the defendants.

The attorney's lien upon the *judgment* is not controverted, neither do we pretend that his remedy upon the *judgment* is impaired by the creditor's discharge of it.

But the lien never extended to the bond, which was given exclusively to the creditor. In the bond the attorney had no rights, and consequently the creditor's discharge of it is effectual. *Grimes* v. *Turner*, 16 Maine, 353; *Storer* v. *Hyde*, 22 Maine, 318.

The suit upon the bond creates new parties, not known in the original judgment. A recovery upon it would create a liability never contemplated by either of the parties. R. S. chap. 148, sect. 20.

The surety cannot be presumed to have subjected himself to any liability, except, that the principal should faithfully perform the condition, to the creditor, to whom the bond was expressly given. If any relative obligation to the attorney can be claimed, it should have been asserted, and brought home by formal notice to the surety.

WELLS, J. — The statute, chap. 117, sect. 37, recognizes the existence of a lien upon the judgment in favor of the attorney in the suit, for his fees and disbursements. It does not accrue until judgment is entered. *Potter* v. *Mayo*, 3 Greenl. 34. By the English rule, to perfect his lien, the attorney must give notice to the defendant that he claims it. *Welsh* v. *Hale*, Doug. 238; *Read* v. *Dupper*, 6 T. R. 361. But our statute does not require that the attorney should give notice of his intention to rely upon his lien in order to retain it against the discharge of the creditor. *Gammon* v. *Chandler*, 30 Maine, 152. The statute creates the lien without such notice of a design to enforce it. A knowledge of its existence is sufficient. It is not contended in this case, that the debtor was ignorant that an attorney was employed to prosecute the suit against him, or that he had not a valid lien upon the judgment, but that the surety on the bond had not such knowledge. But it does not appear, that the surety has made any payment on the bond, and he is now fully informed of the claim of the attorney. A payment made by the debtor to the nominal creditor, when he was not the real creditor and not the owner of the debt, and known to be such, would not be a performance of one of the conditions of the bond by a payment of the debt. Nor would the payment of the entire debt to a part owner have that effect, when there was knowledge of an equitable interest in another of a portion of it.

Does the lien extend to the bond in suit, and embrace it? The attorney has an interest in the judgment to the amount of more than half of it. What is the nature of that interest? It is a property in it to the extent of such interest, as much so as if the creditor had assigned it to him as collateral security

for his fees and disbursements.. And it being the property of the attorney, he has all the legal incidents, which attach to it, and which by law may arise from it. He could not claim a right to the benefit of any contract made between the creditor and debtor in relation to the mode of satisfying the judgment, when it was voluntarily entered into by them, and not prescribed by law. But the debtor has the right, without the consent of the creditor to give a bond to relieve himself from arrest on the execution. It does not depend upon the will of the creditor. It is a legal incident attached to the judgment and execution. The arrest is one mode authorized by law for the collection of the debt, and the bond is a substitute for the custody of the debtor. The creditor is compensated by the bond for the liberation of the debtor. The bond belongs to the owner of the judgment. If the whole amount due upon the judgment was costs upon which the attorney had a lien, would he not be entitled to the control of the bond? It would be his property in equity, and he would have a right to use the name of the nominal party in a suit upon it.

Nor is there any reason why he should be deprived of this right to the extent of his interest, if his lien was upon less than the whole judgment. There would be a similar necessity for protection to him, when his interest is in a part, as in the whole judgment. Suppose the execution to be satisfied by a levy upon real estate, would not the attorney have an equitable interest in the land to the extent of his lien? Whoever owned a part of the judgment in equity would also own in equity an equal portion of the land, and a court of equity would compel a conveyance from the legal to the equitable owner. The attorney's lien resembles an assignment of a chose in action. In the case of *Martin* v. *Hawks*, 15 Johns. 405, the attorney, who had a lien on the judgment, was held entitled to use the name of the nominal plaintiff for the purpose of maintaining an action against the sheriff for an escape, although the sheriff received a release from the plaintiff for suffering the escape. This decision is upon the principle that such action is one of the fruits of the judgment, which

belong to the attorney and grow out of the lien. It is not apparent why the bond should not be viewed in the same manner.

By the Act of August 11, 1848, chap. 85, sect. 3, it is provided, that in an action founded upon a bond given for release from arrest on execution, if the whole amount due upon the execution be recovered, the new judgment shall operate as a discharge of the execution; if only a part of the amount be recovered, the new judgment shall operate as a discharge of such part. So that when the whole amount of the execution is recovered in an action on the bond, unless the lien runs with the bond, it would be lost, and its operation upon a part discharged would also be defeated. But there is no reason to suppose, that the Legislature intended to take away the lien for the costs in the first action, and if it remains, it must follow the bond and become attached to the judgment on the bond, the latter judgment taking the place of the former. If then the lien follows the bond as an incident of the first judgment, and remains with the bond, the creditor cannot discharge it to the prejudice of the attorney's lien. And such appears to be the force and effect, which ought to be given to it. The conclusion is, that this action can be maintained for the amount of the attorney's lien, the amount of which is agreed upon by the parties, notwithstanding the acknowledgment of satisfaction of the judgment and bond made by the plaintiff.

Defendants defaulted.

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

WINSLOW & *ux. versus* PATTEN & *al.*

The ordinance of 1641 provided that the proprietor of land adjoining on the sea or salt water shall hold to low water, where the tide does not ebb more than one hundred rods. Though that ordinance was vacated by the abrogation of the Colonial charter, it has by long usage become the law of the State.

Words of doubtful import in a deed of conveyance, are to be construed most favorably to the grantee.

A grantor deeded a lot or square of land, bounded by an arm of the sea, "*reserving a street through the square,*" [of a described width and location,] "*together with the flats; viz: all my right to the same in front of said square to the channel;* —

Held, that the flats were not included in the reservation, but passed by the deed.

ON FACTS AGREED.

Writ of entry to recover certain flats, lying between high water and low water marks, upon Fore river, an arm of the sea.

So far as involved in the present controversy, the demandants are to be considered as owning one quarter of the flats, by inheritance from the late William Vaughan, unless the same were included in his deed to Donnell, under whom the tenants claim. That deed conveyed a lot or square of land extending down to and bounded by Fore river, "*reserving* a street through said square of forty feet in width, at the distance of 130 feet south of Bridge street, and at right angles with said Bridge street, *together with the flats; viz. all my right to the same in front of said square to the channel.* To have and to hold the same with all the privileges and appurtenances thereof to said Donnell."

Judgment is to be rendered in accordance with the legal rights of the parties.

Fox, for the demandants, conceded that the deed, under which the tenants claim, would convey the flats, except for the *reservation* contained in it; but he contended that, by the reservation, the flats were retained by Vaughan, and did not pass by the deed. *Sprague* v. *Snow*, 4 Pick. 54; *Rackley* v.

Sprague, 19 Maine, 346; *Kennebec F. Co.* v. *Bradstreet*, 28 Maine, 377.

Shepley & Dana, for the defendants.

Wells, J. — The determination of the question presented depends upon the construction of the deed from William Vaughan to James Donnell. If the demanded premises passed by that conveyance, the tenants are entitled to recover. The description of that part of the premises in controversy is as follows: — "Square No. nine, lying and being on the south side of Bridge street in said Portland, bounded northerly on said Bridge Street four hundred and twenty-nine feet, easterly by a street of sixty feet, southerly by Fore river, westerly by a street forty-five feet in width, *reserving* a street through said square of forty feet in width at the distance of one hundred and thirty feet south of Bridge street, and at right angles with said Bridge street, *together with the flats, viz. all my right to the same in front of said square to the channel.*"

The deed of the land bounded by Fore river, an arm of the sea, would convey the flats, by virtue of the Colonial ordinance of 1641. It may therefore be said, that they would not have been mentioned, but for the purpose of making an exception of them. But it has not been unusual in deeds of conveyance to mention flats expressly, although they would pass by the general description of the premises.

If it had been intended to except the flats from the operation of the conveyance, the qualifying phrase, "all my right to the same," &c. would not probably have been introduced. The interest of the grantor would not have required or induced him to limit the force of the exception, if it had been intended to be such, nor could there have been any necessity for him to do so. But if on the contrary a grant of the flats was intended, there might have been a good reason for imposing some limitation upon the language used. For if they were conveyed absolutely, and the title should fail, the grantor would be liable on his covenants, which were those of general warranty, but by conveying his right merely, he might sup-

pose that he would warrant nothing more than his then present interest, whatever it might be. The language employed in the deed would appear to indicate, that the grantor had such a distinction in contemplation, whether well founded in law or not, it is not now necessary to consider.

Taking into consideration, that the expression "all my right," &c. would not have been used unless there had been a desire to prevent a liability, which might arise if the flats were intended to be conveyed, the mind is drawn to the conclusion that the purpose was to convey them.

But if this were a case of so much doubt, that it could not be determined whether the flats were granted or excepted, the construction most favorable to the grantee should be adopted. And if the grantor has really left it in doubt whether he has excepted a part of the premises granted, such part must pass by the general terms and description of the grant. *Lincoln* v. *Wilder*, 29 Maine, 169.

In the opinion of a majority of the Court, there must be judgment for the tenants.

Judgment for the tenants.

GODDING *versus* BRACKETT *& al.*

A purchase of personal property, made by a debtor with his own money and for his own benefit, exposes the property to his creditors, although the bill of sale may have been made to a third person, for whom he pretended to purchase, and although the vendor may have supposed that he was selling to such third person.

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

TROVER for a building, sold as the property of one Hancock, by Brackett, a deputy sheriff, one of the defendants, upon an execution in favor of Pride, the other defendant.

It appeared that one Gross had taken a lease of a lot of land for ten years and erected the building upon it. The plaintiff, to prove his ownership, read an assignment of the

lease and a bill of sale of the building, from Gross to himself. He also introduced Gross, as a witness, who testified *that,* in the assignment and sale, he had no conversation with the plaintiff, but negotiated wholly with Hancock, who represented that, in the purchasing and in paying for the building, he acted as the agent of the plaintiff, and *that* he, the witness, supposed he was selling to the plaintiff.

The defence was, that it was with Hancock's own money and for his own benefit, that he made the purchase; and that he used the name of the plaintiff, as purchaser, merely to conceal from his creditors his ownership of the property. Upon this point there was much testimony.

The Judge instructed the jury, that they were at liberty to determine, from the evidence, whether Hancock purchased for himself or as agent for the plaintiff, and that if the money paid by Hancock was his own money, and he made the purchase for himself, but caused the bill of sale to be made to the plaintiff, with the design to protect the property from his creditors, they might consider the property to be his, notwithstanding the bill of sale was made from Gross to the plaintiff, and although Gross had no knowledge of such design, but supposed he was selling to the plaintiff.

If there was error in the instruction, the verdict, which was for the defendants, is to be set aside.

Fessenden & Deblois, for the plaintiff.

The lease was assigned and the bill of sale made to the plaintiff. To him and to no one else did Gross intend or consent to convey. Can any one become a purchaser, without the consent of the seller? It takes the concurrence of two minds to make such a contract.

But the defendants justify under the precept against Hancock, and assert fraud in the sale. There was, however, no fraud in the *vendor.* This differs essentially from the common cases of sales, fraudulent as against creditors. In such cases, the judgment debtor once owned the property. But Hancock never owned this building. Sales are held to be fraudulent, only when both parties to it concur in the fraud.

The sale from Gross to plaintiff was unimpeachable, for Gross owed no debts, and there is no pretence that the plaintiff ever conveyed to Hancock. On what principle, then, *could* the jury be authorized to find the property in Hancock? *Hilgeim* v. *Deane*, 10 S. & M. 556; *Reed* v. *Woodman*, 4 Maine, 400; *Howe & al.* v. *Bishop*, 3 Met. 26; *Goodwin* v. *Hubbard*, 15 Mass. 210.

Sweat, for the defendants.

HOWARD, J., orally. — The bill of sale was not essential to the transfer of the property, and it may be controlled by testimony. The instruction permitted the jury to find, and they must have found, that Hancock paid his own money, and purchased the property for himself. By such finding, it results that the plaintiff was not the purchaser in good faith, and that Hancock, though not the *nominal*, was the *real* purchaser.

Judgment on the verdict.

HUNT *versus* PERLEY.

Property, held by a religious society as a ministerial fund, is to be assessed to the treasurer.

A fund was vested in a board of trustees, under charge that its interest should be annually paid to support a minister of certain specified qualifications, statedly preaching in a house of public worship to be located in a prescribed portion of the town: —

That, together with another portion of the town, was afterwards incorporated into a parish, and the parish settled a minister who statedly preached in a house of public worship in the prescribed locality: —

Held, that the fund in the hands of the trustees was not property held by the *parish* as a *ministerial fund; and* that the treasurer of the board of trustees, is not, *ex officio*, the treasurer of the parish; and *that* taxes upon the fund cannot be assessed to him.

ON FACTS AGREED.

DEBT, brought by the collector of the town of Bridgton, to recover the taxes assessed for several years upon the defendant as treasurer of the South Parish Fund.

In February, 1819, an Act of Massachusetts was passed, reciting certain donations which some individuals had made to create a fund for the support of a learned and pious Congregational minister in the town of Bridgton, and thereupon incorporating certain persons and their successors to be trustees of the fund, charged to appropriate the interest annually to the support of a learned protestant gospel minister of the Congregational order, duly and regularly ordained and settled, and statedly preaching in a house for the public worship of God, always to be located southerly of the fourteenth range of lots in that town ; provided that, if no such Congregational minister shall be settled in said town, or that if the one settled shall not regularly preach, for at least half of the number of Sabbaths during each year, in a house appropriate for public worship, located as aforesaid, then the interest of the fund for and during such year shall be added to and become a part of the principal.

In 1829, a portion of the town of Bridgton, (including the ranges of lots from one to twenty inclusive,) was incorporated as the South Parish in Bridgton. The parish then proceeded to erect a house of worship within its territory, and south of the fourteenth range of lots, and settled a stated minister in 1832, to whom the proceeds of the fund have been regularly paid by the treasurer of the trustees.

The parish has no parish funds, unless that in the hands of the trustees can be so considered.

The defendant has been for several years treasurer of the trustees with the care of the fund, and unless that constitutes him such, he has never been treasurer of the parish.

The assessors of Bridgton, for several years, have assessed him "as treasurer of the South parish fund." His residence is in a town adjoining to Bridgton, upon a territory, which was set off from Bridgton in 1834.

Whether the action is maintainable was submitted to the Court.

Strout, for the plaintiff.

Willis and *Fessenden*, for the defendant.

Shepley, C. J. — By the Act of 1845, c. 159, § 10, it is provided, that "all property held by any religious society as a ministerial fund shall be assessed to the treasurer of such society." "And if it consists of personal property, it shall be assessed in the town, where such society usually hold their meetings."

Assessments were made by the assessors of the town of Bridgton for the years 1847, 8 and 9, on the defendant as treasurer "for the South Parish Fund."

On February 28, 1829, "so much of the town of Bridgton as lies on the southerly side of the line between the twentieth and twenty-first ranges of lots in said town" was incorporated into a parish by the name of the South Parish in Bridgton.

That parish has been organized under the act; has erected a house for public worship within its limits, and south of the fourteenth range of lots in that town; and there has been, since the year 1832, a Congregational minister settled in that parish and statedly preaching in that house, to whom the income of a fund hereafter noticed has since been paid. It is admitted, that there has not been any other parish known by that name; and that the parish has no fund, unless the fund in the hands of the defendant can be considered as belonging to it.

The inquiry is thus presented, whether the fund held by the defendant as treasurer, can be considered as property held by that parish as a ministerial fund.

By an Act of the Legislature of Massachusetts approved on February 18, 1819, "the trustees of the ministerial fund in Bridgton" were incorporated. Certain persons named had been by the donors appointed trustees to manage their donation. Those persons were by the Act of incorporation made trustees, and were by it directed how to manage the fund and to dispose of its income.

By the third section of the Act of incorporation, it was made the duty of the trustees to pay the interest annually into the treasury of the town of Bridgton, "which shall be appropriated to the support of a learned protestant gospel min-

ister of the Congregational order, duly and regularly ordained and settled and statedly preaching in a house for the public worship of God, which house shall always be located southerly of the fourteenth range of lots in said town of Bridgton and not elsewhere." There is a provision, if no such minister shall be settled, or if he shall not preach one half of the Sabbaths during the year in such house, that the interest during such year shall become a part of the principal.

The only change in the disposition of the fund, made by the Act of January 13, 1823, was to authorize the trustees to pay the interest to such minister of the gospel as is entitled to receive it, instead of paying it into the treasury of the town.

The present settled minister of the South parish in Bridgton may be entitled to receive the interest accruing yearly upon the fund. It is uncertain, whether he or any other minister of that parish will continue to be entitled to receive it. No one can be entitled to receive it, who does not fulfill in all respects the requirements of the Act. There may hereafter be two or more parishes having houses for public worship located in that town southerly of the fourteenth range of lots, and having ministers of like character statedly preaching in those houses. The south parish by being first incorporated and having a minister first settled, did not become the owner of the fund or perpetually entitled to have the interest paid to its settled minister. It might be dissolved, or otherwise cease to exist, and the fund would remain in the custody of the incorporated trustees unaffected by it. It might continue to exist and to have preaching statedly in its house not by a minister "of the Congregational order" or by one of that order not "duly and regularly ordained and settled and statedly preaching." Or it might have preaching by a minister having all the other qualifications required less than "one half of the number of Sabbaths during any year." Or it might have no settled minister, or no preaching statedly in its house. In all these cases the parish could have no claim upon the fund or upon the accruing interest. That would remain as the trust property of the corporate trustees.

The South parish does not appear to have any legal or equitable title to the fund or even to have the accruing interest on it applied to the support of its minister, except so long as it may be the only parish coming within the description contained in the Act incorporating the trustees, and has a minister in all respects conforming to the description of one contained in that Act. It has no title to the principal sum, and none to have the interest applied to the support of its minister except while it has one, and the only one entitled to receive it by having all the qualifications required by the Act. It cannot therefore be considered as holding property as a ministerial fund.

Plaintiff nonsuit.

Daniel Evans *versus* Smith.

A part payment by the maker of a promissory note, within six years before the commencement of an action upon it, takes it from the operation of the limitation bar.

The payee of a negotiable note, who has indorsed it without recourse, and has received from the indorsee a release of all liabilities in connection with the note, is a competent witness for the indorsee to prove that, before the note was indorsed, the maker paid a part of it, and thus to remove the limitation bar.

Assumpsit upon an unwitnessed promissory note of $1200, dated in 1839, payable to William Evans or order, and by him indorsed to the plaintiff "without recourse." There was upon the note an indorsement of $125 under date of 4th January, 1845. The writ was dated 26th Dec. 1850.

To avoid the limitation bar, the plaintiff released the payee from all liabilities in relation to the note, and relied upon the testimony he would give, if admissible, and it was agreed that he would testify that the defendant paid the $125 on said 4th January, 1845, and requested the witness to indorse it upon the note, which he accordingly did at that time, and that he

afterwards indorsed the note to the plaintiff for the consideration of one dollar, and has now no interest in it.

Butler, for the plaintiff.

Fessenden & Deblois, for the defendant.

HOWARD, J., orally. — There is no valid objection to the admissibility of the witness. It is not a sound principle that, in order to take a note from the operation of the statute, the indorsement must be made in the handwriting of the debtor. It is the fact of the part-payment within six years from the commencement of the suit, which has that effect. Such a payment is distinctly shown by the testimony, which it is admitted William Evans would give. *Defendant defaulted.*

MAHAN *versus* MYERS *& al.*

It is not irregular to refuse a motion for leave to summon in additional joint promisors, while an issue is pending upon a plea in abatement for the non-joinder.

ON EXCEPTIONS from the District Court, COLE, J.

WELLS, J., orally. — This suit was brought in the Municipal Court. The defendants there pleaded in abatement that there were two other joint promisors. Upon that plea issue was taken. The decision was for the defendants, and that the writ abate. The plaintiff appealed to the District Court, and there moved for leave to summon in the other two joint promisors. This motion was refused, and the plaintiff excepted.

When the case came to the District Court, the issue in abatement was pending. While that issue was undetermined, it would have been irregular to summon in the other supposed promisors. There was therefore nothing unsuitable in refusing the plaintiff's motion. *Exceptions overruled.*

O'Donnell, for the plaintiff.

Codman, for the defendants.

FIELD *&* *ux.* *&* *als.* *versus* PERSONS UNKNOWN.

When, in a process for partition of land, a person interested is not named, and has had no notice or opportunity to appear and answer, he *may* on motion, at any time before final judgment, *be allowed* to appear and defend. R. S. chap. 121, sect. 9.

The granting of such motion is at the discretion of the Court.

The Court, in the exercise of its discretion, will refuse to grant the motion, unless made prior to the interlocutory judgment that partition be made.

THIS is a petition for partition. It was entered at April term, 1850. At the November term following, an order of notice was issued in the usual form, and published, as ordered, returnable on the 30th day of December, 1850.

On that day, no appearance being made in defence, the usual proclamation was made, and interlocutory judgment for partition was entered. Commissioners were then appointed, who made their return and report at April term, 1851.

At that term, Jonathan True and wife came in, and filed their motion for leave to appear and defend under the provisions of R. S. chap. 121, sect. 9, alleging that they were tenants in common of a part of the premises described in the petition, and that they had no knowledge of its pendency until after the return day of the notice, and had no opportunity to make an earlier appearance.

At the same term, the petitioners moved the acceptance of the report, and the case was then continued.

At the November term following, upon the affidavits filed by True and wife, the presiding Judge ruled that they should be allowed to come in and defend, in pursuance of their motion.

Subsequently, the respective counsel for the parties, having different impressions as to the purport and extent of the application of this ruling, it was agreed to submit to the full Court, in what manner and to what extent, True and wife, being now in Court, are entitled to defend.

If, in the opinion of the Court, True and wife are entitled to defend, as though they had come in at the return of notice on the original petition, then the cause is to stand for trial.

But, if they are not entitled to defend, in the same manner and to the same extent, as though they had come in at the return day, then their motion is to be overruled, and their appearance withdrawn.

SHEPLEY, C. J., orally. — In view of the whole statute, we think the granting of the motion is at the discretion of the Court. The statute language is, that he "*may, on motion, be allowed,*" *&c.* Motions are usually to the discretion of the Court. If the right to defend at such late period be absolute, the previous judgment and proceedings, even after verdict, might be set aside, in order to permit a plea of sole seizin. How could the Court set such verdict aside, unless upon citing the prior parties to re-appear.

What then, in this case, should be the exercise of a judicial discretion? We think it inexpedient to disturb the interlocutory judgment already entered, especially as the same statute furnishes another and a sufficient remedy.

The counsel thereupon withdrew the motion, and the report of the commissioners was accepted.

STATE *versus* HART *&* *al.*

In the trial of an indictment alleging facts and concluding "against the peace and contrary to the form of the statute," the Judge, though requested, is not bound to instruct the jury, whether the indictment is, or is not sustainable at common law.

In an indictment for exercising a noxious trade in a public locality, it is no defence, that the town or city authorities have omitted to assign any place for the exercise of such a trade.

An indictment for a public nuisance charged, that the defendant *in the exercise of his trade*, collected and kept certain (specified) articles in a corrupted state, "*and in manner aforesaid*" collected and kept other (specified) offensive matters; — *Held*, that the indictment sufficiently alleged, that it was *in the exercise of the trade*, that the last mentioned offensive matters were collected and kept.

ON EXCEPTIONS from the District Court, EMERY, J.

INDICTMENT for a common nuisance. Plea, not guilty.

The indictment charged in substance, *that* the defendants in Portland, near to several dwellinghouses, and upon a public street, erected, maintained and used a shop for the purpose of pulling wool and sheep-skins, and of soaking, sweating and pulling wool and sheep skins, and of exercising the trade and business of pulling wool; *that* the defendants did exercise that trade and business, in and about the shop, and did, in the exercise of such trade and business, collect and keep, in and about the shop, large quantities of tainted, rotten and offensive sheep-skins, and of impure, polluted and offensive water; and did, "*in manner aforesaid,*" collect, and suffer to be collected, and to remain within and about said shop large quantities of offal, filth and other polluted, noisome and offensive substances; "*by reason of which said premises*" divers noisome, unwholesome exhalations and stenches were emitted from said shop, &c., to the common nuisance, &c., against the peace and contrary to the form of the statute.

There was much testimony in the case.

The prosecuting attorney propounded to a witness for the government the question, "Do you or not know of noxious exhalations, or offensive smells proceeding from the building of defendants, named in the indictment, prior to the time laid?" To that inquiry the counsel for the defendants objected, for the reason that there is no allegation in the indictment that the exercise of defendants' trade, in the place laid, occasioned such exhalations and smells; and contended that the prosecuting officer, when inquiring in respect to the alleged exhalations and smells, should be held to discriminate between the separate causes or sources of such effects, supposed to be intended in the indictment, and to apply his questions to one or the other cause; and not in any general terms which might embrace both. The presiding Judge overruled the objection, and instructed the jury that, in drawing indictments, it was not unusual to introduce words and phrases in aggravation of the offence, and that proof of all such allegations was not necessary, but that they were to weigh the whole testimony in the case, and to decide whether or not all the sub-

stantial and material allegations in the indictment were proved.

Defendants' counsel requested the Court to instruct the jury that the indictment was not sustainable at common law, but only under the statute; and that the indictment was not sustainable without proof by the government that an assignment had been made under sect. 2, chap. 164, of a place for the prosecution of the sort of business complained of, and that defendants were conducting the business in violation of such assignment, which several instructions the presiding Judge declined to give. The jury returned a verdict of guilty, and the defendants excepted.

Barnes, for the defendants.

1. The indictment charges two distinct offences in one count; viz. the exercise of a noxious trade, and the collection of offensive substances around the shop; or else there is a mixture of both charges, leaving it uncertain which of the two causes produced the evil complained of, or whether all the narrative respecting the trade and business was but inducement to the charge of collecting the offensive substances. This uncertainty unallowably embarrassed and prejudiced the defence.

2. It cannot be gathered from the indictment whether the business, by its own character and location, produced the evil, or whether the evil was occasioned by the negligent and careless mode of conducting it, by an unnecessary collection of the offal, &c. If, in point of fact, it was the latter cause, then an indictment for *that* cause would have corrected the evil, leaving the lawful business to be pursued in a proper manner.

What the jury found in this respect cannot be known, for it is impossible to decipher what the indictment intended.

3. The indictment presents no means from which to ascertain what should be the judgment and sentence. If an abatement should be ordered, will it be of the shop or of the offal? If an injunction, will it be of carrying on the lawful trade, or of collecting offal? If a fine, for which?

4. The requested instruction, that the indictment is not

sustainable at the common law, should have been given. The clear and exact statute definitions of offences and the discriminations as to the penalties, require this rule. Good policy as well as justice forbids that offences thus laid down by statute, shall be held also indictable at common law.

5. The terms of the R. S. chap. 164, and especially the provisions for the penalty, in sect. 2, show, that the exercise of a trade is not punishable, except when other places for carrying it on have been duly assigned by the town or city authorities.

These statute provisions furnish confirmation that the indictment is insufficient. For, suppose a place for carrying on the trade had been assigned,. and the defendants' shop were within that place, what protection would the statute give for collecting the offensive offal?

Tallman, Att'y General, for the State.

SHEPLEY, C. J., orally. — The objection to testimony assumes, that the indictment charges, in the same count, two distinct proceedings on the part of the defendants, and that, therefore, the government, in its proofs, were bound to discriminate which of those proceedings occasioned the injurious results alleged. But the indictment is not thus defective. It charges, *that* the shop was erected and maintained for the purposes of the trade described; *that* the defendants did therein carry on that trade, and in the exercise of that trade, collected and kept certain offensive matters; and, *that in manner aforesaid,* they collected and kept certain other specified offensive matters, and, *that by reason of the premises,* that is, by the exercise of the trade, and by collecting the offensive matters *in the exercise of the trade,* the evil results followed. The term, "premises," used in the indictment, includes both the exercise of the trade and the accumulation of the hurtful materials in that exercise of the trade. The defendants requested, that the question to the witness should be limited either to the exercise of the trade, or to the accumulation of the noxious matter. But, as the indictment included both,

there was no ground for the request; and there was no error in admitting the answers, as they were given.

When an indictment alleges particular facts, and that those facts constituted an offence, the government is to prove the facts, and is entitled to prove them *all.* Whether the facts are properly alleged, or, if proved, would constitute a crime, cannot be raised in the examination of testimony. Those points would be properly presented on motion in arrest of judgment.

The defendants requested instruction to the jury, that the indictment was not maintainable at the common law.

The indictment alleges certain facts, and concludes, "against the peace and contrary to the form of the statute." It therefore proceeds expressly upon the *statute.* When an indictment claims a conviction upon a *statute,* can the Court be required to instruct the jury whether it could be sustained at the common law? That would not be a question for the jury, and the Judge was not bound to give them that instruction.

The defendants claim that an indictment for exercising a noxious trade is unsustainable, unless some place for the exercise of it had been previously assigned.

The stat. chap. 164, sect. 2, provides that the selectmen, &c. may, "when they judge it necessary," make such an assignment. They are not required to do it, unless they judge it necessary.

Then, are persons allowed to exercise such a trade, in any place they may choose, merely because it has not been thought necessary to assign a particular place for it? We think the offence is not made to depend upon the exercise of that power by the selectmen, but rather the contrary. The obvious intent of the first section is to prohibit such nuisances. The second section, by authorizing the assignment of places, even before the evils had occurred, rather accumulates the power to prevent such offences. The requested instruction, therefore, could not legally have been given.

Exceptions overruled. —

Case remanded to the District Court.

DEERING & *al., appellants, versus* ADAMS.

On an appeal from a decree of the Judge of Probate, the right in this Court to open and close belongs to the appellant.

By the R. S. chap. 105, sect. 25, any person "aggrieved" by a decree of the Judge of Probate, may appeal to this Court.

In legal acceptation, a party is aggrieved by such decree, only when it operates on his rights of property, or bears directly upon his interest.

From a decree of the Judge of Probate, appointing a guardian to a minor child, the trustees of a fund bequeathed for the benefit of such child have no authority to appeal.

APPEAL from a decree of the Judge of Probate, appointing the appellee to be guardian to certain minor children.

Edward D. Preble died possessed of property, real and personal, to the amount of several thousand dollars, leaving a widow and three minor children. His mother survived him, and, by her will, appointed the appellants as her executors, and entrusted to them the entire care and management of a large estate for the period of twenty years for the benefit of Edward's children. In the will, she appropriated funds for their education and support, and expressed it as her "particular will and request," that her executors should be their guardians.

The Judge of Probate, however, appointed the appellee to be the guardian. From the decree making that appointment, this appeal was taken, and reasons therefor were duly filed.

G. F. Shepley, for the appellee, submitted to the Court, that the open and close belonged to him.

SHEPLEY, C. J. — The decree of the Judge of Probate is not to be vacated, unless the appellants shall have shown, and this Court shall have found, that proper measures have been taken to make the appeal legal and effective. It is incumbent then upon the appellants to show, that the case is rightfully here. They are entitled, therefore, to the opening, and the close also will be theirs.

W. P. Fessenden, for the appellants, then presented the grounds upon which they claimed that the decree should be

vacated, and introduced evidence, and cited authorities and presented arguments at much length in support of their views; contending, that the affairs of the children were well attended to by the appellants, and that the appointment of any guardian for them was unnecessary and inexpedient.

G. F. Shepley and *Clifford*, for the appellee.

We present an objection, in its nature preliminary. It is that the appellants had no legal right to enter the appeal or to maintain it.

The right of appeal is founded upon R. S. chap. 105, sect. 25. That gives the right only to persons "*aggrieved*" by the decree. We contend that the appellants were not "*aggrieved*" within the intendment of that provision. They appeal, in their capacity of executors and trustees of Mrs. Preble, and show that, by her will, they are appointed guardians. But she was not the mother of these minor children, and her appointment of testamentary guardians was unauthorized and merely void.

The appellants are not next of kin to Edward D. Preble, nor creditors of his estate, nor do they represent such. And this appellee, by being appointed guardian of the children of Edward, and thereby entrusted with the management of the estate which they inherit from him, cannot claim, and does not claim, any right to control or interfere with the estate of Mrs. Preble, of which it is admitted the appellants have the entire and exclusive management.

The persons indicated by the statute under the term "aggrieved," are not those who may happen to entertain *desires* upon the subject; but those only who have rights, which may be enforced at law, and whose pecuniary interest might be established or divested in whole or in part by the decree. *Penniman* v. *French*, 2 Mass. 140; *Boynton* v. *Dyer*, 18 Pick. 4; *Downing* v. *Porter*, 9 Mass. 386; *Swan* v. *Picquet*, 3 Pick. 444; *Stebbins* v. *Lathrop*, 4 Pick. 33; *Smith* v. *Bradstreet*, 16 Pick. 264; *Wiggin* v. *Sweat*, 6 Metc. 194.

We submit then that these appellants were not "aggrieved." Neither as individuals or in their representative character,

have they any interest, nor any rights to be enforced, nor can they be affected by the decree.

Fessenden, in reply. —

If these executors are not so aggrieved as to be authorized to take an appeal, no person whatever can be. But in point of fact, are they not interested?

They have a property, over $140,000, to be managed for these children. The right to appeal does not require a personal interest; an official interest is enough. A guardian may appeal for his ward; may be aggrieved for her. These trustees are in like manner interested for the children. There is a fiduciary relation, which may well justify the appeal. *Bryant* v. *Allen*, 6 N. H. 116.

Howard, J. — The appellants are executors of the will of Mrs. Preble, and entrusted with the entire care and management of her estate, for the period of twenty years, for the benefit of the three children of her deceased son Edward D. Preble, according to provisions and directions contained in the will. The executrix expresses it as her "particular will and request," that the same persons who are her executors shall also be the guardians of these children, who were her only grandchildren; and as her "express wish and desire," that no difficulty should be suffered to arise on account of the special provision constituting the same persons executors and guardians. Directions are contained in the will for the management of the estate, and for the application of so much of the income and profits, by the "executors and guardians named," as should be necessary and proper for the education and support of the children; and for the division, equally, of the whole estate among them, at the expiration of twenty years, and that it "shall not vest in them or either of them, before the end of that period in any manner."

The respondent was appointed guardian of these children by the Judge of Probate for this county; having been nominated by the eldest, who is over fourteen years of age, as her

guardian. The mother of the children is wife of the respondent.

It appeared that Edward D. Preble left estate, real and personal, to the value of several thousand dollars, and that the appellants had supplied means for the support and education of his children, since the death of his mother, agreeably to the provisions of her will.

An exception is taken that the appellants are not "aggrieved, by any order, sentence, decree or denial of the Judge of Probate," appointing the guardian, within the meaning of the R. S. chap. 105, sect. 25, and that they have no right to prosecute the appeal.

Fathers may, by last will, appoint guardians to their minor children, until the age of fourteen years. R. S. chap. 88, sect. 2. But grandparents have no power to appoint guardians for their grandchildren; although they can bestow their estates upon them on such terms or conditions as they please.

Mrs. Preble could not appoint the appellants as testamentary guardians, nor could they, as executors of her estate, be guardians to any minors interested in that estate. R. S. chap. 110, sect. 6. They were not, therefore, testamentary guardians of the children; and not being heirs next of kin, or in any manner interested in the estate of Edward D. Preble, they can have no pecuniary interest, either in their personal or representative characters, which is affected by the appointment of the respondent, and were not aggrieved by the decree of the Judge of Probate. In legal acceptation, a party is aggrieved by such decree, only when it operates on his property, or bears upon his interest directly. *Smith* v. *Bradstreet,* 16 Pick. 264; *Wiggin* v. *Swett,* 6 Metc. 194; *Bryant* v. *Allen,* 6 N. H. 116.

The construction of the will, and questions of expediency addressed to our discretion, at the argument, and embraced in the reasons of appeal, are not before us, and cannot, properly, be considered.

The appeal must be dismissed.

JEWETT *versus* DOCKRAY.

The written approval, by a plaintiff, of a receipt taken by the officer for goods attached, and a delivery of the receipt to the plaintiff, discharge the officer from liability to him for the goods.

Such an approval and acceptance of the receipt are of the same effect, whether done by the plaintiff or by his attorney in the suit.

The delivery to the plaintiff of such an approved receipt, is entitled to be protected, as an equitable assignment.

In a suit brought by such plaintiff, in the name of the officer, upon such a receipt, a release by the officer, delivered to the receiptor, after knowledge by him of such an assignment, is of no effect.

An exhibition made at the trial, to the Court, and in presence of the receiptor, of the receipt so assigned, is a sufficient notice to the receiptor of the assignment.

A release, therefore, by the officer, delivered to the receiptor, *after such an exhibition*, will not qualify the receiptor to be a witness for the defendant.

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

ASSUMPSIT upon a promissory note.

It appeared, *that* goods were attached on the writ; *that* the officer delivered them to one John Elder, taking his obligatory receipt, stipulating that he would re-deliver the same to the officer on demand, and that though no demand should be made he would deliver the goods "at the above named place," and forthwith notify the officer of the same; and, *that* the receipt was approved in writing by the plaintiff's attorney, to whom it was then delivered by the officer.

The defendant, on the trial, called Elder, as a witness. The plaintiff exhibited the receipt in presence of the witness, and contended that it created an interest in the witness to defeat the action. In this opinion the Judge concurred.

Thereupon a sealed release was, in open Court, executed by the attaching officer, and delivered to the witness.

The plaintiff then objected, *that*, as he had in writing approved and accepted the receipt, the officer was under no liabilities concerning the goods attached; and *that* his delivery of the receipt to the plaintiff was an equitable assignment, entitled to protection. The witness was admitted and

testified to facts, upon which a verdict was rendered for the defendant.

To the admission of that witness, the plaintiff excepted.

Fox, for the plaintiff.

Barnes, for the defendant.

The release by the officer was effectual to discharge the interest of the witness.

None of the reported cases upon "receipts," raise this point.

They all are upon questions arising *after judgment*, or *after full and explicit notice* to receiptors, or where the liability of the officer had been either fixed or expressly discharged, or where the liability of the receiptor was fixed in a manner and to an extent not appearing in this case.

In *Clark* v. *Clough*, 3 Greenl. 361, the receipt was delivered by the officer, *after judgment*, to the plaintiff's attorney, *to be prosecuted for the plaintiff's benefit. Jenney* v. *Delesdernier*, 20 Maine, 183; *Rice* v. *Wilkins*, 21 Maine, 558; *Farnham* v. *Gilman*, 24 Maine, 250.

In these cases, plaintiff's attorneys had, before attachment, directed and agreed what receipt should be taken, and who should be receiptors, and *demand had been made* upon receiptors.

1. There must be full and clear *proof*, that the receipt was *so* assigned to plaintiff, as to amount to "an agreement to receive it as a substitute for creditor's claim" upon the officer for delivery of the property. *Humphreys* v. *Cobb*, 22 Maine, 380.

But in this case the approval, written upon the receipt, and the introduction of it by the plaintiff in Court, are not sufficient, without inference of something more, to show that the officer was discharged from liability. But the witness is not to be excluded, by reason of any inference.

2. The most explicit and clear *notice* to the receiptor is necessary.

Here he had no notice, that creditor would look to him.

What was said "in presence of the witness" at the trial, was addressed to the Court, not to the witness.

The witness was bound to know his liability as bailee *to the officer*, but not bound to recognize any obligation *to the creditor*, without distinct and formal notice from the latter to that effect.

3. Neither was there any prohibition by plaintiff's attorney to the officer against giving the release. All were present, the act was done in presence of plaintiff's attorney, yet he "objected" only to the Court.

The "objection" instead of being a notice, was a *surprise* to all. Neither the defendant, nor the receiptor had any previous knowledge, that the receipt was in the hands of the plaintiff's attorney.

4. The terms of the receipt, show a particular liability of the receiptor as *bailee to the officer exclusively*, and that he cannot be discharged from his liability to the officer, and made liable to somebody else, without clear and full proof of *agreement* between creditor and officer to discharge the officer, and of notice from creditor to receiptor, that the latter is now bailee to the creditor.

In a case like the present, the officer might make demand upon his bailee at any time, for, his return upon the writ has gone into the plaintiff's hands, making *him* liable, — the receipt, with the alleged "approval," has gone into the plaintiff's hands also. The officer retains no evidence of his own discharge, he may therefore, to protect himself, if he chooses, call upon the bailee, and resume the custody of the property attached, at any time before notice given by the creditor to the receiptor. *Bond* v. *Padelford,* 13 Mass. 394. If, therefore, the officer could discharge his bailee, by returning the property, he could do it by release.

After judgment, by the terms of this receipt, if no notice were given and demand made by the creditor, the receiptor could discharge himself, *without demand;* the next moment after judgment, he could redeliver the property to the officer, and compel the officer to resume it; consequently, the officer could discharge him. Hence, in this case, the doctrine of equitable assignment is to be received with limitations, to con-

form to the promise of delivery "*to the officer,*" and notice "*to the officer.*"

In *Farnham* v. *Gilman*, 24 Maine, 250, where the officer was plaintiff, suing on the receipt, the language of the Court carries a distinct implication that the officer may release the receiptor, even though, in that case, the particular receiptor had been taken by the original creditor's express direction.

5. In any case of release by the officer on such a receipt, he would resume his original liability to the creditor.

6. The analogy between the defendant's case, and the case of a plaintiff who qualifies the indorser of his writ by placing money in Court for costs, is obvious.

For the same reasons, if a defendant need his receiptor as a witness, why may he not procure his qualification, by giving to the officer, and through the officer to the creditor, an ample and exactly equivalent security?

Ought not every receipt to be held subject to such a limitation and privilege, just as the indorsement of a writ is?

And why may not a receiptor be qualified by defendant's giving a new security, just as defendant's bail may be, by a surrender of the principal?

Wells, J. — The question in this case is, whether the receiptor for the property attached, who was released by the deputy sheriff that made the attachment, was a competent witness for the defendant. Ordinarily such a release would remove the interest, which the witness would have in favor of the defendant. But the receipt had been approved by the plaintiff's attorney and accepted by him, and it was produced in Court by him in the presence of the witness, who must have been informed by the proceedings in Court of the claim of the plaintiff to the receipt before he received the release.

The attorney, as such, had authority to approve of the receipt. *Jenney* v. *Delesdernier*, 20 Maine, 183. The placing of such receipt in the hands of the creditor's attorney, to be prosecuted for his benefit, is an equitable assignment of the contract. *Clark* v. *Clough*, 3 Greenl. 357. The receipt

taken by the officer is a substitute for the property attached, the possession of which he relinquishes. When he does so without the consent of the creditor, he is responsible for the property — but when the creditor authorizes him to take the receipt, he cannot be liable for not retaining the property. And in such case unless the creditor has a right to bring an action upon the receipt in the name of the officer, he would be without any remedy so far as relates to the releasing of the property. It is true, that before the creditor can claim an interest in the receipt, the transaction between him and the officer must amount to a contract of assignment. But it is not necessary that it should be made in direct and positive terms. It may be implied from such acts as clearly indicate the intention of the parties. The authority given to take the receipt, and the consequent discharge of the officer from his obligation to retain the property, and the delivery of the receipt to the creditor and his acceptance of it, would imply a transfer of it from the officer to the creditor. In the present case, the approval was written upon the receipt at the time it was taken, and it was then accepted by the plaintiff's attorney. These acts must have been understood and intended by the parties to constitute an assignment. And such would be the inference to be drawn from them. The action of the officer is adopted by the creditor for his own benefit. *Farnham* v. *Gilman*, 24 Maine, 250.

The assignment of the receipt made it the property of the plaintiff, and the officer could not discharge it, nor could he release the receiptor, who appears to have had full knowledge of the assignment before he received the release. The receiptor, therefore, was interested to defeat the action, and was not a competent witness for the defendant.

Exceptions sustained and a new trial granted.

SIMONTON *versus* GRAY.

Mergers are not favored in courts of law or in courts of equity.

When the purchaser of an equity of redeeming mortgaged land becomes also the assignee of the mortgage, there is not necessarily an extinguishment of either estate.

If substantial justice may be promoted, the mortgage may be upheld by the assignee, according to his intention or his interest.

A widow has the right to redeem real estate, mortgaged by her husband during coverture, although the rights of the mortgagee and also of the mortgager have both come by assignments to the defendant, and although, in the mortgage deed, she relinquished her right of dower.

Of the mode of computing the entire value or the annual value of a widow's right of dower in mortgaged real estate.

BILL IN EQUITY to redeem real estate mortgaged.

The plaintiff is the widow of John Simonton, who died in 1851, and who, in 1844, mortgaged the land, by a deed in which the plaintiff relinquished her right of dower. In 1847, the land was sold for taxes to one Lord, who afterwards conveyed his title to the mortgagee.

Through several conveyances, the defendant became the assignee under the mortgagee and also the assignee under the mortgager.

In July, 1849, the original mortgagee took measures to foreclose by publishing in a newspaper and recording the same as the statute prescribes. The plaintiff, within the three years, and before the filing of this bill, demanded of the defendant an account, &c. which he neglected to render.

NOTE. If the widow is entitled to redeem, the parties requested the Court to give instructions, as to the principles which should govern the master in deciding what amount in gross, or what amount annually, ought to be paid to her for a release of the estate.

Butler, for the plaintiff.

Willis & Fessenden, for the defendant.

HOWARD, J. — An equity of redemption is an estate in the land, which may be devised, or taken on execution, and which

may descend to heirs. It is subject to dower. Rev. Stat. ch. 95, § 15.

If the purchaser of an equity of redemption take an assignment of the mortgage, both estates may stand, though united in the same person. When substantial justice may be promoted, the mortgage will be upheld, or not, according to his intention or his interest. For mergers are not favored in courts of law or in courts of equity. *Campbell* v. *Knights*, 24 Maine, 332; *Holden* v. *Pike*, 24 Maine, 427; *Gibson* v. *Crehore*, 3 Pick. 475; *Eaton* v. *Simonds*, 14 Pick. 98; *Forbes* v. *Moffatt*, 18 Ves. 390; *Lord Compton* v. *Oxenden*, 2 Ves. 264; *James* v. *Morey*, 2 Cowen, 294, opinion of Sutherland, J.

In the case at bar, it is for the interest of the purchaser of the equity of redemption, and of those claiming under him, that the mortgage should be upheld against the incumbrance of dower. It would not comport with just principles of law or equity, that, after uniting with her husband, and releasing her right, the plaintiff should have dower in that estate. But she is entitled to dower in the equity of redemption, to which her release, and the subsequent conveyance by her husband present no bar; and she can, therefore, redeem the estate.

According to the agreement of the parties a master will be appointed to ascertain the value of her estate in gross, and the annual value. As she must keep down one third of the interest on the amount due upon the mortgage, the yearly value of her estate will be found by deducting from one third of the net annual income of the whole estate, one third of the annual interest on the amount of the mortgage debt due.

The master will ascertain the value of the net, annual income of the whole estate; the amount due upon the mortgage at the date of the demand of dower, and the probable duration of the life of the complainant. From these elements the required results may be readily determined. The sum to be paid to her, for the release of her estate, will be the present worth of an annuity during her life, equal to the net annual value of such estate. *Carll* v. *Butman*, 7 Maine, 102; *Rus-*

sell v. *Austin*, 1 Paige, 192; *House* v. *House*, 10 Paige, 158; *Bell* v. *Mayor of New York*, 10 Paige, 62.

All further orders and decrees are suspended, until the coming in of the master's report.

State *versus* Baker.

In criminal prosecutions, it is essential that the indictment or complaint allege with certainty the time at which the offence was committed; although, at the trial, proof that it was committed at a different time is receivable.

A complaint will not be sustained, if in stating the time of the offence it merely allege, that it was committed "on or about" a specified day.

On Exceptions from the District Court, Emery, J.

Prosecution for selling intoxicating liquor in violation of the statute. The complaint alleged, that the sale was made "*on or about*" the thirty-first day of January, 1852.

The defendant before the municipal court moved, that the complaint be quashed, "because the time of committing the offence is not alleged with sufficient certainty." The motion was overruled, and the defendant after conviction, appealed to the District Court. He there renewed the motion, which was overruled, and the defendant excepted.

Barrows, for the defendant.

The judgment should be arrested, because the time of the commission of the offence charged is not alleged with sufficient certainty. Bacon's Abridg. Title Indictment, G. 4, vol. 3, page 106.

The day should be laid with certainty, although, it is not material that it should be proved precisely as laid. Wharton's Am. Crim. Law, p. 75.

Analogous to the allegations with regard to place. *State* v. *Roberts*, 26 Maine, 263.

There is no allegation in this complaint, that the offence was committed on any day named. The words "or about" constitute a qualification of the allegation and leave the time

utterly uncertain. *State* v. *S. S.* 1 Tyler, 295, (U. S. Dig. vol. 2, p. 530;) *State* v. *Beckwith,* 1 Stew. 318, (U. S. Dig. vol. 2, p. 530.)

For aught that appears on the record, the offence may have been committed subsequent to the filing of the complaint.

Tallman, Att'y General, for the State.

I move for leave to strike out the words "or about." Such an amendment is allowable on a motion in arrest of judgment. Wharton's Cr. Law, 165. To striking out on a *motion to quash,* there can be weightier objection than would exist on a *motion to arrest.*

The words, however, are merely surplusage, and do not vitiate the complaint as it stands.

WELLS, J., orally. — The words "or about," cannot be treated as surplusage. If they were stricken out, the complaint would allege an exact day. But such was not the intent of their insertion. They were used to show that there was an uncertainty as to the time. The motion to amend cannot be allowed.

Writers on criminal law concur in requiring the time to be alleged. 3 Bacon's Ab. 106; Indictment, G. 4; 4 Comyn's Dig. 393, G. 2; 1 Chitty's Cr. Law, 181.

But, though necessary that the time should be alleged, it is not requisite to prove that the act was done on the precise day alleged.

On the first appearance, there would seem no very strong reason for the allegation of the time. But there may be utility in it. The accused might have a right to expect the government would rely upon the day alleged, and prepare his defence accordingly. If the government should then depart from that day in their proofs, he might claim a continuance. There may also be other reasons. But whatever the reasons, the law has long been settled, requiring an allegation of the time. In this case it was not done with sufficient certainty, and for that cause the complaint is fatally defective.

Judgment arrested.

WHEELER *versus* NEVINS.

A written but unsealed authorization to use the name of the principal, in settling for him a controverted matter, does not justify the agent in affixing the seal of the principal.

A release of a debt, signed and sealed by an agent, for and in the name of his principal, is inoperative, unless the authority of the agent was itself under seal.

The affixing of a seal without such authorization cannot be regarded as an immaterial act, so as to impart to the instrument the character and effect of an unsealed one.

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

ASSUMPSIT upon two promissory notes.

It appeared that, after making the notes, the defendant, by a sealed instrument, assigned all his property for the benefit of his creditors *pro rata.*

The assignment contained a stipulation to be subscribed by the creditors, and assenting to the assignment, and agreeing to accept the dividends, which when paid were to be a discharge of their respective claims. Several of the creditors signed and affixed their seals to the instrument. The defence was that the plaintiff had subscribed it, and thereby discharged the notes now in suit. The name and seal of the plaintiff, "by J. C. Lane, his attorney," were upon the paper. To show the authority of Lane, a letter addressed to him by the plaintiff was read, saying, "I have concluded to sign the agreement, and give you power to settle the claim for me and to use my name." This letter came through the post office, sealed up in the usual form. There was evidence tending to show that the defendant had no real estate. The Judge ruled that the letter, not being under seal, conferred no authority upon Lane to execute the instrument by affixing the plaintiff's seal, and that therefore the defence failed.

The defendant was defaulted, upon an agreement that if the ruling was erroneous, the default is to be stricken off.

J. Goodenow, for the defendant.

It was not requisite that the plaintiff, in subscribing the instrument by his attorney, should have sealed it. "In what-

soever form made," (such are the words of the statute,) an assignment is effectual. Act of 1844, chap. 112, sect. 2.

An agreement to discharge operates as a present release, though not technically a release. *Goodenow* v. *Smith*, 18 Pick. 414; *Couch* v. *Wills*, 21 Wend. 424; *Tuckerman* v. *Newhall*, 17 Mass. 580; *Pierce* v. *Parker*, 4 Met. 91, 92; *Good* v. *Cheeseman*, 22 Com. Law R. 89.

Where the contract may be made without deed, the seal shall not prevent its enuring as a simple contract, though the authority be by parol, or merely from the relation between the principal and agent. *Lawrence* v. *Taylor*, 5 Hill, 113.

The contract is, that the plaintiff, by J. C. Lane, agrees to the assignment, and that the instrument shall be a discharge when the dividend shall be paid. The letter simply gives authority to Lane to make this agreement and to sign the plaintiff's name.

The extent of the authority of an agent will be varied, or extended, on the ground of implied authority, according to the pressure of circumstances. The authority of an agent, contracting for the sale of lands, need not be in writing. 2 Kent, 613.

An attorney to collect debts may assent to an assignment and bind his client. *Gordon* v. *Coolidge*, 1 Sumner's C. C. R. 537; 2 Kent, 620.

If a creditor, (under a composition arrangement with other creditors and the debtor,) agree to accept part of his demand as a composition or in full for his demand, the claim to the remainder is in law extinguished, although there be not any release by deed, because it would be a fraud on the other creditors to seek to enforce the balance; and a creditor concurring in a composition cannot sue, contrary to the terms of the arrangement. Chitty on Cont. 685, 775; 5 Johns. 333, 386.

T. A. D. Fessenden, for the plaintiff.

WELLS, J., orally. — The instrument signed and sealed by Lane, as attorney to the plaintiff, contained a release of the debt for which this action is brought. One question is,

whether Lane had authority to affix the seal. The defendant, in order to prove that Lane had such authority, introduced an *unsealed* paper, signed by the plaintiff, authorizing Lane to use his name, and settle the claim. The infirmity of the defendant's case is that a parol authorization does not justify the annexing of a seal. Lane, in sealing the instrument, transcended his authority, and the plaintiff is not bound by it.

The defendant also contends that, as the instrument would have been effectual without a seal, the seal may be disregarded; that the sealing, being uncalled for, may be treated merely as a void act.

But the law, establishing the difference in the effect of instruments sealed and unsealed, has been settled from time immemorial.

An instrument signed and sealed by one acting as attorney, is wholly inoperative, if he had no authority to affix the seal; even though he was empowered to affix the signature.

The default is confirmed.

GANNETT & *al.* *versus* CUNNINGHAM.

It is not allowable that one, in the discharge of an official duty, should make a gain out of property entrusted by the law to his custody for the benefit of others.

An officer, who, under the R. S. chap. 114, has sold upon mesne process, the goods which he may have attached thereon, and taken a note to himself therefor, approved by the attaching creditor, has no right to retain, for his own use, the interest money accruing upon such note.

An assignment, by the debtor to the creditor, of the goods so attached, or the proceeds of the same, includes the interest as well as the principal, collected by the officer upon such note.

When the assignment was accompanied by an order, directing the officer to deliver the goods or pay the avails of them to the assignee, it may, from a payment of the *principal* according to the order, be *inferred* that the officer accepted the order, though he at the same time refused to pay over the interest money, and claimed to retain it for his own benefit.

Upon such implied acceptance, an action of assumpsit may be maintained by the creditor against the officer for the interest money.

After the dissolution of a co-partnership, it is regarded as continuing for the settlement of its affairs, and each partner, for that purpose, retains his former powers, unless a different agreement be made.

A conveyance of property to one member of a co-partnership firm, made *after the dissolution* in payment of a debt due to the firm, will enure to the benefit of the firm.

For an invasion of such property, an action may be maintained in the name of all the members of the firm.

On Report from *Nisi Prius*, Wells, J.

Assumpsit for $136,74, money had and received, being the amount of interest money collected by the defendant, a deputy sheriff, upon notes claimed by the plaintiffs.

Shepley and *Dana*, for the plaintiffs.

Barnes, for the defendant.

1. The action is not maintainable in the name of all the plaintiffs. The assignment on which the whole claim rests, was made to Balch only. He alone gave the order upon which the net avails of the sale were paid by the officer to the attorneys; and their receipt therefor was given in the name of Balch alone.

2. No action is sustainable by B. W. Balch, in his own name. He had only an assignment of the debtor's interest in "goods" or proceeds. There was no proof of express promise by Cunningham to pay him.

The assignment did not *profess* to convey any authority to demand *interest.*

3. In suit by any parties, *assumpsit for money had and received*, would not lie. Refusal to pay, if not justifiable, was a breach of official duty. Assumpsit, (implied,) is not the proper remedy. 14 Maine, 112.

4. Upon the ground, that plaintiffs in the original suit are entitled to the *interest*, because *they* directed and insured the credit, they would be equally entitled to it, if they had failed in their action, which is absurd.

5. Upon the question of fact, "what was Cunningham's relation to the proceeds of the sale," the evidence does not

show that he was released from his official responsibility and risk.

It must be *clearly* shown that Cunningham was *adequately* released, otherwise his right and privilege were equal to his liability and risk.

The mere verbal, individual consent and approval by Palmer, the plaintiff's attorney, were not adequate.

Cunningham's acts at the time, and his return, are proof, that he was not released from his risk.

This is shown by the words in his return of proceedings at the *sale*, "which sum I hold to be disposed of according to law."

It was Cunningham, not Palmer, who gave the extension of credit on the notes.

The notes taken were payable to Cunningham, not negotiable, and were within Cunningham's control.

Finally, it was not possible for plaintiffs, or any one in their interest, to release Cunningham from his liability to Williams & Waterhouse, the original defendants.

After the sale, the plaintiffs might have failed in their suit. The notes might have proved worthless. If it be credible, that Palmer gave Cunningham an adequate guaranty as against the plaintiffs, and other attaching creditors, it is absurd to hold, that any thing testified to by Palmer was accepted by Cunningham, as a sufficient resource, out of which, in case of failure of the notes, to make out the $3202,52, necessary to reimburse Williams & Waterhouse.

Shepley, C. J. — The case is submitted for decision with authority to draw such inferences as a jury might properly do. It appears, that the defendant, as a deputy of the sheriff of Waldo county, on May 4, 1850, attached certain goods on a writ in favor of the plaintiffs against Waterhouse & Williams. He subsequently made an attachment of the same goods on a writ in favor of the plaintiffs against Waterhouse alone, and also on a writ in favor of Hobart & Briggs against Waterhouse. Service was never completed upon the last and it was never entered. A suit was commenced by Williams against

the sheriff of Waldo county for the alleged misconduct of the defendant in making those attachments.

Upon application of the plaintiffs the goods attached were appraised and sold at auction under the direction of the defendant, on August 13, 1850, by virtue of the provisions of the statute, ch. 114, § 53 to 56 inclusive. The goods appear to have been sold on a credit of sixty and ninety days, for good and satisfactory notes, by the verbal consent and approval of Palmer, one of the plaintiffs' attorneys, present at the sale. Two notes were accordingly given by the purchaser with satisfactory sureties, payable to the defendant, each for one half of the purchase money, one payable in sixty and the other in ninety days with interest.

On May 3, 1851, those suits were settled between the parties to them, and Waterhouse & Williams assigned, transferred, and released, to Benjamin W. Balch, one of the plaintiffs, and a member of the firm of Gannett, Balch & Co., all their title and interest in the goods and the proceeds of them, discharged the suit of Williams against the sheriff, and by a written order directed the defendant to deliver the goods attached to said Balch, the firm of Gannett, Balch & Co. having failed about three months after the sale. Balch directed the defendant to deliver the goods or pay the proceeds to the attorneys of the plaintiffs in these suits. The defendant having given an extension of the credit, collected the notes, several months after they became payable, and paid over to said attorneys, (who receipted therefor as attorneys to Balch alone,) the sum of $3202,52, being the net proceeds of the sales, except the interest which had accrued and been collected by him upon the notes. This he declined to do on the ground, that it belonged to him and not to the plaintiffs. To recover the amount of that interest money, this action is brought.

If the defendant, by any arrangement with the debtors or others, had disposed of the goods without the consent of the creditors, he would have become responsible to them for the same, and they might not have had any claim upon him for any benefit received by him by his own misconduct. The

loss or gain might have been his own. While making sale of the goods upon credit and taking notes from the purchaser, he acted in his official capacity. He was justified in carrying that arrangement into effect. *Twombly* v. *Hunnewell*, 2 Greenl. 221. For taking such notes by consent of the attorney of the plaintiffs he could not have been made responsible, if the makers of them, being in good credit at the time, had failed before their maturity. *Jenney* v. *Delesdernier*, 20 Maine, 183.

A sheriff cannot by his official acts acquire an absolute title to goods attached by him, or to their proceeds when sold according to the provisions of the law. *Harrington* v. *Fuller*, 18 Maine, 277.

If goods attached should be taken from an officer by a trespasser, and he should recover therefor a sum equal to the value of the goods at the time of their attachment, with damages equal to the interest on that sum for several months, while the action on which they were attached was pending, could he retain such damages to his own use? In case the action should fail, and he should be called upon to restore the goods to the debtor; or in case of recovery by the plaintiff, could he refuse to apply them in satisfaction of his judgment? They would have been recovered on account of injury to the debtor's property, in which the officer had only a special property. By the trespass of another, that special property could not be so changed as to make him the absolute owner. He could become so only by the debtor's refusing to receive the proceeds and recovering a judgment against him for the value of the goods. Acting as an officer of the law and as such, being an agent and trustee for all concerned, he could have no other claim to such damages than to be remunerated from them for all expenses incurred respecting the goods.

In the case of the *Franklin Bank* v. *Small*, 24 Maine, 52, the opinion states; "if the officer immediately upon attaching property converts it to his own use; or if he should then realize the full value of it by a sale; or recover of receiptors, or of one who had tortiously taken it from him;

a good reason would exist, why he should be accountable to the creditor for such value."

This would make him accountable for what he received on account of the property attached, although it might be an amount much greater than the value of the property at the time of attachment.

The defendant cannot be permitted to retain the amount received as interest, on the ground that it has become his property. It would be highly objectionable to allow an officer to make a gain out of property entrusted by the law to his custody, not for his own benefit, but for the benefit of others.

It is insisted if the plaintiffs are entitled to the amount received for interest, that it cannot be recovered in an action of assumpsit.

Admitting that the defendant held the money in his official capacity, and that an action of tort was the appropriate remedy, and that such an action could have been maintained against the sheriff for the default of his deputy, the case cited and other cases would authorize an action of assumpsit to be maintained against the defendant upon an express promise.

When a written acceptance is not required by statute, an acceptance of a bill of exchange or order may be inferred from the conduct of the drawee. Bayley on Bills, 175, note 45, Ed. by P. & S.; *Hough* v. *Loring*, 24 Pick. 254. In the latter case it is said, an acceptance may be inferred from any act, which gives credit to the bill. In this case the order drawn upon the defendant requested him to deliver all the goods to Balch. He insists, that he has complied with that request in full, and has thereby exhibited the fullest evidence of a disposition to accept and to pay upon the order all which he ought to pay upon it. The acceptance of an order amounts to a special promise to pay it. The objection to the form of the action cannot prevail.

Another objection is, that the action cannot be maintained in the name of all the plaintiffs, because it appears, that the firm of Gannett, Balch & Co. had been dissolved before a

settlement of their action was made, and the goods attached were not transferred to the members of that firm, but to Balch alone.

After the dissolution of a partnership, it is regarded as continuing for the final settlement of its affairs; and each partner for that purpose retains the full possession of his former powers, unless they make a different agreement. Story on Part. sect. 324, 328. The settlement appears to have been made by the attorneys of Gannett, Balch & Co. and of Waterhouse & Williams. The consideration for the transfer of the goods appears to have been the settlement and payment of claims asserted by the former against the latter. The transfer of the goods was made to one of the members of the firm, for the purpose of paying a debt claimed to be due to the firm; and the order was made upon the defendant to deliver the goods to him, being a member of that late firm. A conveyance of property to one member of a firm, in payment of debt due to the firm, will enure to the benefit of a firm. One member of a firm could not, if so disposed, deprive the firm of property taken in payment of a debt due to the firm by having it conveyed to himself. It would, if thus conveyed, remain partnership property. There is in this case no reason to conclude, that Balch, by having the transfer made to himself, had any intention to deprive the firm of its interest in the property.

That form of conveyance would seem to have been adopted for the convenience of collecting the debt. A fraudulent intent to deprive his partners of their rights cannot be presumed, especially, when he is found uniting with them in a suit to recover a part of that property alleged to have been conveyed to him in exclusion of their rights.

The other objections to recovery cannot prevail.

Defendant defaulted.

HARRIS *versus* STURTEVANT.

In order to prove, by a deposition, the contents of a paper in the hands of the adversary party, it is not requisite that notice to produce should be given to him prior to the *taking of the deposition.*

The deposition will be admissible, if the notice to produce be given a reasonable time before the trial.

BIRD *versus* SMITH.

In an action upon a judgment, it is inadmissible to prove that, *prior to its rendition,* a part of the claim, upon which it was founded, had been paid.

In an action upon a security, given in satisfaction of a judgment, it is inadmissible to prove that prior to the rendition of the judgment, a part of the claim, upon which it was founded, had been paid, whether to the nominal plaintiff or to any party having an equitable interest in it.

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

ASSUMPSIT. — The defendant, in 1841, gave his negotiable note, of $1500 and interest, to one Ellis, by whom it was negotiated to Ephraim Woodman as collateral security for a loan of about $338. Ephraim Woodman negotiated it, before the pay-day, to Oliver O. Woodman, in whose name a judgment was recovered upon it in June, 1850, for the sum of $2285, damage, besides costs. An execution, which was issued upon the judgment, was placed for collection in the hands of this plaintiff, (Bird,) who was a deputy sheriff.

On the 31st Oct. 1851, the defendant drew a check signed by himself, in the following words, and handed it to the plaintiff.

"$2318,66. Canal Bank, Portland, Oct. 31, 1850. Pay to R. A. Bird, on 2d Dec. next, twenty-three hundred eighteen dollars, sixty-six cents."

The check was not paid at maturity, and this action is brought to recover its amount.

The defendant offered to be defaulted for the sum of $556,80.

The check having been read, the defendant insisted that the plaintiff was bound to prove a consideration for it; but the Judge ruled it to be unnecessary. The defendant also de-

manded that the plaintiff's counsel should disclose who were the owners of the execution, when in the plaintiff's hands or at the time of the trial. But no such disclosure was made.

The defendant then read a copy of said execution against him, together with the plaintiff's return thereon, which admitted that he had received some money from the defendant upon the execution, and that he had received the check in payment and discharge of the balance.

Upon the execution was another indorsement, directed to the officer, as follows: — "No part of the within belongs to the within named Woodman; and I am the attorney for the owners. You will therefore follow only my orders, and pay over only to me." "John S. Abbott, Attorney."

The defence set up was that Oliver O. Woodman, in whose name the former judgment had been recovered, had no property in it beyond the said sum of $556,80, and that the residue of the claim upon which the judgment was recovered belonged to Ellis, who had directed the mode in which he desired it to be paid, and that the defendant had accordingly paid it in that mode, prior to the commencement of this suit.

He then offered to show that neither Ephraim Woodman or Oliver O. Woodman had any interest in or claims on the execution, beyond said sum of $338, and its interest; and that both of said Woodmans had repeatedly offered to receive of the defendant the said sum of $338 and its interest, in discharge of all their claims on said judgment.

In proof of such offer, the defendant offered a letter from Ephraim Woodman, dated a few days after Oliver had recovered the judgment. This letter expressed a willingness on the part of the Woodmans to accept such sum as would be right, according to the bargain made by said Ephraim with Ellis, and a willingness that the remainder, if any, should go where it ought in justice to go; and an opinion that if the writer could see this defendant and Mr. Abbott, the attorney, by whose agency the judgment was recovered, a right adjustment could be made.

The defendant also offered to show, that the residue part of

the judgment belonged to Ellis; and that Ellis had ordered and prescribed the manner in which the defendant should pay that residue, and that the defendant had, before the commencement of this suit, paid the same in that manner; and, that Ellis is still indebted to the defendant in a large amount.

In further proof of the facts, offered to be proved, the defendants offered in evidence the answers, *made in* 1842, by Oliver O. Woodman, Ephraim Woodman and said Ellis to the defendant's bill in equity against them. The view taken by the Court renders it unnecessary to present here the contents of those answers.

The Judge ruled that the proofs so offered were inadmissible.

If such offered proofs were inadmissible, judgment is to be rendered for the plaintiff for the amount due on the check as declared on, should the evidence, which was admitted, be adjudged sufficient to authorize a recovery by him.

J. S. Abbott, for the plaintiff.

S. Fessenden and *F. O. J. Smith*, for the defendant.

We may not impugn the judgment obtained against Smith. That is *res adjudicata.* But we may prove who was the actual owner of a judgment, in whose name soever it was recovered. If payment be made to the true owner, it is a discharge, notwithstanding any attempt by the nominal creditor to collect it. At the trial, we offered proof that the whole judgment, except $338 and its interest, remains the property of Ellis. The check comes in as a substitute for the judgment, and we offered proof that we had previously paid the Ellis part of the judgment. We have also offered to be defaulted for the other part.

The plaintiff however says, if Ellis owned a part of the check, that part when collected of the defendant, will go to the administrator of Ellis, who is now dead, and that if we paid Ellis, we must go to his estate for reimbursement, instead of defending this suit. But we think there is a better way, one which avoids circuity of action. By our transac-

tions with Ellis, his part of the claim was virtually assigned to us.

Bird is but a nominal plaintiff. If he recovers in this suit, he will be bound to pay the true owner. If our transactions with Ellis did not constitute an assignment to us, then Ellis' administrator is the owner. Suppose we sue the administrator and trustee Bird, the money must come from Bird to us. Having then in our hands money to which we are entitled, may we not retain it?

But the plaintiff says we have not offered to prove this by some particular mode. I do not know that we are bound to specify by what document or by what witness, we are able to prove it.

We have however specified one mode, by which we propose to prove it. The defendant, then, is to be considered the legal and equitable assignee of a portion of the judgment and of the execution upon it. He is the owner. The plaintiff is not the owner, and the Ellis portion of the check was received by the plaintiff in trust for this defendant.

In fact the whole of the judgment belonged to Ellis. For Ephraim Woodman, to whom the note was pledged by Ellis, transferred and indorsed it, before any forfeiture, "not accountable," and thereby discharged all right which he held in it, as collateral security. The whole property in the note then reverted to Ellis. *Bowditch* v. *Green,* 3 Metc. 160. Under Ellis we therefore might hold the whole amount of the check. But for the sake of disembarrassing the case from intricacy, we have offered to be defaulted for all that the Woodmans can have the slightest pretence to claim.

The fact that a recovery for the whole amount of the note was had by the indorsee, does not extinguish its collateral character. As the note was collateral, so was the judgment, and the money which might be collected upon it would belong to the pledgor. *Lord* v. *Clark,* 14 Pick. 223; *Burbank* v. *Sibley,* 11 Pick. 282 – 4. The defendant then is subrogated to the administrator of Ellis. Who then can claim a right above the defendant, whose claims against Ellis' estate

have been allowed by the commissioners of insolvency to an amount far above that of the check; say six or seven thousand dollars?

But the plaintiff asks, why were not these claims called up and proved in the original suit?

Our reply is, that for seven years we were struggling to get at the evidence, by means of bills in equity and every other appliance known to the law, but without success, until recently. Being pressed, when upon the stand in a suit at law, Oliver O. Woodman was compelled to state that he had the receipt, given by Ephraim to Ellis when the note was pledged as collateral; whereupon the Court required him to produce it. By aid of that document we are now prepared to show the extent of Oliver's claim.

But it is asked us, what though the Woodmans may receive their part, who owns the rest, and what is to be done with it? Our reply is, it was due to Ellis, and that we paid it to him, and that is what we offered and now wish to prove.

But if Ellis did not own, who did? The counsel refused to disclose for whom he was acting; and it is certain that none of Mr. Abbott's friends could have acquired any interest in the note until overdue, neither could they have acquired such interest, without knowledge that it was subject to counter claims, set-offs and equities.

We offered to prove the identity of the $1500 note; *that* except the $338, it was Ellis' property; *that* we had paid it and many hundred dollars over; *that since the judgment* and *notwithstanding it*, the Woodmans have offered to settle upon the basis of the contract, made when the note was pledged, so soon as it could be found what that basis was, and we have now found what it was, and wish a new trial in order to prove it. We therefore submit that the Judge erred in excluding the offered testimony. R. S. chap. 115, sect. 32; *Fogg* v. *Hill*, 21 Maine, 529; *Bowditch* v. *Green*, 3 Metc. 360; *Lord* v. *Clark*, 14 Pick. 223; *Hunt* v. *Nevins*, 15 Pick. 500; *Beckwith* v. *Libbey*, 11 Pick. 282.

Wells, J. — Oliver O. Woodman on the second Tuesday of June, 1850, recovered a judgment against the defendant on a promissory note given by the defendant to Benjamin H. Ellis, and which was negotiated by Ellis to Ephraim Woodman, and by him to said Oliver. The check in suit was received in part payment of the execution, which issued on the judgment.

The defendant contends, that the note was held by the Woodmans as collateral security for a sum much less than the amount of it loaned by Ephraim Woodman to Ellis, and he offered to prove, that the balance due on the note belonged to Ellis, that Ellis had prescribed the manner in which that balance should be paid, and that before the commencement of this suit, he had paid such balance in the manner directed by said Ellis. But the proof offered related to facts, which existed before the recovery of the judgment by Oliver O. Woodman. If any portion of the debt had been paid to Ellis or by his direction, and proof of such payment was admissible against Woodman, it should have been presented in defence of the former action. The judgment in favor of Woodman is conclusive evidence that it was due to its full amount when recovered. And the introduction of evidence, which existed before the rendition of the judgment, to show that it is not all due, would impair the force and effect which the law gives to it. If the judgment were in favor of Ellis himself, testimony, showing that the debt on which it was founded had been paid before the judgment, either in whole or in part, would be clearly inadmissible, for such testimony would directly contradict the judgment. If Woodman held the judgment partly for himself and partly in trust for Ellis, and a payment made to Ellis after it was rendered were admissible in evidence, on the ground of its having been made to the equitable owner, no evidence was offered of any such payment.

The proof offered, that both of the Woodmans had repeatedly offered to the defendant to receive from him the sum of three hundred and thirty-eight dollars and interest, in discharge of their claim on said judgment and execution, could

have had no legal effect, if it had been received in evidence. The offer was not accepted and no money was paid, and the debt was unaffected by it. It was merely a proposition not accepted or acted upon. Nor does the letter of Ephraim Woodman, if it were admissible in evidence upon proof that he was part owner of the execution, show any part of it to have been paid, but on the contrary it denies, that either he or Oliver has received any part of the debt. His expression of a willingness to make a proper adjustment does not tend in the remotest degree to establish any fact showing the judgment has been paid or satisfied in any manner whatever. And if Oliver had received a portion of the judgment while the balance belonged to Ellis, and that was known to the defendant, his release of the whole could not have deprived Ellis of his part, and facts existing anterior to the judgment could not have been received to defeat his title to such part.

The testimony offered was properly rejected, and the amount of the check, which was taken in part satisfaction of the execution, is recoverable in this action.

Defendant defaulted.

BACHELDER *versus* MERRIMAN.

The statute, requiring the caption of a deposition to certify that the deponent was sworn according to law, may be complied with by a statement of the language used in the administration of the oath, and if it appears to have been what the law requires, it is sufficient.

A certificate that "the deponent was first sworn and was examined according to law," is insufficient.

A judgment against a trustee will not operate as a bar to protect him against an action by the principal defendant, unless a demand for the goods, effects and credits had been made within thirty days from the judgment by an *officer holding the execution.*

Neither will such judgment operate as such a bar, unless the trustee had delivered or accounted for the goods, effects and credits upon the judgment.

ON EXCEPTIONS from the District Court, COLE, J.

Assumpsit against the maker of a promissory note, payable to one Reed, by whom it was indorsed to the plaintiff after being overdue. The defendant offered a deposition, the caption of which stated, that "the deponent was first sworn, and was examined according to law, and his deposition reduced to writing by himself and by him subscribed and sworn to." The defendant also offered two other depositions, the captions of which stated, that "the deponents being first sworn, were examined according to law," &c. All the depositions were objected to, but were admitted.

To show that the note was given without consideration, or that there was a failure of consideration, the defendant offered evidence, which was objected to, but admitted; by which the following facts appeared. One Weeman instituted a suit against Reed, and summoned, as his trustees, the administratrix and also the administrator *de bonis non* of one Mathews, neither of whom made any disclosure, and the administratrix was defaulted, and judgment was recovered against Reed and his said trustees; and within thirty days from the judgment the execution *creditor* demanded of the administrator the goods, effects and credits of Reed.

Pending the action against Reed and trustees, this defendant gave to Reed his note for the amount of Reed's claim against the estate of Mathews; and this is the note now in suit.

The defendant contended that, by the judgment afterwards obtained against the trustees, the debt due from Mathews' estate to Reed was, in law, transferred to Weeman, and, that Reed was thereby barred from any claim against the estate; so that there was a failure of consideration for the note now in suit.

The plaintiff objected to the effect of the trustee judgment, because no demand upon the trustees for the goods, effects and credits of Reed had been made by *an officer;* and because (the trustees never having delivered or accounted for any of such goods, effects and credits,) the judgment would be no bar to an action which Reed might bring against the estate.

The Judge, however, instructed the jury that the demand upon the trustees by the execution creditor was sufficient, and that, without proof that the trustees had delivered or accounted for the said goods, effects and credits, the judgment was a bar to any claim by Reed against the estate. The verdict was for the defendant, and the plaintiff excepted.

McCobb, for the plaintiff.

Gilbert, for the defendant.

TENNEY, J. — The first question presented is, whether certain depositions offered and objected to, but introduced by the defendant, were competent. It must appear affirmatively by the proper proof, that depositions, in order to be used as evidence, have been legally taken. That proof is in the certificate of the magistrate, who acted in administering the oath and in taking the depositions.

The statute, ch. 133, sect. 19, requires, that the magistrate shall certify, that the deponent was sworn "according to law." This provision may be complied with by the certificate in the words of the statute; or by a specification therein of the language used in the attempt to administer the oath, and if the latter shows that the oath has in fact been administered according to the proper form, it is sufficient. *Atkinson* v. *St. Croix Man. Co.* 24 Maine, 171.

In the certificate annexed to Groton's deposition, it is stated that "the deponent was first sworn by the subscriber, one of the justices of the peace for said county of Lincoln, was examined according to law." The words "according to law," in the certificate, by a proper grammatical construction, is confined in its reference to the *examination* of the witness, and does not extend to the administration of the oath. The meaning of the magistrate herein, is at best doubtful. In the depositions of Haines and Gilman, positive violence is done to the language used, by adopting the construction, that the words "according to law" were intended to apply to the caption of the oath, as well as to the examination of the deponent. The terms are, "the deponent first being sworn by the subscriber,

one of the justices of the peace for said county of Lincoln, was examined according to law." It could not have been the design of the magistrate to certify, that the deponent was sworn according to law.

The result to which we come on the first question, is sufficient to sustain the exceptions; but as the depositions may be retaken, or an amendment permitted in the certificate, by direction of Court and they become competent; and as other points are involved in the case, some of which it may be proper should be settled in reference to future proceedings of the parties, we proceed to consider them; and with this view, it will be done in connection with the defendant's evidence, without regard to its admissibility.

After the trustee process was commenced upon an account in favor of Weeman against Reed, and the administratrix of the goods and estate of John Mathews, as trustee, the present defendant gave to Reed his negotiable promissory note, (which is the one sued in this action,) for the account, which was the alleged cause of action. The trustee suit resulted in a judgment against the principal, and against his goods, effects and credits in the hands and possession of Gilbert, who was at the time of the judgment the administrator *de bonis non*, of the estate of Matthews. Upon execution issued upon that judgment, and within thirty days after its recovery, the creditor therein demanded payment of the trustee, who thereupon informed him, that he need not place the execution in the hands of an officer, and acknowledged in writing on its back demand of payment. The note was negotiated after its dishonor to the plaintiff.

The counsel for the plaintiff contended, that the judgment, execution and demand by the creditor would not alone constitute a bar to the present suit, without proof of a demand made by an officer upon the trustee of the goods, effects and credits in his hands, or at least an acknowledgment, that such demand had been made, and it was contended that the trustee must be shown to have paid, delivered or accounted for, the goods, effects and credits in his hands, or some por-

tion of them, by force of such judgment. But the Judge instructed the jury, that the judgment was a bar to such demand of Reed, without proof of such disposition of such goods, effects and credits, and that a demand upon the trustee by the execution creditor was sufficient.

The statute, chap. 119, sections 74, 80 and 81, clearly indicate the intention of the Legislature, that a demand shall be made by an officer after judgment and before the attachment expires, by virtue of an execution in the usual form against the principal and his goods, effects and credits, in the hands of a trustee, upon the trustee for such goods, effects and credits. This is done, that the property, if a subject of sale, may be converted into money by the officer which may be applied towards satisfying the execution; or if not delivered, that the foundation for a writ of *scire facias* may be laid.

The goods, effects and credits for which a trustee is holden, if charged as trustee in the original suit, till after a demand in the legal mode, are the property of the principal; and it is not competent for the creditor to take them on the execution, as he can neither appropriate them directly in satisfaction of the execution, nor has he the power to dispose of them by sale. A demand therefore by the creditor can create no liability in the trustee.

By sections 83 and 84, of the same chapter, the judgment against the trustee, shall discharge him from all demands of the principal defendant, for all goods, effects and credits paid, delivered or accounted for, by the trustee by force of such judgment, and the same shall be a bar to an action, by the principal defendant against him. The trustee has not brought himself within these provisions. On the ground, therefore, that the defendant is entitled to the same defence, which would be open to the trustee, had Mathews given the note, while in life, and at the same time, and that the plaintiff in every respect stands in the place of Reed, of which we give no opinion, the defendant cannot object successfully to the plaintiff's right to maintain the action, upon the facts, which have been introduced in evidence. *Exceptions sustained and new trial granted.*

MUSSEY *versus* CAHOON, WEBB AND CUMMINGS.

In the assessment of damage, done to an individual by the establishment of a city street, which would require a removal of his building, a provision that he should not be required to do it, until necessary for the opening of the street, does not require any special notice to him of the time for the removal.

That time would be sufficiently indicated to him by the progress made in the formation of the street.

One who abuses the authority, vested in him by law for a special purpose, will be treated as having had no authority for any part of his acts.

Thus if an officer, who had authority to remove from the street the building of another person, should after removing it, make sale of a part of its materials, he will be deemed a trespasser *ab initio*, and held chargeable for the whole value of the building.

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

TRESPASS for tearing down and removing a shop, belonging to the plaintiff and situated at the head of his wharf in Portland.

It was admitted that Cahoon, as Mayor of the city, directed Webb to remove the shop, and that it was taken down and removed by Cummings under Webb's directions. It was proved by the plaintiff, that the shop was worth $300 to remain where it stood, or $250 to be removed; and that some fragments of its materials, after lying eight or ten days upon the wharf, were sold by Webb for $20.

It was shown, in defence, that in March, 1850, the city authorities located and established a street, (upon which they also consented that a railroad should be built,) passing directly under the shop.

The estimate of compensation, assessed for damages done by the location, was based upon a right in the owners to remove the buildings, if done so soon as should be necessary for the opening of the street. On the 7th August, the plaintiff was notified that an immediate removal of his shop was necessary; and he was requested to do it. On the 8th August the laborers having arrived at that part of the track, and being in readiness to drive piles there for the formation of the street, the shop was removed, as before stated.

The case was withdrawn from the jury, and submitted to the Court with power to draw inferences of fact.

Rand, for the plaintiff.

W. P. Fessenden, for the defendants.

Howard, J. — The city council had exclusive authority and power to lay out and alter streets in the city of Portland; "and to estimate the damages any individual may sustain thereby." Special Laws, 1832, chap. 248, sect. 6; Act of 1837, chap. 25.

It is admitted, for the purposes of this trial, that Commercial street, in that city, was duly laid out, in March, 1850; and that the building taken down by the defendants, on Aug. 8, 1850, was standing within the limits of that street. The committee for laying it out, and estimating the damages, used the following language, in their report, — "It being understood, in our estimation of the damages, that the owners of the buildings standing on the line taken for said street as aforesaid, should have the right of removing the same, provided the same is done as soon as said removal is necessary for the purpose of making said street." This report was accepted by the city council. On May 30, 1850, the commissioner of streets, who was Webb, one of the defendants, was authorized and directed, under the advice of the city solicitor, to cause the buildings, vessels, and all other obstructions on Commercial street, to be removed forthwith, "or as soon as it may be necessary for the purpose of making said street, provided the owners neglect or refuse to remove the same."

In the estimation of damages sustained by the plaintiff, the removal of his buildings was left as a privilege for him, if he chose to remove them upon the terms specified in the location. It was not provided, or stipulated, that notice should be given to him, when the removal would be necessary, nor can it, reasonably, be inferred that he was to have other notice, than such as might be derived from the location of the street. He could waive or enjoy the privilege, but could not properly insist upon the right to further notice of the time when he

must move, in order to secure it. He was bound to take notice of this if he would make the privilege available.

The notice of August 7, 1850, would not have been reasonable, if any had been necessary; and we cannot regard an attempt of the Mayor to give that notice, other than as a gratuitous service to the plaintiff, not authorized by the city council, and not required by law, or by the terms of the location.

As commissioner of streets, and in pursuance of the order of the city council, it was the duty of Webb to cause the building of the plaintiff to be removed at the time when it was done. The evidence is satisfactory, that the removal was then "necessary for the purpose of making the street." Special Laws, 1831, ch. 135; Special Laws, 1832, ch. 248, § 1, 4; Revised Ordinances of the city of Portland, ch. 2.

The agency of Cummings and Cahoon, the other defendants, appears to have terminated with the removal of the plaintiff's building; the former acting as servant of the commissioner of streets, and the latter giving directions as the chief executive magistrate of the city. To that time neither of the defendants can be regarded as trespassers, or wrongdoers.

Afterwards, the remains of the building, which was called an "old cooper-shop," was sold by Webb, assuming to act as commissioner of streets, and in behalf of the city. It is conceded that the sale was unauthorized.

When one abuses the authority with which he is invested by law, for a special purpose, he is regarded as having acted throughout the transaction without authority. The law withdraws its protection from him, as to every thing done by its authority thus perverted and abused. While the commissioner of steets was legally authorized and empowered to remove the shop as an obstruction from the street, he had no right to sell, confiscate or destroy it. Selling it in the manner proved, was an abuse of authority conferred by law, which rendered Webb a trespasser *ab initio*, and answerable for the value. *The six Carpenters' cases*, 4 Coke, part 8, 290; Bacon's Abridg. Trespass, B. sect. 24; *Allen* v. *Crofoot*, 5 Wend. 506; *Malcom* v. *Spoor*, 12 Metc. 279.

It does not appear, that Cummings or Cahoon participated in the sale made by Webb; or that they had any information or knowledge of its being made, and they are not implicated or affected by that transaction, as in furtherance, or prosecution of a common design. *Wynne* v. *Anderson & als.* 3 Car. & P. 596; *Adams* v. *Freeman*, 9 Johns. 117. Judgment must therefore be rendered for them, for costs, and against Webb, for the value of the building.

BAILEY *& al. versus* FISKE.

Within the import of the Massachusetts Act of 1786, prohibiting the marriage of a white person with any negro, Indian or mulatto, a person having but one-sixteenth, (or perhaps one-eighth,) of the colored blood is to be considered a white person. The marriage of such person with a mulatto was null, and the children of such marriage, being illegitimate, could not take their father's land by inheritance.

WRIT OF ENTRY. The demandants claim as heirs at law of their father Tobias Jones. The evidence introduced by them proved, *that* Tobias was a mulatto; *that* their mother, (who was married to him fifty-nine years ago,) was a daughter of a father who was entirely white, and of a mother who was one-eighth Indian, she having been the child of a man who was a quarter Indian. The Judge considered the marriage of Tobias Jones to have been null, and ordered a nonsuit, to which the demandants excepted.

Fox, for the demandants.

W. P. Fessenden, for the tenant.

SHEPLEY, C. J. — There is a difference of opinion respecting the proportion of African blood, which will prevent a person possessing it from being regarded as white.

Some Courts appear to have held, that a person should be so regarded, when his white blood predominated both in proportion and in appearance.

Those least disposed to consider persons to be white, who

have any proportion of African blood, have admitted, that persons possessing only one-eighth part of such blood should be regarded as white. 2 Kent's Com. 36, note, 7th Ed.

There was in Abigail Jones, according to her testimony, but one-sixteenth part of Indian blood, and she must be considered a white woman. She was married to a mulatto, who could not be regarded as a white man.

The marriage of white with colored persons was then forbidden by statute. Their children were therefore illegitimate, and they could not inherit from their father.

Exceptions overruled and nonsuit confirmed.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1852.

COUNTY OF PENOBSCOT.

Larrabee *versus* Lumbert.

Where the grantor of land remains in possession after the conveyance, a legal presumption arises that he is tenant to the grantee.

Upon that presumption, if uncontrolled, assumpsit for use and occupation may be maintained.

That presumption may be repelled by parol proof.

After notice to quit, the grantee may elect to treat the grantor, if in possession, as holding by wrong, and not as a tenant.

The bringing of a writ of entry is such an election.

Such writ of entry with possession thereby obtained, precludes a recovery for use and occupation.

On Facts agreed.

Assumpsit, for use and occupation.

The opinion of the Court, Shepley, C. J., Wells, Rice, and Appleton, J. J., was drawn up by

APPLETON, J. — Assumpsit, for use and occupation, is an equitable action. It is founded on a contract, and unless one express or implied is established, it cannot be maintained.

By the facts as agreed upon by the parties, it appears that on the twelfth of April, 1846, the defendant, by deed of warranty, conveyed to the plaintiff a store in Bangor, the rent of which he demands in this suit. It is further agreed that the defendant, after giving the deed, remained in the possession and occupation of the premises, taking the rents and profits, till the tenth of July, 1850.

It is well settled that when the grantor remains after the conveyance, in possession of the premises conveyed, the presumption is, that he is there rightfully and as tenant of the grantee. *Sherburne* v. *Jones*, 20 Maine, 70. Were there no other facts to be considered, the right of the plaintiff to recover would seem indisputable.

But the presumption, that the grantor remaining in possession, is to be deemed a tenant, is like other presumptions, and may be controlled or disproved by counter proof. In the absence of all other evidence, it suffices as a basis for the action of the Court in the direction which it indicates. "Presumptions of law are suppositions or opinions previously formed on questions of frequent occurrence, being found from experience to be generally accordant with the truth, and remain of force till repelled by contrary evidence. It is observable, that formerly many of the presumptions of law were considered too powerful to admit contradiction; but this doctrine is now confined principally, if not altogether, to cases of estoppel." Mathews on Presumption, 1.

The plaintiff offers no proof of any express contract nor of any implied one, except so far as it may be inferrable from the legal presumption arising from the grantor's continuance in possession after his grant. To negative this presumption, the defendant has offered evidence to show that the deed referred to, though absolute in form, was given only for purposes of security; that, except for such purpose, it was without consideration; that the plaintiff refused to take a mortgage or give

back a bond conditioned to reconvey the estate upon being paid, saying, that he wanted the deed so that the defendant should be prompt, that if the notes should be paid the store should be reconveyed, and that he did not want any thing to do with the store, unless he had to pay or advance the money to pay the notes; that if he had to pay or advance "and wait three years, he was to have it." It was in evidence that other real estate was conveyed in mortgage to the plaintiff for security, and that since the commencement of this suit the plaintiff's claim has been fully paid.

It is objected that this testimony is inadmissible, because its tendency is to affect the plaintiff's title. If it were offered for the purpose of altering or varying the terms of the grant, it could not upon legal principles be received. But this is not the object. The verbal agreement can in no way alter, diminish or control at law the plaintiff's rights to the land conveyed. The instant the deed was delivered, the grantee's rights under it were as great as those derived from any conveyance. The grantee might instantly enter and take the rents and profits; he might lease or convey or in any other mode control the estate as fully as if no verbal agreement had been proved. If the debt were paid, he might deny the equitable interests of the defendant, and he would be remediless at law. But the evidence is not offered to change or vary any of the ordinary legal results of the conveyance. They remain entirely unaffected thereby. The plaintiff did not enter into possession as he might have done, but permitted the defendant to remain in the undisputed enjoyment of the premises, and this evidence is offered to show what were the relations between the parties to the deed after its delivery. The action of assumpsit for use and occupation may be maintained upon parol evidence, and the same evidence is receivable to defeat it. The claim of the plaintiff rests only on a legal presumption. Proof is properly admissible to show why and wherefore the demandant continued in possession, and thus to rebut a presumption of law or establish its inapplicability as affecting the legal rights of the parties.

For such purposes the evidence offered is admissible and being admitted, the inference is irresistible that the presumed relation of landlord and tenant, upon proof of which alone the plaintiff can hope to recover, never existed. That the conveyance was merely for purposes of security, though absolute in form; that the defendant remained in possession without any contract or agreement to pay rent; that rent was never demanded by the plaintiff and never paid by the tenant; that other lands were mortgaged for the same purpose and at the same time, of which no rent has been claimed, all tend to prove that the plaintiff at the time never thought of leasing, nor the defendant of receiving a lease, or being considered a tenant of the premises.

The premises for the occupation of which rent is sought to be recovered, had been mortgaged on 27th of January, 1845, to the President, Directors and Company of the Kenduskeag Bank, and the plaintiff took an assignment of the same on the 12th of April, 1849. If the defendant were to be regarded as tenant to any one, it would seem to be to the Kenduskeag Bank, their title being prior in time to the plaintiff's, and the Bank could alone enforce a claim for rent accruing before their assignment; but it is unnecessary to discuss that question, inasmuch as the action is not, on other grounds, maintainable.

The plaintiff having on the 12th of April, 1849, received an assignment of the mortgage given by the defendant to the Kenduskeag Bank, on the same day gave him notice to quit, and on the 4th of June following, he commenced a writ of entry to recover the possession of the store of which he had a conveyance, and having obtained judgment in his favor, June 10th, 1850, he entered by virtue of his judgment and execution in possession thereof, and has continued in the occupation of the same to the present time.

The plaintiff, it will be remembered, claims to receive rent up to the time of his entry into the premises, under the execution he had obtained in the suit to which reference has just been made.

The relation of landlord and tenant, it has been seen, did not exist prior to the notice to quit. If it had existed before, the plaintiff would then have terminated it, and might henceforth treat the defendant as a disseizor or not, at his election. By bringing a writ of entry he terminated that election, and chose to consider him as a disseizor. This action for use and occupation is now founded upon a tort, and cannot be maintained against a disseizor. The plaintiff, having recovered judgment against the defendant in a writ of entry, cannot now waive the dissiezin, which was the only ground upon which he recovered in that suit, and now recover for use and occupation. The defendant cannot at the same moment be a tenant and entitled to possession and responsible for rent, and a disseizor and liable to be dispossessed by writ of entry, as being wrongfully in possession.

The judgment therefore disproves the very existence of the relation of landlord and tenant. *Birch* v. *Wright*, 1 D. & E., 371. "It is well settled," says Sutherland, J. in *Featherstonhaugh* v. *Bradshaw*, 1 Wend. 134, "that an action for use and occupation will not lie to recover rent accrued subsequent to the demise laid in the declaration in ejectment. The lessor denies that the relation of landlord exists after that period and treats the defendant as a trespasser; he cannot therefore, sustain an action which supposes the relation to have existed during the same period." *Walker* v. *Prescott*, 6 N. H. 98; Taylor's Landlord & Tenant, 294.

The plaintiff has been fully paid. The deed under which he claims being intended only as security for a debt would be deemed by a Court of Equity a mortgage, and upon payment of the debt secured, a reconveyance would be decreed. *James* v. *Johnson*, 6 Johns. Ch. 417. In this State, if the same facts were admitted in an answer, the same results would follow.

It would be absurd to authorize a recovery of money, which a Court of Equity, if the same facts were before them, would decree to be repaid. The law requires no such absurdity.

In the writ of entry on which the plaintiff recovered judgment, he had inserted a count claiming damages for the rents and profits of the demanded premises from the time his title accrued, in pursuance of the provisions of R. S. chap. 145, sect. 14, 15. The writ was subsequently amended by striking out this count. The right so to declare is permissive and not compulsory. It was probably given to avoid the necessity of bringing trespass for mesne profits after a recovery of the premises. In no view can it be deemed a substitute for the action for use and occupation, which would not lie under such circumstances, or as authorizing that action to be brought, when before it would not lie.

In no view of the case, can the action be maintained. In accordance with the agreement of the parties a nonsuit must be entered. *Plaintiff nonsuit.*

Peters, for the plaintiff.

Rowe & Bartlett, for the defendant.

Kimball *versus* True.

The bond to be taken by an officer, before replevying property, is to be in double its true value.

For his failure to take *such* a bond, it is no defence, that, in the writ, the property is stated to be of a value, less than its true value; or that the writ prescribes, as the amount of the bond to be taken, a sum less than double the true value.

The damage to be recovered against the officer, for such a failure, is the amount of injury thereby occasioned.

On Facts agreed.

Case against the sheriff for the default of his deputy in neglecting to take a sufficient bond in a replevin suit against the plaintiff for a yoke of oxen. Judgment in that suit was rendered for this plaintiff for a return of the property. The value of the oxen was alleged in the replevin writ to be $30, and the direction in the writ was to take a bond in the sum of $60.

The value of the oxen, at the time of replevying, was $35. The damage recovered in the replevin suit by this plaintiff was one cent and cost $84,20.

A. W. Paine, for defendant.

What is the duty imposed upon an officer relative to the taking of replevin bonds? Is he, or not, bound by the value in the writ, and by the command and direction of the writ, or is there imposed upon him the further obligation to assess the true value of the property and require a bond accordingly?

The statute provision on this subject is contained in R. S. chap. 130, sect. 10. This provides that the bond shall be "in double the value of the goods to be replevied, conditioned as in the bond described in sect. 3."

Section 3 provides, that the bond shall be conditioned as stated in the prescribed form of the writ.

Section 1 prescribes the form to be the same as prescribed in chap. 114.

Chapter 114, sect. 1, provides, "that the forms of writs shall remain as established in 1821, chap. 63, which chapter remains unrepealed."

Statute 1821, chap. 63, sect. 9, prescribes the form of replevin writs, which form embraces, as a part of it, the blank for the value and the amount of the bond.

This form, thus prescribed, indeed, is the only enactment prior to the R. S. imposing the obligation to take a bond at all. The duty, however, of the officer to take a bond was ever recognized. This could only be required, upon the principle, that the form thus adopted and prescribed was to be regarded as a binding obligation. Counting it as such, all parts are of equally binding effect, and the construction, which imposes upon the officer the duty to take a bond at all, requires it to be taken in the penal sum named in the writ.

There can hardly be a doubt, that under the Stat. of 1821, the whole duty of the officer consisted in taking a bond of the penal sum *prescribed.* Have the Revised Statutes varied this obligation?

The negative is very clear, from the facts that these have kept in force the same *form* as existed before. And in doing so, it is a fair conclusion, that they have re-enacted it, subject to the same construction as was before given to it.

This view too is in accordance with the spirit, if not the express language, of the Repealing Act of R. S. sect. 4.

The language too of the Revised Statute in question, chap. 130, sect. 10, is in no respect different from the language of the writ, in both cases the words being the same, viz: — "double the value of the goods." If there were any doubt as to the construction to be given, if this phrase stood alone, that doubt is solved by the other provision, enacted at the same time, requiring the penalty of the bond to be according to the value named in the writ. Both statutes are to be taken together in the construction.

It was not intended to give the officer a discretion, in fixing upon the penalty of the bond. Had such been the intention, some provision would have been made, to meet the contingency and governing this discretion or defining rules for fixing the value.

In no case does the statute thus give the officer such a discretion to fix the price of property, either imposing such an obligation, or giving such a power for good or evil, as is here contended for.

Bail, on the contrary, is to be taken in such penalty as is prescribed in the writ. This bears a strong resemblance to the case at bar.

The policy of the law should be, to free the officer from all *discretionary* action as much as possible. He is a mere *executive* officer, whose duty it is to exercise the power of carrying into effect the judgments or discretions of others, while it is peculiarly the province of the judiciary to exercise the discretion of *directing*. And the same policy which, by the constitution, guarded the separation of the two powers, should carefully ensure the exercise of these same powers by its separate and appropriate officer, in whatever case its exercise may be called for. On the one hand, the *right of the*

citizen requires that the officer should have no power to deprive him of the benefit of his process, by a captious or overcareful exercise of discretion, and on the other hand the right of the officer demands that his course should be plainly marked out, when he is held accountable pecuniarily for his acts.

Again, it is equally a dictate of justice and common sense, and it is believed of *law*, that where the law imposes a discretion, it gives also immunity for its exercise. This seems implied in the very nature of the case. To compel a man to judge in any given matter, and then to hold him responsible in damages for the correct exercise of his judgment, is a contradiction in terms. All judicial officers, justices in poor debtor disclosures, approving of bonds, admitting to bail and discharging from prison and arrests, appraisers of real estate and of personal property, of demands turned out in disclosures, estates of deceased persons, all tax assessors, executors, administrators, guardians, and all trustees acting under warrants, imposing the most important discretion, inspectors of all kinds, surveyors of lumber, sealers, all town and corporation officers, and in general all persons who are vested with a *discretion* are held free from liability for the proper and honest exercise of it.

The officer cannot be so intimately acquainted with all kinds of property as to be capable of correctly appraising it, and it is certainly a gross injustice upon him to compel him to assume that responsibility without remuneration.

But a still greater objection lies against the ground assumed by the plaintiff. Until the writ *and bond* are placed in the officer's hands he has no power or right over the property to be replevied, nor even a right to intermeddle with it. How then shall he come to a correct conclusion about its value? A stock of goods, jewelry, gold and silver, dry goods or groceries, extensive in quantity and of large value, are frequently the object of such suits. Without a power to examine schedule and overhaul, how is it to be expected, that the officer will enable himself to fix upon a value so nearly cor-

rect as not to be responsible for any over or under valuation? Yet he is powerless with reference to the property until the valuation is made, the bond taken and finally delivered.

If objected that the doctrine contended for is an unsafe one to adopt, as leading to hazardous consequences by giving the replevying plaintiff an opportunity to commit great wrong, the answer is readily at hand that, if so, it is not the province of the *Court* by special legislation to remedy the evil. The remedy lies with another department of government.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, APPLETON and HATHAWAY, J. J., was drawn up by

HATHAWAY, J. — Before serving a writ of replevin, the officer is required by the statute to take a bond to the defendant, with sufficient sureties, in double the value of the property replevied, (the statute is imperative,) his precept also gives him similar directions; and if he serve the writ without taking such bond as the law prescribes, and the defendant in replevin suffer damage thereby, upon the plainest principles of law and justice the officer should be liable to the extent of the injury thus occasioned.

The case finds that the value of the oxen replevied was thirty-five dollars, the bond, therefore, should have been seventy dollars. The misfeasance of the defendant's deputy is admitted by the default. If the bond had been legally sufficient it would have been security to the defendant in replevin only to the amount of its penalty, and although, in this case, the plaintiff may have been injured more than that amount by the replevin suit, yet the penal sum of such bond as the officer should by law have taken, is all the damage that the plaintiff could have sustained by his misfeasance. Upon the facts presented, therefore, the plaintiff may have judgment for seventy dollars and interest from the date of his writ.

Knowles, for the plaintiff.

PHILIP H. COOMBS *versus* WARREN.

The property in negotiable notes may pass by delivery, without indorsement.

A town or city tax cannot lawfully be assessed to the mortgagee of land, who is not in possession, and has never entered to foreclose.

If so assessed, a sale made by the collector for payment of the tax gives no title.

A levy of mortgaged land on execution against the mortgagee, who is not in possession and has never entered to foreclose, passes no title.

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

WRIT OF ENTRY for two small parcels of land in Bangor.

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

As to the first parcel, called B, the demandant read a mortgage of a thirty-eight acre lot, including parcel B, made in 1835 to Philip Coombs to secure certain notes payable in 1839, and assigned by said Philip to the demandant in 1843. He also introduced five of the mortgage notes unindorsed.

The tenant claims title to the thirty-eight acre lot by a collector's deed to himself, upon a sale for a city tax assessed in 1839 against said Philip Coombs. He also proved a levy of the thirty-eight acre lot, made in 1839, on execution against Philip Coombs; and a conveyance made in 1843, from the levying creditor to the tenant.

As to the second parcel, called C, the demandant read another mortgage, made in 1835, to Philip Coombs, and assigned to the demandant in 1844, and introduced four of the mortgage notes indorsed in blank.

The tenant claimed title to lot C, under the same tax deed. Japheth Gilman, a witness for the tenant, testified that Philip Coombs formerly occupied this parcel. One of the assessors of 1840 testified that in that year, having in his hand said Philip Coombs' inventory of taxables for 1839, he called for an inventory for 1840; and Coombs gave in the same land which had been taxed to him in 1840; that he gave in the thirty-eight acre lot and also the lot C.

The tenant also introduced a disclosure made in 1844, under oath, by Philip Coombs and this demandant.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

WELLS, J. — The demandant is the assignee of two mortgages made to Philip Coombs. Five of the notes, to secure which one of the mortgages was given, were not indorsed. The assignment of the mortgage conveyed the legal interest in it to the demandant. The property in the notes would pass without an indorsement of them. *Jones* v. *Witter*, 13 Mass. 304. The notes were in the possession of the demandant, and produced by him in evidence, and there is nothing to show that he was not the owner of them.

It is contended, that the tenant has acquired a title to the premises by the purchase of them, at a sale made by the collector of taxes for the city of Bangor in 1839. Both parcels of land were situate in Bangor, and were taxed in that year to Philip Coombs, the mortgagee, and then owner of the mortgages and resident in that city. Were they taxable to Philip Coombs? By the statute of 1821, chap. 116, sect. 15, taxes are required to be assessed, "according to the rules that shall be prescribed in and by this Act, and the then last tax Act of the Legislature," &c. By the second section of the tax Act of 1835, the assessors are required to make their assessment "upon the respective inhabitants thereof, according to the value of the real estate therein owned or possessed, by each of them, on the first day of May next, either in his own right or the right of others, improved or not improved," &c. By this Act, the inhabitant taxed must be the owner or possessor of the real estate, upon which the tax is assessed. The Act of March 6, 1838, chap. 313, sect. 2, provides "that all real estate, &c. may be taxed to the tenants in possession or to the owners thereof," &c. Between the mortgager and mortgagee, the latter is regarded as the owner, but in relation to other persons the former is so regarded, but he cannot authorize others to do any acts, which would impair the per-

manent estate. The mortgagee holds the title for security and may recover possession of the estate, but when his debt is paid, he ceases to have any claim upon it. He cannot therefore be taxed as the owner of the estate, the ownership for that purpose being in the mortgager, but may be for the money due to him upon the mortgage. If he is in possession, by the terms of the statutes, he may be taxed for the land mortgaged. The burden of proof is on the tenant to establish his title under the sale for taxes. By merely showing that Philip Coombs was mortgagee, he does not show, that Philip Coombs was taxable for the property. It must be proved by the tenant that the mortgagee was in possession.

It does not appear from the testimony of Japheth Gilman, that the mortgagee occupied the land in 1839. The witness says, that he formerly occupied the small lot, but does not state how many years ago it was, or when the occupation ceased. Because the mortgagee gave in to the witness the lands to be taxed in 1840, it cannot be inferred, that he was in possession of them the year before, and it is unnecessary to consider the question raised, whether such declaration of the mortgagee would be admissible against the demandant. It appears, that the debt, for which the mortgage containing thirty-eight acres was given, was not due until August, 1839, a period subsequent to the assessment of the taxes, and it is not usual for mortgagees to take possession until there is a breach of the condition in the mortgage. This circumstance has some weight in the evidence presented. But independently of that consideration, there is not sufficient evidence to show the mortgagee in possession in 1839, the year when the taxes were assessed.

By the Act of February 10, 1823, ch. 229, the assessors were authorized to assess improved lands, houses or tenements, to the tenants in possession of the same, or to the owners, whether they resided in this State or elsewhere, and the collectors were authorized to collect such taxes in the manner pointed out in the thirtieth section of the Act, to which that Act was additional. And the Act of 1838, before mentioned,

provides, "that for all taxes hereafter legally assessed, on real estate belonging to resident proprietors, &c. the same remedies may be had for collecting the same as is now provided by law for the assessment and collection of taxes on the estates of non-resident proprietors." By this Act it appears, that the mode provided for selling the real estate of resident and non-resident proprietors was the same. The Act of March 12, 1831, ch. 501, § 2, declares what evidence shall be deemed conclusive of the purchaser's title to real estate sold for taxes.

But that Act must be taken in connection with the other Acts, which have been mentioned, to carry into effect the intention of the Legislature. And whatever is required by them, in addition to what is stated in that Act to be sufficient, must also be proved. So that the evidence mentioned in that Act will be conclusive, when the estate is taxed to the owner or tenant in possession. And when it is properly taxed to a proprietor or owner unknown, it will then be taxed to the owner. This construction is strengthened by the consideration, that if the assessment were held to be conclusive in relation to ownership, lands, not liable to taxation at all, might be taxed to a person not the owner, and by a sale the lawful owner be deprived of them. But if the determination of the assessors were conclusive as to ownership, such result would follow. And as the same law applies to all cases, it must be held conclusive in all or none, and the inference is, that it was not intended to be conclusive in that respect in any case. When real estate is taxed and advertised to be sold as the property of one, and it belongs to another, if the latter could ascertain from an accurate inspection on examination of the description, that it was his land, the statement that it belonged to another would serve to deter him from making any. The ownership of the premises being in the mortgager for the purposes of taxation, the tenant acquired no title to them by the assessment and sale of them as the property of the mortgagee.

If the mortgagee, in his disclosure made in 1837, denied that he was the owner of any property, while he was the

owner of the mortgages, such declaration would not convey his title to the tenant, nor prevent him from conveying it to the demandant.

The levy, under which the tenant claims one of the parcels of land, was made upon it as the property of the mortgagee. Such interest before foreclosure is perfected cannot be taken by a levy. *Smith* v. *Peoples' Bank*, 24 Maine, 185. It does not appear, that the mortgagee made any entry upon the mortgaged premises, or took any measures to foreclose.

As none of the grounds of defence presented by the tenant can prevail, judgment must be rendered for the demandant.

Judgment for the demandant.

Fessenden, for the demandant.

Cutting, for the tenant.

Fairfield *versus* Hancock.

In an action by the payee of a draft against the drawer, it is not admissible to prove that, when taking the draft, the plaintiff admitted the debt, for which it was given, to have been contracted by the drawer as agent of the drawee, and thereupon *promised*, that the drawer should never be held accountable.

Neither could the drawer, after judgment against him in such suit, succeed in a special action upon such *promise* against the payee.

The proof of such a promise would contradict the draft, which is the written contract, and would therefore be inadmissible.

On Report from *Nisi Prius*, Tenney, J. presiding.

Assumpsit.

This defendant, as payee of a draft, had recovered judgment against this plaintiff as drawer. 30 Maine, 299. After payment of that judgment, this action is brought upon the promise, which was offered to be proved in that suit. In support of this action the plaintiff offered to prove, *that* the lumber purchased of this defendant, (for which the draft was made,) was purchased by the plaintiff merely as agent for one

Weld; *that* that fact was known to the defendant, who had inquired into the ability of Weld to pay; and *that*, in taking the draft, the defendant agreed to look only to Weld, and promised that the drawer should never be called upon. The evidence was objected to on account of its "irrelevancy."

The declaration also contained the money counts. But, in support of them, no additional evidence was offered.

Cutting, for the plaintiff.

In the case of *Hancock* v. *Fairfield*, 30 Maine, 299, it was held that parol evidence was not admissible to control the legal effect of defendant's responsibility as drawer, and that, as such, he was personally liable; that "whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself and no other person." The correctness of that decision we do not now controvert, but have brought our action founded on the parol contract there excluded.

The plaintiff was under no legal obligation to give the defendant a draft, binding himself as drawer; he might have drawn and signed as the agent of Weld; the defendant knew at the time of selling the lumber, that the plaintiff was so acting. Defendant inquired as to the responsibility of Weld, and sold the lumber on his credit. But the draft was written in common form and signed by plaintiff as drawer, and delivered to the defendant upon his aforesaid agreement. This was a benefit to the defendant, and, therefore, a sufficient consideration for his promise.

In *Perkins* v. *Gilman*, 8 Pick. 231, WILDE, J., in delivering the opinion of the Court, says, "The defendant's remedy for the violation of that agreement, is by action against the promisees of the note, and the principle adopted to avoid circuity of action is not applicable."

In *Allen* v. *Kimball*, 23 Pick. 473, the Court recognize *Dow* v. *Tuttle*, as the leading case in that Commonwealth, and recite the language of the Court, which was pronounced in that case, and then conclude by saying, "in the present case the agreement offered to be proved, was executory, for

the breach of which the plaintiff is liable to an action, in which the present defendant will be entitled to a full indemnity for any damage which he has or may suffer.

These cases fully establish the doctrine for which I contend.

Was the testimony admissible ?

It was objected to only upon the ground of *irrelevancy, and for no other cause.* Certainly that evidence is relative which has a tendency to prove the issue.

Had it been objected to upon the ground that it contradicted the tenor of the draft, it might have presented another and very different question, although, I apprehend, it would not have availed in this suit; it could only avail, as it has, in the suit on the draft. The written and parol contracts were independent.

In the action, *Dow* v. *Tuttle*, 4 Mass. 414, which was founded on a note payable in one year, defendant offered parol proof that the promisee, at its inception, agreed to delay payment for five years. PARSONS, C. J., says, "If the agreement was a part of this contract, it would be repugnant to the note and destroy its effect. The agreement, although made at the same time, must be considered as a collateral promise of the promisee's, for the breach of which, if there be a legal consideration, *an action would lie.*"

Rowe & Bartlett, for the defendant.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The plaintiff, acting as the agent of G. M. Weld, purchased of the defendant a quantity of lumber, and drew a draft upon Weld in favor of the defendant in payment for it. In a suit upon that draft the plaintiff offered to prove, that the defendant agreed, that he would not hold him liable upon it as drawer. That testimony was excluded, and judgment was rendered against the present plaintiff. *Hancock* v. *Fairfield*, 30 Maine, 299.

This suit is founded upon the same alleged promise. The

witness states it to have been made in these words: — "That if Mr. Fairfield would give him the draft, he would not hold him liable as drawer of said draft and would look only to Weld the drawee."

Few rules of law are more perfectly established or founded upon better reason than that, which excludes parol evidence offered to contradict, alter or vary the terms of a written contract.

The law regards the written contract as exhibiting the whole of the final conclusions and agreements of the parties respecting the subject matter of it, and does not admit, that any previous conversations can constitute any contract respecting it.

The plaintiff now attempts to establish a separate contract, which would contradict and annul the written contract between him and the defendant, and to do it by proof of a conversation between his agent and the defendant prior to a delivery and acceptance of that draft. If there was such an agreement, it would have been very easy to have incorporated it into the written contract by adding the words not accountable as drawer, or other words to the like effect.

The cases of *Perkins* v. *Gilman*, 8 Pick. 229, and of *Allen* v. *Kimball*, 23 Pick. 473, are not in fact or principle like the present. The contracts exhibited in those cases, providing for an extension of the times of payment, appear to have been made long after the notes.

Plaintiff nonsuit.

Dodge *versus* Emerson *& al.*

A note for a sum certain and for another sum, the amount of which is contingent, though made payable to order, is not negotiable, and no action can be maintained upon it in the name of an indorsee.

In a suit upon such a note, in the name of the indorsee, it is not competent for the plaintiff to abandon the uncertain sum, and recover for that which is fixed.

On Facts agreed.

ASSUMPSIT, by the indorsee against the makers of a note payable to the Protection Insurance Company or order, for "$271,25, with such additional premium as may arise on policy No. 50, issued at the Calais agency."

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

APPLETON, J. — No principle of law is more fully established by authority and the universal concurrence of the commercial world, than that to make a written promise a valid promissory note, it must be for a fixed and certain, and not for a variable amount. In France it is so determined by the provisions of the Code Napoleon. It is the recognized mercantile law of continental Europe. In England and in this country, it has received the sanction of repeated and well considered adjudications. Story on Promissory Notes, § 20. Without this essential requisite, a written promise, though in terms payable to order, is to be regarded as a simple contract and not negotiable.

The defendants in this case have promised to pay two several sums; one certain and definite, the other uncertain and contingent. The defendants' liability being for both these sums, is obviously for an unascertained and indefinite amount.

It is insisted in argument, that the plaintiff may abandon all claim for the additional premium, which is uncertain, and proceed only for the certain sum expressed in the contract. Undoubtedly he may take judgment for any sum less than the amount due, and in that mode abandon a portion of his legal claims, but that still leaves the contract in its original state, and can in no way affect its legal construction. He could not erase the clause relating to the additional premium, without thereby making such an alteration in the instrument declared on, as would discharge the defendants.

In *Smith* v. *Nightingale*, 2 Stark. R. 375, the promise was to pay the payee sixty-five pounds and all other sums that

may be due him, and it was claimed for the plaintiff, to whom the interest in the contract had passed by indorsement, that he might disregard the latter clause and recover on the certain sum set forth in his contract as indorsee, but the Court decided otherwise. *Davis* v. *Wilkinson*, 10 Adol. & El. 98.

The inquiry is made by the counsel for the plaintiff, whether the clause providing for the payment of an additional sum, introduced after the promise to pay the sum fixed and certain, controls that sum so as to make it in any event uncertain. The amount due to the plaintiff is uncertain. Whether the contract is to be regarded as a promise to pay one sum, which shall be the aggregate composed of a certain and of an uncertain sum, the amount of which is to be ascertained at some subsequent time, or as a promise to pay two sums, one fixed and the other uncertain, is perfectly immaterial. In either case there is no precise and ascertained amount due by the contract, and it cannot be regarded as a promissory note. If it was not in its origin, it cannot be made one by any abandonment, which the plaintiff may deem it advisable to make of any portion of the sum due him. The contract declared on not being in its character negotiable, the action cannot be maintained by the present plaintiff. *Plaintiff nonsuit.*

Cutting, for the plaintiff.

G. M. Chase, for the defendants.

RAWSON, *Judge, versus* PIPER *& als.*

Suit upon an administration bond can be brought for the benefit of those persons only, who are interested in the estate.

A creditor of an intestate, who has received for his debt a negotiable note against a third person, of the same amount, secured by a mortgage of land, has no further interest in the estate, although the maker of the note became insolvent and the mortgage was valueless.

The assignee of such a note and mortgage can have, in the intestate estate, no higher interest than his assignor had.

Debt, upon an administration bond.

The administratrix, under a license from the Probate Court, sold land belonging to the intestate, and received of the purchaser his negotiable notes, made payable to several of the creditors of the estate, to the exact amount of their respective debts. To secure these notes, the purchaser gave a mortgage of the same land, jointly to the several payees of said notes. The creditors, (the said payees,) accepted the notes, and gave up to the mortgager the notes which they held against the intestate. Moulton, one of the payees, assigned to Wiggin his note and his interest in the mortgage. The maker of the note became insolvent, and the title under the mortgage failed, because the administratrix had not, prior to her sale of the land, taken the oath required by law in such cases.

This suit is brought by the procurement and for the benefit of Wiggin.

The opinion of the Court, Shepley, C. J., Wells, Rice, Hathaway and Appleton, J. J., was drawn up by

Hathaway, J. — The case states that this action, (which is debt upon principal defendant's bond, given as administratrix of Eben S. Piper's estate,) was brought for the benefit of J. S. Wiggin, assignee of Nathan Moulton, one of the creditors of said estate; said Moulton having assigned his claim against the estate to said Wiggin, Jan. 12, 1842.

By R. S. ch. 113, sec. 5, any person interested either personally or in any official capacity in any probate bond, shall have a right to originate a suit on such bond, which suit, by sec. 4, of same statute, is required to be brought in the name of the Judge of Probate. The first question presented, therefore, is whether J. S. Wiggin, for whose benefit the suit was brought, was interested in the bond.

The case finds that Nathan Moulton and some other persons were severally creditors of the estate, holding notes or demands against the deceased intestate; that the administratrix, April 14, 1841, having previously obtained license from the Judge of Probate, to sell the real estate of the deceased

for the payment of debts, &c. sold the same, or a portion thereof, to C. W. Piper and gave him her deed thereof, and by an arrangement, previously made between the parties, said Piper gave his own negotiable notes to said Moulton and to certain other creditors of the estate, to each for the amount of his debt; and for the balance of the purchase money, a note of same kind payable to the administratrix, the whole of which notes were secured by mortgage (with the usual covenants of warranty) from said Piper, of the same premises, to the respective payees of said notes. And said creditors, at the same time, gave up to said C. W. Piper their demands against the estate.

By inspection of the mortgage, it appears that the creditors of the estate only, were mortgagees, not including the administratrix, but that the note to her was specified in the condition of the mortgage as one of the debts secured thereby. On the back of said mortgage Nathan Moulton (one of the mortgagees) assigned to said Wiggin all his interest therein, Jan'y 12, 1842. There was no other assignment presented in the case.

It seems that by the arrangement made by the parties, C. W. Piper, instead of paying the administratrix directly for the land, was to pay a part of the purchase money to Moulton and others, creditors of the estate. And the case finds that he did pay those debts. His note and mortgage, which Moulton received for his debt, were as much payment of it, so far as Eben S. Piper's estate was concerned, as if it had been paid in money, so that Moulton had no demand against the estate to assign to Wiggin. The note and mortgage of C. W. Piper constituted no claim against the estate of the deceased, and of course, the assignment thereof to Wiggin could transfer no claim against the estate. The facts, that C. W. Piper subsequently became insolvent, and that there was no evidence that the administratrix took the oath required by law, when licensed to sell by the Probate Court, can have no effect in this case. Moulton received the note of C. W. Piper, secured by mortgage, in exchange for his own demand against the estate. He

might have ascertained, by examining the public records, whether the proceedings had been legal and the title was perfect or not. But he was contented to rely upon the credit and covenants of C. W. Piper, and his assignee of the mortgage cannot, in this respect, be in any better condition than Moulton was in when he made the assignment.

J. S. Wiggin, therefore, having failed to show any interest in the bond sued, which would authorize him to originate a suit thereon, it becomes unnecessary to examine the case further, and a nonsuit must be entered.

A. W. Paine, for the plaintiff.

A. Sanborn, for the principal defendant.

Peters, for the surety, one of the defendants.

Hinkley *versus* Gilligan *& al.*

The declarations of one co-partner, made after the dissolution of the co-partnership, concerning facts that had occurred prior to the dissolution, may be received in evidence to charge the partnership.

On Facts agreed.

Assumpsit against the three members of a co-partnership, which had been dissolved before the date of the writ.

Norton, one of the defendants, having removed from the State, the plaintiff discontinued as to him, because no service had been made upon him. After the commencement of the suit, Norton acknowledged in writing that the debt was justly due from the partnership.

The opinion of the Court, Shepley, C. J., Wells, Rice, and Appleton, J. J., was drawn up by

Rice, J. — The only question presented for consideration in this case is whether the admissions of Norton, were competent testimony for the plaintiff. The case finds that Norton and the defendants, during the summer of 1848, and

covering the time of the charges in the writ, were co-partners.

It has been held by this Court that the declarations of one co-partner, made after the dissolution of the co-partnership, concerning facts which transpired previous to that event, may be received to charge the partnership. *Parker* v. *Merrill*, 6 Maine, 41. According to the agreement of the parties a default is to be entered.

McCrillis and *Crosby*, for the plaintiff.

Mudgett, for the defendants.

Miller *versus* Goddard.

Where one has contracted to labor in the service of another during a given time, at a specified rate of wages, if he be discharged by his employer, before the expiration of the time, without justifiable cause, he is entitled to recover damages.

But if he voluntarily quits the service before the expiration of the time, without justifiable cause, he can recover nothing for his previous labor.

In a case, presented on exceptions, it is the province of the Court to decide, not upon the general merits of the case, but merely upon the legal correctness of the proceedings excepted to.

On Exceptions from the District Court, Hathaway, J.

Assumpsit, for labor performed.

The plaintiff worked for the defendant in the woods, three or four months. Both parties admitted, that the labor was performed under a contract for a longer term at an agreed price per month. The plaintiff insisted, that the defendant discharged him without cause. On the other side it was insisted, that the plaintiff voluntarily quit, without fault or consent of the defendant. Upon these questions, evidence was introduced.

The Judge instructed the jury that, if the plaintiff agreed to work during the lumbering season, and left before that time was out, without the fault or consent of the defendant, he could still recover his wages for the time he did perform,

deducting therefrom the damages, if any, which such leaving caused to defendant, (unless the damage thus caused to defendant, was equal to, or exceeded the amount of plaintiff's wages due at the time when he left, in which case plaintiff could recover nothing, and their verdict would be for defendant.)

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

Peters, for the defendant.

The plaintiff's contract was an entirety. Its full performance was a condition precedent to his recovery. The cases, establishing this principle are too numerous for citation. I beg leave, however, to present the cases in Massachusetts. *Olmstead* v. *Beale*, 19 Pick. 528; *Rice* v. *Dwight Manuf. Co.* 2 Cush. 80; *Faxon* v. *Mansfield*, 2 Mass. 147.

The decisions in Maine are not in conflict with the doctrine, but rather confirmatory of it. 17 Maine, 38; 2 Fairf. 54; 31 Maine, 555.

The case of *Britton* v. *Turner*, 6 N. H. 481, is obviously against us. But that decision, so far from being founded on the law, was but an evasion of all law, and in conflict with the whole current of authorities, and was founded somewhat, as the case itself shows, upon some local usages.

The instruction in this case would defeat all confidence in contracts. It confuses principles, applicable to this class of cases, with those applicable to another class, such as that in 7 Pick. 181, which, as is said in 19 Pick. before cited, are exceptions to the rule; cases where there have been a substantial performance and an acceptance of that performance with its deviations.

In such cases, the keeping of materials, or labor and materials, even if varying from the contract, holds the party to pay for them, if they *can* give them up, but choose to keep them, and be benefited by them.

But in a case of this kind it cannot be said we have the benefit of partial services, and can restore those services. We cannot deliver the labor back, we could an unfinished

article of property, a carriage, a house, a bridge. We could refuse to take them, we cannot refuse labor already executed, and it is no fault of ours that we cannot. We did not know, when the plaintiff was performing this labor and we were receiving it, that he would refuse to finish it. We have never consented to receive and pay for labor for less than the lumbering season, and no such consent can be implied.

It makes no difference, that a man is to be paid a given sum per month for a number of months, it is a distinction without any legal difference; it is, notwithstanding, one contract entire and indivisible. Hiring a man six months for 72 dollars, is the same contract as hiring him six months for 12 dollars per month; he may be worth only 6 dollars to me for the first month, but 18 for the second.

C. P. Brown, for the plaintiff.

Nothing can be more transparent than that the equities of the case are with the plaintiff. The inquiry was, which of the parties broke the contract. By finding for the plaintiff, and by finding for him more than the agreed rate of wages would amount to, it is demonstrable, that the jury found the contract to have been broken by the defendant and by him only.

In view, then, of such a fact, deducible with certainty from the papers before the Court, the case will not be sent to a new trial. "In deciding upon exceptions, the Court will look to the whole case, and not disturb a verdict which is fully justified by the facts, independent of those excepted to, although the instruction may not have been fully correct." 20 Maine, 325; 1 Maine, 17; 21 Maine, 512; 28 Maine, 523.

But the instruction in this case was correct. I do not find the question to have been settled or directly presented in our own Courts. It has, however, been fully investigated and settled in our favor by the Supreme Court of New Hampshire, cited on the other side. That case is cited with approbation, and its conclusions said to be sensible and just, in the 6th Am. Ed. of Chitty on Contracts, 580. So too the prin-

ciple is recognized and established in Smith's Leading Cases. The same rule is indirectly recognized, 3 Fairf. 293; 8 Porter, 253; 11 Vermont, 510; 13 Wend. 276.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

WELLS, J. — This was an action for work performed under a special contract, in which, it was alleged, the plaintiff was to labor during the season of lumbering, at an agreed price per month.

The Judge of the District Court instructed the jury in substance, that if the plaintiff left the employment of the defendant before the contract was performed without the fault or consent of the defendant, still the plaintiff could recover his wages for the time he labored, deducting the damages, which the defendant sustained by a want of entire performance of the contract, and if they were equal to the wages or exceeded them, then the plaintiff could not recover any thing.

It is a rule of the common law, that where an entire service is to be performed, for an entire compensation to be paid at its completion, the performance of the service is a condition precedent to the recovery of the compensation. The language of such contract indicates clearly, that it is not intended by the parties that the stipulated price should be paid until the service is performed. And it is manifest, that the rule is founded in the familiar principle, that contracts should be expounded and executed according to the true and just intent of the parties. *Cutter* v. *Powell*, 6 T. R. 320; *Spain* v. *Arnott*, 2 Stark. R. 227. "Unless there be some express stipulation to the contrary, whenever a specific sum is to be paid for specific work, the performance or service is a condition precedent; there being one condition and one debt, they cannot be divided." 3 Stark. Ev. 1303.

In the case of *Stark* v. *Parker*, 2 Pick. 267, which was an action for services rendered, it was held, that the plaintiff must perform the agreed service as a condition precedent to his right to recover any thing under the contract, and that

he could not renounce the contract and recover on a *quantum meruit.* The same principle is confirmed in *Omstead* v. *Beale,* 19 Pick. 528. And the law is held to be the same in *Lantry* v. *Parks,* 8 Cow. 63.

In New Hampshire, it has been thought more equitable that in such cases, the laborer, who has departed from his contract, should recover what his services were reasonably worth. *Britton* v. *Turner,* 6 N. H. 481. When the laborer has adequate cause to justify an omission to fulfil the contract, he cannot be regarded as in any fault. But it does not very well accord with the good faith, which the rules of law uniformly require, to allow him to stop at any stage of his labor, in open violation of his agreement, and still compel his employer to pay him what his services are worth. If it were permitted to the laborer to determine the contract at his pleasure, no well founded reliance could be placed, at any time, upon a due observance of it.

It is contended that this case falls within that class where work and labor and materials are furnished in the performance of contracts, like those of *Hayden* v. *Madison,* 7 Greenl. 79; *Abbot* v. *Hermon, Ibid,* 118; and *Norris* v. *School District in Windsor,* 3 Fairf. 293, and there is not a complete and full performance in all respects. But it will be found in those cases, that there was a waiver of a strict compliance or an acceptance of what was done, or that the work was done and the materials furnished, but not in the manner specified in the contract and without any intentional variation from it. *Knowlton* v. *Inhabitants of Plantation No.* 4, 14 Maine, 20.

The present case is not one of an imperfect performance, as it would be if the plaintiff had labored during the time, but had performed his labor in a negligent and unskillful manner; but an absolute want of performance, for a portion of the time employed, is the ground upon which the instruction was based.

It is contended, that independently of the instruction under consideration, upon a correct view of the law and the facts, the plaintiff is entitled to retain the verdict. But it is not

the province of the Court, when a case is presented by exceptions, to decide upon its general merits, but to determine whether the law applicable to it was correctly given to the jury.

If the defendant discharged the plaintiff before the expiration of the time for which he was employed, without justifiable cause, the plaintiff will be entitled to recover all the damages, which he has sustained, by the breach of the contract; but if the plaintiff has departed from it, without justifiable cause, he cannot recover any thing.

The exceptions are sustained.

Moody *versus* Brown.

The manufacture of an article, pursuant to the order of a customer, does not transfer the title.

Neither does the tender of the article, when so manufactured, transfer the title.

Neither does the leaving with the customer, against his will, of the article, so manufactured and tendered, transfer the title.

To pass the title, there must be an acceptance, either express or implied.

An action against the customer, as for an article sold and delivered, cannot be maintained by the manufacturer, unless the article have been accepted.

An exception to this rule obtains, when the customer employs a superintendant, and pays for the property by instalments as the work progresses.

On Exceptions from the District Court, Hathaway, J.

Assumpsit, on a count for materials and labor furnished, and one on an account for articles sold and delivered. The account was for stereotype plates, $18, alteration of same $4, and some interest and expressage, making in all $25,04.

A witness for the plaintiff testified, *that* in behalf of the plaintiff he presented the bill and requested payment, to which the defendant replied, that he had ordered the plates, but did not feel able to take them; that there was a mistake in them, which the plaintiff was to correct at his own expense; *that* he afterwards carried the plates to the store of

the defendant who refused to take them; *that* he left them there, against the remonstrance of the defendant; *that* the defendant afterwards offered to pay $20, for the whole bill; *that,* at a still subsequent period, the witness asked the defendant when he would pay the $20, who replied that he would do it in a few days; and, *that* the defendant afterwards repeatedly said he would pay the twenty dollars.

The Judge instructed the jury, that, if defendant contracted for the plates to be made for him, and refused to accept them when made, although he might be liable to plaintiff in an action for damages for not fulfilling his contract, yet he would not be liable in this action for their value, as for goods sold and delivered; *that,* if they were left at defendant's store against his consent and remonstrance, such a proceeding on the part of plaintiff could have no effect to vary the liabilities of defendant.

But if afterwards defendant offered to pay the twenty dollars in full for the bill, and if that offer was accepted, the plaintiff would be entitled to recover the twenty dollars and interest thereon from the time such offer was accepted, but, that defendant would not be bound by that offer, unless it was accepted.

J. E. Godfrey, for plaintiff.

Where an agreement is performed on one part, it cannot be repudiated on the other.

The tender of the plates was tantamount to a delivery, and the rule of damages is the value of the plates, for which this action was brought.

The case of *Bement* v. *Smith,* 15 Wend. 493, is in point, and conclusive for the plaintiff. It is identical with this, except that *here* the goods were not only *tendered,* but *left* with the defendant. 18 Johns. 58; Strange, 506.

Simpson, for the defendant.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

Shepley, C. J. — There is not a perfect agreement of the decided cases upon the question presented by the exceptions.

The law appears to be entirely settled in England in accordance with the instructions. *Atkinson* v. *Bell*, 8 B. & C. 277; *Elliott* v. *Pybus*, 10 Bing. 512; *Clarke* v. *Spence*, 4 Ad. & El. 448.

The case of *Bement* v. *Smith*, 15 Wend. 493, decides the law to be otherwise in the State of New York. The case of *Towers* v. *Osborne*, Stra. 506, was referred to as an authority for it. The plaintiff in that case does appear to have recovered for the value of a chariot, which the defendant had refused to take. No question appears to have been made respecting his right to do so, if he was entitled to maintain an action. The only question decided was, whether the case was within the statute of frauds.

In the case of *Bement* v. *Smith*, C. J. Savage appears to have considered the plaintiff entitled upon principle to recover for the value of an article manufactured according to order and tendered to a customer refusing to receive it.

This can only be correct upon the ground, that by a tender the property passes from the manufacturer to the customer against his will. This is not the ordinary effect of a tender. If the property does not pass, and the manufacturer may commence an action and recover for its value; while his action is pending it may be seized and sold by one of his creditors, and his legal rights be thereby varied, or he may receive benefit of its value twice, while the customer loses the value.

The correct principle appears to have been stated by Tindal, C. J. in the case of *Elliott* v. *Pybus*, that the manufacturer's right to recover for the value depends upon the question, whether the property has passed from him to the customer. The value should not be recovered of the customer, unless he has become the owner of the property, and can protect it against any assignee or creditor of the manufacturer.

To effect a change in the property there must be an assent of both parties. It is admitted, that the mere order given for the manufacture of the article does not affect the title. It

will continue to be the property of the manufacturer until completed and tendered. There is no assent of the other party to a change of the title exhibited by a tender and refusal. There must be proof of an acceptance or of acts or words respecting it, from which an acceptance may be inferred, to pass the property.

This appears to be the result of the best considered cases.

There is a particular class of cases, to which this rule does not apply, where the customer employs a superintendant and pays for the property manufactured by instalments as the work is performed. *Exceptions overruled.*

Dow & Foster *versus* Huckins & Dudley.

G. contracted to drive the defendants' logs at a fixed price per thousand feet, The plaintiff, however, was compelled to drive a large part of them with his own, in consequence of their intermixture with his; and, after the driving was over, he stipulated with the defendants, that they should not be required to pay him, for the driving, more than two hundred dollars in addition to the price which G. was to have had. — *Held,* that this stipulation did not bind the plaintiff in order to recover for his services, to perform all the duties in driving, which G. had agreed to perform.

On Exceptions from *Nisi Prius,* Tenney, J. presiding.

Assumpsit, for driving a large quantity of the defendants' logs, (about one and three fourths millions of feet,) down the Penobscot river, and claiming to enforce the statute lien against them.

It appears, that the plaintiffs were driving a large quantity of their own logs, and also those of some other owners, according to contracts between them. In so doing, the defendants' logs became intermixed with the rest, so that they were compelled to drive those also.

The plaintiffs finished driving on the 29th of Nov. 1849, having got the logs to the boom, except, that about 300,000 feet of the defendants' logs were left up the river, which they employed other men to drive the next spring. There was

also evidence tending to show that those logs were jammed with a large body of other logs, and could not, without a great rise of water be got out, except by hauling each one separately, and that, in contracts for driving, it was not generally understood that logs, so situated, should be driven.

The defendants introduced a contract of Oct. 11, 1849, by which one Gilmore and Trickey were to drive all the defendants' logs, and deliver the same in the booms for twenty-five cents per thousand feet, payment to be made when the logs were all delivered in the boom.

A demand was made by the plaintiffs upon the defendants to pay for the driving, on the 12th Dec. 1849.

The defendants also introduced a paper dated Dec. 26, 1849, signed by Dow, one of the plaintiffs, of the following tenor.

"I hereby acknowledge that the understanding between John Huckins and myself in regard to myself and S. I. Foster driving the Huckins & Dudley logs was, that the said Huckins should not be required to pay any more than two hundred dollars in addition to the fulfilment on the part of John Huckins of the contract made by and between the said Huckins, and Gilmore & Trickey, that being twenty-five cents per M.

The Judge instructed the jury *that* the contract introduced by defendants imposed upon plaintiffs the full obligation of the contract made by Trickey & Gilmore, to the full extent and in the same manner that Trickey & Gilmore were bound; and *that*, unless the plaintiffs had substantially fulfilled the contract of Trickey & Gilmore, then the verdict must be for defendants.

A verdict was returned for defendants, and the plaintiffs excepted.

The opinion of the Court, Shepley, C. J., Wells, Rice, Appleton and Hathaway, J. J., was delivered by

Shepley, C. J., orally. — The writing or memorandum signed by Dow, speaks only of the amount which Huckins & Dudley were to pay, viz, two hundred dollars in addition

to the twenty-five cents per M., which it was agreed should be paid to Trickey & Gilmore for the same service. The writing does not contain any promise or engagement on the part of Dow to drive all the logs, nor to do the work in any particular manner. It contains no language from which even an inference could be drawn, that plaintiffs were to perform the Trickey & Gilmore obligation. The Court having instructed the jury, that the memorandum in question imposed upon plaintiffs the full obligation of the Trickey and Gilmore contract, and such instruction being erroneous, the verdict must be set aside and *New trial granted.*

A. W. Paine, for the plaintiffs.

M. L. Appleton, for the defendants.

Treadwell *versus* Moore.

A debtor, when paying money, has the right to appropiate it to any one of the creditor's demands.

If he appropriate it, though to a claim arising for a violation of law, the Court cannot afterwards transfer its appropriation to a debt lawfully existing.

But, if no appropriation be made, the law will apply it to that one of the creditor's claims which is legal, in preference to one which is not collectable in law.

On Exceptions from the *District Court,* Hathaway, J. presiding.

Assumpsit on an account for groceries, $37,51. The defendant introduced some receipts from the plaintiff amounting to $38, " to be allowed on account."

A witness testified that, beside the grocery bill, the defendant had purchased of the plaintiff a quantity of spirituous liquors, charged on another bill, to the amount of $53,88, and that the receipts for $38 were for moneys paid on account of the liquors. On the question, whether the plaintiff had license to sell liquors, no evidence was given.

The Judge instructed the jury that, in the absence of op-

posing proof, the plaintiff had a right to sell the liquors, but, if the evidence satisfied them, that the plaintiff sold the liquors in violation of law, then the moneys for which the receipts, (amounting to $38,) were given, should be appropriated to the account for the groceries, and the verdict should be for the defendant. The plaintiff excepted.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, and APPLETON, J. J., was drawn up by

APPLETON, J. — The defendant having been sued for the amount of a bill of groceries, the items of which were admitted, offered by way of defence, receipts signed by the plaintiff "to be allowed on account," for a sum exceeding the claim demanded in this suit. Were the case to end here, the defence would seem to be established. But from the evidence introduced, it further appeared, *that* the plaintiff, beside his grocery bill, had other dealings with the defendant; *that* he had sold him at different times spirituous liquors, which were to have been paid for on delivery, but were not; *that* these liquors were not charged on his books with the other articles sold; *that* when sold they were entered on bills, and, *that* this course was adopted because otherwise, as the witness testified, the bill for groceries could not be collected by law. There was evidence tending to show, that the receipts produced by the defendant were for sums of money paid specifically at the time towards the liquors, which he had purchased.

No principle of law is better settled than that receipts are open to explanation by parol evidence. If the sales of the groceries were to be deemed separate and distinct transactions, in good faith and with no design to evade the salutary provisions of the stat. ch. 205, approved August 7, 1846, "to restrict the sale of intoxicating drinks," then it would become an important question for the jury to determine to the payment of which account the defendant had appropriated the money, by him paid, and for the purpose of ascertaining this, parol proof was properly admitted. It may be observed, that

the law never interposes to designate the appropriation of payments, except upon and after the neglect of the debtor and creditor to act. The debtor has, in the first instance, the right to apply the payments in reduction of any claim whatsoever. The claim may be one which the law will not enforce, it may be in violation of its provisions, and the party paying may have the right to recover it back, still the money must be applied by the party receiving it, as the debtor when making the payment shall direct. When however the creditor has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made, the law will afterwards apply it in discharge of the demand which it acknowledges, and not that which it prohibits. *Wright* v. *Loring*, 3 B. & C. 172. The receipts offered were equivocal, and their application indeterminate. It should have been left to the jury to determine, whether the sales of the liquors and groceries were to be deemed as parts of one transaction, or as separate and distinct, and if distinct, then it would remain for them to ascertain towards the settlement of which bill these payments have been made, and if in payment of the bill for liquors, the jury should have been instructed, that as they were not filed in set-off, the defendant could not derive any benefit from them by way of defence.

Instead of submitting to the jury the determination of these facts, under appropriate directions in matters of law, the presiding Judge instructed the jury, "that if there was evidence, that satisfied them that he sold the liquors without license and in violation of law, then the money paid by the defendant, for which receipts were given and which the defendant claimed to have allowed in this action, should be appropriated in payment of the account sued." This instruction applied to a finding of the jury establishing the facts, that the sale of the liquors were separate transactions, and that the payments were made in discharge of the bill for liquors, and required the jury, in such case, to appropriate the money received in payment of an illegal, to the liquidation of a legal sale, towards which it

had never been paid. It is difficult to perceive upon what grounds this view of the law can be sustained. The defendant may recover back the money thus paid, by instituting a suit under the provisions of the eleventh and twelfth sections of the Act before referred to. The claim thus arising might, perhaps, have been filed in set-off, and the defendant have thus received the benefit of it in satisfaction of the plaintiff's claim. But this he has not done. No case can be found where the law by its own vigor has withdrawn a payment deliberately applied to the discharge of a claim, however illegal, and appropriated it in payment of some legal claim existing against the individual making the payment. No such principle, as applicable to the appropriation of payments, is recognized. It would rather seem, that if the debtor should neglect to make any appropriation at the time of payment, that the creditor might apply the money received, in payment of a demand which could not be enforced at law, in preference to one which could be. The case of *Philpott* v. *Jones*, 2 Ad. & El. 41, resembles, in essential particulars, the case now under examination. In that case there were claims for spirituous liquors sold in less quantities than was permitted by the statute, and for the recovery of which no action could be maintained, as well as other items to which there were no objections. The debtor had made payment generally. It was insisted in the defence, that they should be applied to the legal portion of the plaintiff's claim. DENMAN, C. J. says, "the question is, whether the jury were warranted in saying that the former payment was on account of the spirits. The defendant made no appropriation of that payment; the plaintiff, therefore, might at any time elect to appropriate it to this part of his demand." *Crookshank* v. *Rose*, 5 C. & P. 19. If a note tainted with usury has been paid, the debtor cannot apply the usurious excess in discharge of any note upon which he may be sued by the same creditor, unless he shall have filed his claim in set-off. It is immaterial how the defendant's claim may have arisen, whether by note, judgment, or under the provisions of a statute authorizing the recovery of money

because paid in violation of its provisions. The claims he may have, no matter what their origin, are all to be regarded as on the same footing. They may be enforced by suit, and the judgments may be set off by order of Court. If the counter claims which the defendant may have, were not in fact payments, the law cannot and will not so regard them.

It is urged that these payments may be treated as unappropriated, if they have been applied to illegal claims. But such is not the law. The money is none the less appropriated, though in violation of law and though the party paying may repent of such appropriation of his funds, and by suit recover them back. The law cannot disregard established facts and treat that as unappropriated, which all must perceive has been appropriated, but leaves the parties to the ample remedies provided for them. *Exceptions sustained.*

New trial granted.

S. H. Blake, for the plaintiff.

E. C. Brett, for the defendant.

Ricker *versus* Barry.
Ricker *versus* Barry & Wife.
Ricker *versus* Barry.

One purchased land, as bounded on the East by land of L, and on the South by land of D. The land of L extended a part only of the distance to D's land, but the course of L's line, if continued, would strike the land of D; — *Held*, that the land purchased is bounded on that continuation-line.

In a deed of land, if the boundary descriptions disagree, and one of them is expressed as being certain and the other as being uncertain, the former must prevail, in the absence of controlling circumstances.

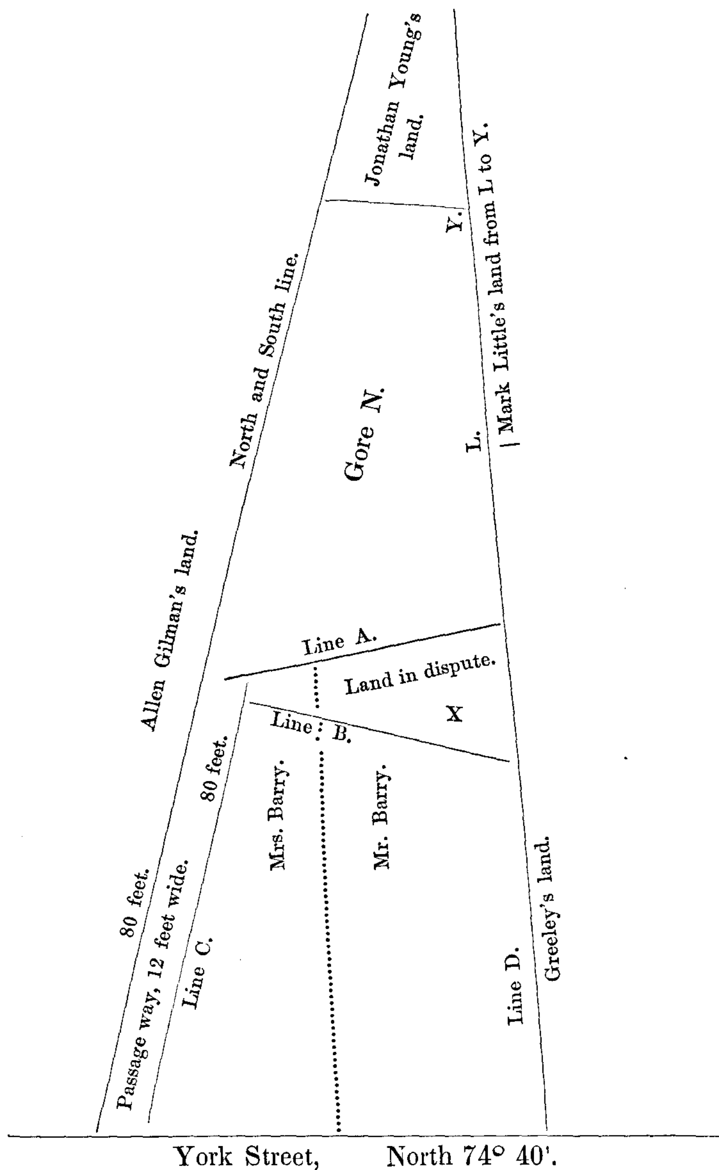
In the construction of such a deed, however, a long occupation, pursuant to the uncertainly expressed boundary, would have much influence.

Where, by one of the persons having a right of passage, an action is brought against another of them for obstructing it, no defence is established by proof that the plaintiff has obstructed it at its termination adjoining his own land.

On Report from *Nisi Prius*, Tenney, J. presiding.

The first and second actions are writs of entry. The third is for obstructing a passage way.

The cases will be better understood by referring to the diagram.



The tenants occupy and claim the lot lying within the lines A, C, and D, Mr. Barry having a deed of the East part, and Mrs. Barry having a deed of the West part. Their title is derived from Rufus Dwinel.

Dwinel's title was by a deed from Philip Coombs, "beginning on York street adjoining land of Mrs. Greeley; thence running by York street about fifty-five feet to a way of twelve feet laid down by said Coombs forever South-westerly; thence North eighty feet; thence East about forty-eight feet to land of the aforesaid Mrs. Greeley; thence by said Greeley's land South-easterly about eighty feet to York Street to the first mentioned bounds."

The demandant claims all the land in the gore N and coming to the line B, thus including the piece marked X, which is the land in dispute. His title is under a levy on execution against said Coombs, bounding him Westerly on land of Allen Gilman; Easterly 84 feet on land owned or occupied by Mark Little; Southerly by land of Rufus Dwinel.

There was some evidence, which is sufficiently detailed in the Opinion of the Court, respecting a fence formerly at or near the line A, and respecting a stone at or near the Eastern end of that line, and also respecting some fences across the passage way.

The Opinion of the Court, Shepley, C. J., Wells, Rice, and Hathaway, J. J., was drawn up by

Shepley, C. J. — The title upon which the demandant rests for a recovery in the two first named actions, is derived from Philip Coombs, by the levy of an execution against him, in favor of Henry Warren, made on July 4, 1842.

The land was described in the return of the officer as bounded Westerly on land of Allen Gilman, Northerly on land occupied by Jonathan Young, Easterly eighty-four feet on land owned or occupied by Mark Little, and Southerly by land of Rufus Dwinel.

The testimony proves, that Little did not own or occupy land on the East more than about half the distance between

the land of Young on the North and the land of Dwinel on the South.

It is however certain, that the levy was made upon land lying between the lands owned or occupied by those persons. The line upon the East after leaving the land of Little will extend in a direct course Southerly to the land of Dwinel. The false description bounding it by the land of Little the whole distance upon the Eastern line will not affect the conveyance, for the land taken by the levy will be sufficiently described by rejecting so much of the description as is found to have been false. The land being bounded Southerly on the land of Dwinel, the East line will extend it to land owned by him although it may be necessary to extend it more than eighty-four feet in length, and although Dwinel may have occupied and fenced his lot further North than his true line. *Crosby* v. *Parker*, 4 Mass. 110.

It therefore becomes necessary to ascertain the bounds of the land, which Coombs had before conveyed to Dwinel on August 29, 1833. There is no dispute respecting the two first lines named in that conveyance.

The third line is described as extending from the end of the second line "East about forty-eight feet to land of the aforesaid Mrs. Greeley;" and the fourth line, "thence by said Greeley's land South-easterly about eighty feet to York street to the first mentioned bounds."

If the third line be extended from the Northerly end of the second line East to Greeley's land, it will strike it too far Southerly to allow the fourth line to be "about eighty feet," and will leave it but little more than sixty-four feet.

The course named in the deed for the third line and the distance named for the fourth line cannot both be correct.

The course is not always to be regarded as more satisfactory than the distance. *Davis* v. *Rainsford*, 17 Mass. 207.

When one is described with certainty and the other is not, there can be no doubt, that the one certainly described must govern in the absence of other controlling circumstances.

The course of the third line is made certain. It is East;

and if it had been described as extending Easterly without any object to control its course, it must have been considered as extending due East. *Brandt* v. *Ogden,* 1 Johns. 156. The distance named in the fourth line, being preceded by the word about, cannot be regarded as certain. It could only be regarded as extending precisely eighty feet, if there were no monuments or other objects to determine its true length. *Cutts* v. *King,* 5 Greenl. 482.

It is insisted, that there are facts proved, which should cause the distance named in the description of the fourth line to prevail over the course named for the third line. That the intention also is made apparent to convey a lot bounded upon the street fifty-five feet and extending Northerly from it eighty feet.

Such may have been the intention, but when the parties to the deed clearly and certainly described the course of the line bounding the lot upon the North, and left the length of the line bounding it upon the East uncertain, there are no sufficient indications of it to be collected from the deed and proof of the circumstances existing when it was made, to authorize such a conclusion. It is probable, that the error was not made in describing the course of the third line differently from what was really intended, but by omitting to notice, that the line of the street would not be found to coincide with one extending East from the South end of the West line of the lot.

The statement made in argument, respecting the facts referred to is, that such a lot as the tenants claim, "has been used and occupied and fenced as such, and admitted by the acts of the parties as such, from the time of Coomb's conveyance till this time."

There would be much force in the position, if it was found to be well supported by the testimony. The fence referred to, does not appear to have been erected very soon after the deed was made, or for the purpose of designating the North line of the lot. The witness, Coombs, states, that it was not erected "till two or three years after the conveyance;" and

he does not state by whom or for what purpose it was erected, a stone post was found at the Easterly end of that fence, and the witness, Dean, testifies, that "he placed it there, but not for a monument where it stands; that there was a fence from the twelve feet way to the Greeley line; he does not know its age, but from its appearance it had not been there more than seven or eight years."

The witnesses, Coombs and Eaton, testified "that a fence was standing on this land nearly identical in its position and course with the line" "which the defendants claim to be the true back line of their lots, which fence had been built some years; how long neither could tell; and that there was a stone at or near the end of that fence; but whether intended for a monument or not, they could not tell from any indications."

This testimony when considered in connection with that of Dean fails to establish the position; or to prove, that the parties owning the adjoining lands admitted, that the fence was erected to designate the North line of the lot, or that it stood upon it.

The demandant, by a correct construction of the conveyances, appears to be the owner of the triangular piece of land claimed by him; and he will be entitled to a judgment in both the real actions.

The "passage way" was established, according to the testimony, by Philip Coombs, then owner of the lands now owned by these parties. It is referred to in his deed to Dwinel as "a way of twelve feet laid down by said Coombs forever." This was sufficient to convey to the grantee, whose land was bounded upon it, the right to use it as a way. The grantor would continue to be the owner of the land subject to the servitude, and he would be also entitled to use the way. His title and rights have been conveyed to the plaintiff. There is proof, that the defendant has built a fence across the way.

The principal objection made to a maintenance of the suit is, that the plaintiff "has blocked up and cut off the passage way by a board fence across it." The testimony does not

appear to support the allegation. According to the testimony of the witness Stafford, the fence referred to was not built across the way, but on the Westerly side of it, between the land of the plaintiff purchased of Gilman, and the way. The witness also states that there is a picket fence at the Northerly end of the passage way; but it does not appear by whom it was erected or maintained. If the way had been obstructed in one place by the plaintiff, it is not perceived, that the defendant would thereby be authorized to obstruct it in another place.

A default is to be entered in each of the three actions.

Rowe & Bartlett, for the plaintiff.

C. P. Brown, for the defendants.

PRINCE *& al. versus* FULLER *& als.*

Where judgments are recovered at the same term, one in favor of A against B and sureties, and the other in favor of B against A, the Court, on motion of B, will set off the one against the other.

ON FACTS AGREED.

The plaintiffs recovered a judgment against Fuller and the other defendants as his sureties on a replevin bond; Fuller also recovered a judgment against the plaintiffs for a smaller sum, and he now moves, that his judgment be set-off, so far as it will go, upon the judgment against him and sureties.

The attorneys, who commenced the suit upon the replevin bond, and also some other suits in behalf of the plaintiffs, having claims for their fees and disbursements, resist the motion for the set-off.

The plaintiffs had assigned their suits, and Fuller's action was brought after notice of that assignment.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and HATHAWAY, J. J., was drawn up by

HATHAWAY, J. — On the 13th of Sept. 1845, plaintiffs (in-

habitants of Massachusetts,) sued Timothy Fuller in this county, the suit was defended, and Fuller recovered judgment for his costs, January, 1849. October 23, 1845, Fuller replevied some lumber from plaintiffs and recovered judgment for part of it and for his costs, and plaintiffs prevailed as to the residue and had judgment for a return and their costs, which were paid. The lumber not having been returned, this action was brought upon Fuller's replevin bond, and defaulted Oct. 7, 1851, for about $375. June 5, 1850, Fuller sued his two judgments against plaintiffs for costs and recovered judgment by default, the same Oct. 7, 1851, and moved the Court to offset the judgment recovered by him against plaintiff's judgment on his replevin bond. The case, surely, presents no good reason, why Fuller's judgment against the plaintiffs should not, to its amount, cancel their judgment for their debt, recovered against him and his sureties. R. S. ch. 114, § 74, 75; *Burnham* v. *Tucker*, 18 Maine, 179.

Plaintiff's attorney claims a lien upon the judgment for costs and disbursements in sundry other actions, stated in the report of the case. Such claim cannot be sustained.

Defendant's motion is allowed and offset ordered.

Cutting for the plaintiffs.

J. Appleton, for the defendants.

WILSON *versus* WOOD *&* *trustee.*

In this Court, when acting upon exceptions, it is too late to object to the appearance in the Court below, of the attorney who there filed the exceptions.

The decision of the Court below, upon the answers of one summoned as trustee, respecting the deposit with him, by the principal defendant, of a negotiable note, and of his liability to account for the same, is not of that class, in which an adjudication of that Court, as to matters of fact, is conclusive.

A chose in action is not trusteeable as goods, effects or credits.

Thus, one holding an indorsed promissory note, under an obligation to the principal defendant, to account for it, *when collected,* is not chargeable for it as trustee.

ON EXCEPTIONS from the *District Court,* HATHAWAY, J.

The question is upon the chargeability of the supposed trustee. By his disclosure, the following appear to have been the facts, so far as considered by the Court to be material.

Wood, being indebted to the trustee, delivered to him an indorsed negotiable note for a larger sum, and took back an obligation by which the trustee bound himself to pay to Wood the surplus when collected.

The trustee considered the transaction as an absolute purchase of the note.

The Judge ruled that the trustee was chargeable, and an attorney of the Court excepted to the ruling.

In the Court below, and also in this Court, the plaintiff objected to the right of the attorney to file the exceptions, and moved that they be dismissed.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The plaintiff insists, that the attorney, who appeared for the trustees and filed the exceptions in the District Court, had no authority to appear for him, and that the exceptions should not be entertained.

That question should have been presented and determined in that Court. Nothing is presented for decision in this Court not contained in the bill of exceptions. The exceptions appearing to have been regularly presented and allowed in that Court, and to have been regularly presented here, the trustee becomes entitled to have a decision upon them.

Another objection is, that exceptions will not be entertained, because the case was appealable. It does not appear, that the case was appealable. In his argument, the plaintiff states, that the principal was defaulted in the District Court, at May term, 1851, and the adjudication upon the disclosure appears

to have been made at October term, 1851, when the case was not appealable.

A further objection is, that exceptions will not lie to a decision of the District Court upon matters of fact, and this case is alleged to come within that rule.

The decisions referred to have reference to cases arising under the sixty-ninth section of the statute authorizing a decision, that goods are holden under a fraudulent and void conveyance, and to cases, in which testimony not contained in the disclosure has been introduced, and not to cases like the present.

It is admitted, that process was served upon the trustee on August 24, 1849. It is provided by statute, ch. 119, § 3, that no person shall be adjudged trustee " by reason of money or other thing due from him to the principal defendant, unless it is at the time of the service of the writ upon him due absolutely and without depending on any contingency."

The contingency named in the statute is one, which may prevent the principal from having any claim upon the trustee, or right to call upon him to account. *Dwinel* v. *Stone*, 30 Maine, 384.

The trustee, by his contract made on April 5, 1849, agreed to pay the principal a certain sum, when the note received of him was collected. The words " when the same is collected" do not have reference to the time only, when payment was to be made, but they embrace the fact of collection. If the note received had never been, and could not have been collected, the principal would have had no claim upon the trustee ; and he was not therefore indebted to the principal absolutely, until after the note had been collected. It was not collected for many months after service of the process upon the trustee.

Exceptions sustained and trustee discharged.

Wilson, for the plaintiff.

A. W. Paine, for the trustee.

Hutchings *versus* Van Bokkelen.

From the Act, giving the writ *de homine replegiando*, it is inferrable that one person may be entitled to the custody of another, although without a civil or criminal process.

Thus, a deserter from the army of the United States may be arrested and confined for trial by his appropriate officers, without warrant.

It is no infraction of the deserter's rights, that the county jail is used, as the place of his confinement.

Such confinement for the space of ten days is not unjustifiable, unless it appear that a court martial could have been convened for his trial within that period.

For an act, affecting another's rights, and done by a person under claim of authority as a public officer, the authority may be established by proof that such person had, on other occasions, acted as such public officer.

This mode of proof may be adopted by the party, who exercised the authority, even in a suit against him for so doing.

On Report from *Nisi Prius*, Tenney, J. presiding.

Replevin of the person.

Brief statement, *that* the plaintiff was an enlisted soldier in the army of the United States; *that* he deserted before the term of his enlistment had expired; and *that* the defendant, as a recruiting officer of the army, arrested and held him in custody.

It was in proof for the plaintiff that he was confined by order of the defendant in the county jail, ten days until taken out upon this writ.

For the defendant, witnesses testified that they had seen the plaintiff in the military service of the United States, and that he had several times recently admitted himself to be an enlisted soldier and a deserter.

The defendant introduced the following documentary evidence: —

1. A paper purporting to be an enlistment for five years by the plaintiff in 1839, certified as having been subscribed and sworn to by him before A. J. Brown, justice of the peace, it being admitted that Brown would testify to its truth; but it is denied that the plaintiff is the person who signed it. This document also contained an allegation signed by J. B. Hill,

Acting Lieutenant, as to the description of the plaintiff's person, and that he was sober, when he enlisted.

2. A copy of the defendant's commission as a brevet second lieutenant in the United States service, attested by the Adjutant General.

3. Extracts from the army roll of the United States. These extracts contained statements of the plaintiff's enlistment in 1839 for five years; of his desertion in 1840; of his joining in October, 1841, from desertion, and being put in confinement; of his wages being paid up to December 31, 1839, and of his second desertion in December, 1841.

The defendant also proved by oral testimony, that he was acting as a lieutenant in the service of the United States, at the time of the plaintiff's arrest and confinement in the county jail.

He also proved that said Hill, at the time of the enlistment, was an acting lieutenant and recruiting officer, and that his signature is genuine. All the foregoing proofs, documentary and oral, were seasonably objected to.

The case was then submitted to the Court with power to draw inferences of facts.

A. W. Paine, for plaintiff.

1. We contend, that the process will lie because the defendant, as an officer, had no right to imprison a soldier *in the county jail.* No such power is given by statute, and the assumption of it is a high handed violation of the citizen's rights. To be seized upon suspicion, and thrown into the cell with felons, without warrant, and that too by an officer unknown to our State laws, is an aggression which the law demands to be rebuked. Even the case of persons convicted of crimes, under the laws of the United States, cannot be imprisoned in our common jails, except by virtue of the statute providing for the case. U. S. Stat. March 3, 1825, § 15; Gordon's Dig. 1108.

2. We object for the reason, that here was no warrant or other process, authorizing the arrest and imprisonment. This

is the express case, provided in the Act regulating this process. R. S. chap. 142, § 1.

It is a plain infraction of the right provided for in the Constitution of Maine, Art. 1, § 5, and Constitution of U. S. Art. 5 of Amendments; 2 Kent's Com. 32 and note.

Desertion is a crime; in war a capital one, and at all times followed by most severe punishment, in addition to which is inflicted the penalty of serving out the time of his enlistment. Gordon's Dig. 1025, 1010.

Every one, charged as a deserter, must be tried on warrant before he can be imprisoned. Gordon's Dig. 1100.

The power of arresting and depriving a person of his liberty, without legal process, is averse to our system of government; and any infraction of personal liberty is watched with jealousy.

The right of courts to punish for *contempts* can only be exercised on *view* of the offence, by a judicial authority, having the power from the State, and this, too, carried into effect by a warrant from the bench.

The *fugitive from service* can only be taken upon a warrant issued upon a hearing before a competent tribunal established for the purpose.

The *fugitive from justice* is, too, protected against an unwarrantable seizure of his person.

Rioters and *unlawful assemblies* may be dispersed only by high civil officers, and arrests made only so far as necessary to quell the disturbance and held only until proper warrants may be issued. And even this power is only given in consideration of the necessity of prompt and immediate action.

Criminals may be arrested by *officers* on strong suspicion, but can only be detained until a warrant may be issued by competent authority.

If asked what course should the defendant pursue? I answer, if there is no course under the "fugitive from service" or "fugitive from justice" Acts, or some other, then it is a *casus omissus;* one not provided for, and the military man, who seeks to seize upon a supposed deserter, is in the same con-

dition that the slaveholder was before the Act was passed for his relief, when he found his human chattels in a free State, or in the condition that the loser by theft was, when the thief was escaped into another State or country, before the Acts and treaties were in force for the reclamation of such fugitives. That the law does not allow the exercise of a power, is a poor excuse for exercising it.

3. If any right to arrest ever existed, the imprisonment was too long protracted.

4. No legal proof of defendant's being qualified for any command or to exercise any power as an officer. He must be sworn. Of this there can be no doubt. The copy of his commission is certainly inadmissible, and no proof of the oath is pretended. The only question which arises is, whether he could be proved a duly qualified officer by evidence of his acting as such.

Where questions arise collaterally in a case, involving the due exercise of an official authority, proof of such officer acting in the capacity claimed, with a general recognition of his acts, is evidence admissible to prove such office. But there must be such an acting as implies or presupposes a public assent to, or recognition of the capacity in which he acts, and the proof can only be offered when the question arises collaterally either to the party or to the cause. When, however, the right to exercise the office is the precise question at issue, the party justifying, as such officer, must prove his right. *Cottrill* v. *Myrick*, 3 Fairf. 234; *Fowler* v. *Bebee*, 9 Mass. 235.

This doctrine is recognized throughout the cases, as in *Doty* v. *Gorham*, 5 Pick. 489; *Nason* v. *Dillingham*, 15 Mass. 171; *Bucknam* v. *Ruggles*, 15 Mass. 182.

The rule admitting such testimony of holding office is *only* applicable where the *general convenience* requires. Where the question arises collaterally, it is not expected that third parties have the power to prove the authority. 1 Greenl. on Ev. sect. 83.

But the reason does not apply, where the party justifying is

on trial himself. Especially when his whole defence is based upon the legality of his office.

An important distinction, which serves to explain some apparent discrepancies in the application of the rule, exists between those officers connected with the Court, and those who may be said to act *in pais*. 3 Phil. on Ev., Hill's notes, 239.

In the latter case, proof of the office is required, whereas the Court, in the former, will take judicial knowledge of the fact of office.

5. No proof of plaintiff's identity with the person named in the enlistment. The enlistment is not proved. The paper offered in evidence on that point was inadmissible.

6. Plaintiff had a right to leave the service under the facts shown. *By stat. of U. S. March* 16, 1802, *sect.* 13, *vol.* 2, *page* 135, *enacted — The corps shall be paid in such manner that the arrears shall at no time exceed two months.* Gordon's Dig. No. 3473.

Same vol. page 362, Art. 20, proof of payment is a prerequisite before the party can be convicted of desertion and punished. Gordon's Dig. 3513. By the evidence introduced, it appears that he did not desert until July 4, 1840, and he had received pay only to Dec. 31, 1839. The enlistment is a contract, and its validity is no less strong against the United States than against an individual.

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

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, and HATHAWAY, J. J., was drawn up by

WELLS, J. — The writ *de homine replegiando* lies in favor of a person unlawfully imprisoned. *Richardson* v. *Richardson*, 32 Maine, 560. The question presented is whether the plaintiff was unlawfully imprisoned.

The original writing signed and sworn to by the plaintiff, together with his confessions, show very clearly his enlistment in the army of the United States as a soldier. It also appears from his confessions and from the records of the war department, that he was a deserter. He was arrested by

the defendant, who caused him to be confined in the jail at Bangor. The first section of the Act authorizing this writ must be construed in reference to the whole Act, by which it appears, that one may be entitled to the custody of another, although that custody may not be derived from a civil or criminal process.

The provisions of the constitution of this State and of the United States, cited in argument, do not forbid the arrest of deserters from the army without warrants, nor were they intended to prevent the enactment of suitable and proper laws for its government.

By the Act of Congress of April 10, 1806, prescribing the rules and articles by which the armies of the United States shall be governed, it is provided, "Art. 78, non-commissioned officers and soldiers, charged with crimes, shall be confined, until tried by a court martial, or released by proper authority."

No warrant is required for their arrest, nor is the manner of confinement specified. The plaintiff having deserted was subject to confinement until he should be tried, and it was the duty of the defendant to cause him to be safely kept. There was no violation of law in confining him in the county jail. The jailor was under no obligations to receive him, but his consent to do so, furnishes no just ground of objection on the part of the plaintiff. Nor is it apparent that the place of confinement was improper, nor that the defendant departed from the line of his duty. There was probably no other convenient mode by which he could securely keep the plaintiff.

It is contended, that the imprisonment was too long. The Act before mentioned provides, "Art. 79, no officer or soldier, who shall be put in arrest, shall continue in confinement more than eight days, or until such time as a court martial can be assembled." The plaintiff was confined ten days before he was liberated by the present process, but it does not appear, that a court martial could be assembled within that period, and consequently the confinement did not exceed the bounds authorized by the law.

It is further contended, that there was no legal evidence of the authority of the defendant to make the arrest. His commission was not produced, but a copy of it from the records of the department of war was offered.

It is not necessary in the present case to decide whether such copy is admissible, for it was proved, that the defendant was an acting lieutenant in the service of the United States at the time he made the arrest. His authority could not be presumed from the mere act of arresting, but the testimony is understood as embracing other acts performed in that capacity.

When one has acted in the discharge of the duties of a public office, under color of a legal appointment, although his commission or appointment is not produced, his acts have been held valid between third persons. *Fowler* v. *Bebee & al.* 9 Mass. 231; *King* v. *Gordon,* 2 Leach's Crown Cases, 581; 3 Cruise's Dig. 159; *Doty* v. *Gorham,* 5 Pick. 487; *Bucknam* v. *Ruggles,* 15 Mass. 180; *Cottrill* v. *Myrick,* 3 Fairf. 222. And there are authorities, which decide, that generally where such officer is a party to the record and justifies under his authority, his official acts are *prima facie* evidence of it. *Potter* v. *Luther,* 3 Johns. 431; *Wilcox* v. *Smith,* 5 Wend. 231; *State* v. *Wilson,* 7 N. H. 543; 1 Greenl. Ev. sect. 83 and 92. It is not perceived, that any evil can arise from the adoption of this rule, for where there is cause to doubt his authority, when he is the party to the record, those who question it will be at liberty to show, that there is no legal ground for its exercise. The question presented in this case was not raised in *Cottrill* v. *Myrick,* and the order of proof, if the town clerks had been parties, was not investigated.

The evidence introduced must be deemed sufficient to show, that the defendant was a lieutenant *de facto,* and that he was duly qualified by taking the oath required by law. Such appointment and qualification may be presumed from the acts done, and this presumption will remain until it is removed by other evidence.

The objection, that the plaintiff had a right to desert because he had not received all the wages due to him, cannot prevail. The Act of Congress, before mentioned, provides by Art. 20, that "all officers and soldiers, who have received pay, or have been duly enlisted, in the service of the United States, and shall be convicted of having deserted the same, shall suffer death, or such other punishment as by sentence of a court martial shall be inflicted." This Act was so far modified by that of May 29, 1830, as to abolish the punishment of death for desertion in time of peace. The plaintiff having enlisted and deserted was properly arrested for the purpose of being tried; whether he should have been convicted, it is not our province, but that of a court martial, having jurisdiction of the offence, to decide. By becoming a soldier, he has subjected himself to the laws applicable to that condition, and he must submit to the mode of administration, which they have provided.

According to the agreement of the parties, the plaintiff must become nonsuit, and the defendant have judgment for a redelivery of the body of the plaintiff, to be disposed of agreeably to law.

BLETHEN *versus* DWINEL.

In the absence of controlling proof, the legal presumption is, that by a deed of conveyance duly executed and recorded, the title passes, and that the grantor had sufficient seizin to enable him to convey, and that the seizin and the title correspond with each other.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

WRIT OF ENTRY.

The demandant introduced, subject to objection, the office copy of a deed of the land from David Webster to James Webster, executed and acknowledged in 1809; also a deed to himself from Andrew H. White, of Liverpool in Nova Scotia, and Susan his wife, in her right, executed in 1851. Susan was the sole heir of said James Webster, who was a

citizen of this State. She was born in Nova Scotia in 1822. She was in Maine with her father in 1823, when he died, and within two months afterwards she returned to Nova Scotia, where she has ever since resided, and where she was married to said Andrew in 1846.

The tenant moved for a nonsuit, which was ordered for the purpose of advancing the case. The demandant excepted.

Cutting and *Fessenden*, for the demandant.

Rowe & Bartlett, for the tenant.

In order to recover, demandant is required, by R. S. chap. 145, § 11, to prove that he is entitled to an estate in fee in the premises, and had a right of entry into the same on the day when the action was commenced. He fails to show both.

All title rests upon occupancy. Defendant has the title which springs from present possession. To recover, plaintiff must show a prior possession in himself, or in some one from whom he derives title. The right of entry must be derived from some one who has been seized of the premises. Plaintiff offers no evidence to show seizin and possession either in himself, or in any one from whom he claims title.

Deeds acknowledged and recorded operate as livery of seizin only when the grantor had good right and lawful authority to convey. JUDGE TROWBRIDGE, 3 Mass. 574-5; *Bates* v. *Norcross*, 14 Pick. 224, 231; *Goodwin* v. *Hubbard*, 15 Mass. 213-4; *Marston* v. *Hobbs*, 2 Mass. 439.

At common law, on the trial of *nul-disseizin*, plaintiff was bound to prove the seizin on which his action was founded, to make out a *prima facie* case. Jackson on Real Actions, 4, 137.

The statute simply substitutes proof of a right of entry for proof of actual seizin.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

HATHAWAY, J. — A writ of entry on the demandant's own seizin and disseizin by the tenant, on the general issue pleaded

and brief statement of title by possession, and claim for betterments.

The demandant read in evidence a quitclaim deed to himself, of the demanded premises, from Andrew H. White and Susan S. his wife, who was daughter and sole heir at law of James Webster, which deed of quitclaim was duly executed and recorded.

Also subject to objection, an office copy of a deed of same premises from Daniel Webster to James Webster, duly executed and recorded in March, 1809. Upon this evidence a nonsuit was ordered.

The office copy of the deed from Daniel to James Webster was admissible under the 34th rule of this Court.

A deed of conveyance acknowledged and recorded is equivalent to feoffment with livery of seizin. The legal presumption is, that seizin follows the title and that they correspond with each other.

In the absence of other evidence, the deed, itself, raises a presumption that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee.

The deeds introduced by the demandant, *prima facie*, established his title. *Ward* v. *Fuller*, 15 Pick. 185; *Thompson* v. *Watson*, 14 Maine, 316. *Exceptions sustained.*

SARGENT *versus* ROBERTS.

A right of entry is made by statute a sufficient seizin upon which to maintain a writ of entry.

An unsealed agreement by a doweress, (after having recovered judgment for her dower,) made with the warrantor of the judgment-tenant, that she would receive a specified sum yearly during life, in lieu of dower will not, after a neglect of payment, bar her right to ~~receive~~ possession by writ of entry.

Such an agreement is not to be viewed as a lease of the land, nor as a release of dower.

It creates no privity of estate betwixt her and the warrantee.

It reserves to her the right of rescinding when the payments fail.

Unless there be such a rescission, her right to recover mesne profits in a writ of entry does not arise.

On Facts agreed.

Writ of Entry, claiming *mesne profits.*

In 1839, the demandant recovered judgment for dower against the tenant, who had purchased the whole lot by warranty deed from William Bruce. The judgment was founded upon an award of referees, under a rule of Court.

In 1840, after the judgment, the demandant and Bruce entered into an unsealed contract, by which Bruce agreed to pay her, in lieu of dower, $25 a year during her life; and she agreed to accept of that sum annually in full of her claim for dower. Bruce died insolvent about the year 1841. Since his insolvency was declared, nothing has been paid to the demandant upon the contract.

A. W. Paine, for the demandant.

Peters, for the tenant.

We submit that the demandant's remedy, if any, is by *scire facias*, and not by writ of entry. R. S. chap. 115, sect. 106; *Kennebec Purchase* v. *Davis*, 1 Greenl. 309. We respectfully call attention to the irregularities, in the former suit, submission and judgment.

Claiming by deed from Bruce, we were rightfully in possession under the demandant's contract with him, and this suit cannot be maintained, except on proof of a notice to quit; or of an entry and demand of possession, or until we had done some act of hostility toward the proprietor. Her contract was a license that we, under Bruce, should be undisturbed. Its intent and import were that she would rely on Bruce's agreement to pay, and would allow Roberts to remain in possession without payment of rent.

By simply remaining in possession, Roberts was not a disseizor or a wrongdoer. Yet this writ of entry charges him as a disseizor. He was but a tenant at will, without liability to pay rent, till notice.

So if he was but a tenant at sufferance, notice must be

given or an entry made before suit. 2 Black. Com. 150; 4 Kent's Com. 117.

Or, if the contract with Bruce was but a letting from year to year, the tenant was entitled to notice to quit. R. S. chap. 95, sect. 19; 21 Maine, 114; 24 Maine, 242.

The holding over, after failure of Bruce to pay rent, was a tenancy at will. R. S. chap. 91, § 30; *Mosher* v. *Reding*, 3 Fairf. 478; 2 S. & R. 49; 10 Johns. 335; 3 Johns. 332; 1 B. & C. 448; Comyn, 291; 13 East, 210. We suggest too that the contract with Bruce was an accord and satisfaction; or that it was a lease for her lifetime, giving to her the right to sue for rent, and to us the right to hold possession. The suit perhaps would lie against Roberts by privity of estate, unless he disaffirmed.

The counsel also argued to show that, if the action be sustainable, the demandant has no right to recover for *mesne profits*.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The title of the demandant rests upon a judgment rendered in an action of dower between these parties. Whether perfectly formal or not, that judgment will be operative until reversed.

An actual possession of her dower at any time is not required to enable the demandant to maintain her action. Proof of title and of a right of entry are made sufficient proof of seizin by the provisions of statute chap. 145, sect. 6.

The contract made between the demandant and William Bruce cannot, under the circumstances proved, operate as a bar to the action. It does not appear to have been the intention of the parties to it to have a conveyance of the dower made. If such had been their intention, it could not have been carried into effect by their contract without a seal.

Nor does their contract appear to have been intended to operate as a lease of the premises. Neither party expected that Bruce was to occupy them either personally or by the

tenant as his assignee; or that the relation of landlord and tenant should exist between them. No claim respecting repairs, taxes, or good husbandry, could be made by either of these persons upon another. No notice to quit was therefore required.

The sum agreed was to be paid "in lieu of dower," and it was to be accepted "in full of her claim for dower." The instrument amounts to an agreement on her part to forbear during life further to enforce her right to dower, upon condition, that Bruce would pay to her annually twenty-five dollars. The failure to perform that condition left her at liberty to avoid it.

The *tenant* did not become responsible, that Bruce should make the annual payments, and the demandant might not be able to recover them of him in any form of action. It is not perceived, that there has been any privity of contract or of estate between them. The demandant cannot insist, that the tenant was an unlawful occupant, while he occupied by virtue of her contract with Bruce, that he should not be disturbed. That agreement must be considered as subsisting, until the demandant, in some form, made known her election to avoid it on account of the neglect of the other party to perform. No other evidence of such election is presented than the commencement of the suit. The demandant will not be entitled to recover for *mesne profits* before that time.

If her *title* to the estate had been dependent upon her election to take advantage of a neglect to perform the condition, the action could not have been maintained without proof of an entry for breach of condition before its commencement; but her *right of occupation* only was dependent upon it.

Defendant defaulted.

THAYER *& al. versus* MAYO *& als.*

A levy of land on execution, "reserving and excepting such incumbrances and conveyances as have been made prior to the levy," is too indefinite and uncertain, to be sustained.

A levy of land, appraised at an amount, greater by fifty-two cents, than the sum to be collected on the execution, is void.

ON FACTS AGREED.

DEBT on judgment. The defence was, that an execution, issued on the judgment, had been satisfied by a levy of real estate. On the other hand, it was contended that the supposed levy was defective and void.

The appraisers' return, so far as material to this point, was as follows: —

"Having viewed the following lands and tenements, to wit, one undivided twenty-first part of that parcel of land, situate in Frankfort in the county of Waldo, known as the Frankfort Granite Quarry, conveyed by, &c.; intending to set off one undivided twenty-first part of the whole of said land, from said Mayo's interest in the whole, including one twenty-first part of all the buildings and fixtures thereon and privileges and appurtenances, reserving and excepting such incumbrances and conveyances as may have been made prior to the levy. Also, one undivided twenty-first part of land conveyed by Oliver Parker and the heirs of the late Joshua Treat to said Ellis and Mayo, from said Mayo's part thereof, together with one twenty-first part of the buildings, fixtures, privileges and appurtenances belonging to the same, being shown to us by Edward R. Southard, one of the creditors, as the property of the within named John M. Mayo, one of the debtors, and we have appraised said lands and tenements at the sum of nine hundred and thirty-one dollars and fifty-five cents, the amount of this execution with all fees and charges."

The officer's return was appended to the appraisers' certificate, and stated that "the appraisers viewed the above described lands and tenements, which were shown to them and me by the said Edward R. Southard, as the estate of the within

named John M. Mayo, and I have extended this execution on the said described lands and tenements by said appraisers appraised at the sum of nine hundred and thirty-one dollars and fifty-five cents, which is the amount of this execution and all fees and charges; and I have delivered seizin and possession of the same with the appurtenances to the said creditors, to have and to hold the same to him *and said Thayer, the other creditor,* and his heirs and assigns forever in satisfaction of this execution, all which appears, and so I return this execution satisfied."

The fees and charges of levy were affixed, amounting to $23,09. On the day of the levy, one of the plaintiffs certified, under the officer's return, that the officer had delivered to him seizin and possession, &c. The judgment and execution are referred to.

M. L. Appleton, for the plaintiff.

The judgment has never been satisfied. The supposed levy was void. It conveyed no title, no rights to the plaintiffs.

1. The appraisal does not set out the interest or share which Mayo had in the estate; nor does it describe the estate by metes and bounds or by any other such mode, that it can be known and identified.

The land levied is insufficiently described. It purports to be one twenty-first part of the lot, "from said Mayo's interest in the whole;" excepting and reserving such incumbrances and conveyances as may have been made prior to the levy. What those incumbrances and conveyances were, the appraisers did not know, nor pretend to know. *Bussey* v. *Grant*, 20 Maine, 281.

2. There is another fatal defect in the levy. The case refers to the judgment and execution. And the officer's return shows the expenses of the levy. On computation it appears that too much land was taken; more than enough to satisfy the execution, interest and expenses. *Dwinel* v. *Soper*, 32 Maine, 119; *Pickett* v. *Breckenridge*, 22 Pick. 297.

Kelley, for the defendants.

It has been urged, that the levy does not set out Mayo's interest in the land. I think otherwise. It sets forth that he owns one half, and sets off one twenty-first part of the whole, to be taken from his half.

Again, the plaintiff objects, that the levy contained a reservation of such incumbrances as may have existed upon the estate. But there was nothing for the reservation to operate upon. For it does not appear, that any conveyance or incumbrance had ever been made by Mayo.

Further, the levy was objected to, because too much land was set off. If it were so, the levy would not be *ipso facto* void. It would be but voidable, and *Mayo,* not the plaintiffs, is the party who has the election to avoid it. He affirms the levy; and I now offer, in his name, to file for the use of the plaintiff a release of the land, with a bond to any amount to protect the title.

But there is no legal evidence that too much land was taken. The officer asserts that the land was set off at $931,55, and that that was the amount, including expenses, to be collected on the execution. True there are some minutes at the foot of the return, in form of a schedule of charges. But it was not the officer's duty to furnish them nor does the levy refer to them. They cannot be allowed to contradict the full and express certificate of the officer, as to the amount due.

But if too much, the excess is only fifty-two cents, quite too small a trifle to defeat such a levy.

By the papers, it appears that the judgment was rendered upon the fourth day of July. But it was forbidden by statute that any Court should be held on that day. The judgment was therefore void.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

RICE, J. — This is an action of debt on judgment. The question presented for consideration, is whether that judgment has been satisfied by a levy, made Dec. 9, 1848.

Against the validity of that levy two objections are urged: *First*, that the description is uncertain and defective. *Second*, that the land taken exceeded in value the amount of the execution and fees. The land levied upon was held in common by the debtor with others. In such cases the statute, chap 94, § 11, provides, that the whole estate must be described by the appraisers and the debtor's share or part thereof, so held, be so stated by them; and the whole or such part of the debtor's interest as may be necessary to satisfy the execution may be taken.

This provision requires, that the estate levied upon shall be so distinctly described that the parties may know, with certainty, what rights pass to the creditor. In this case the levy was made upon one twenty-first part of certain property described in the appraisers' certificate, "*reserving and excepting such incumbrances and conveyances as may have been made prior to the levy.*"

No reference is made to any particular conveyance or incumbrance. For aught that appears, the debtor's whole interest may have been conveyed before the levy, or it may have been incumbered to the full extent of its value. The rights acquired by the levy, if any, are therefore in the highest degree indefinite and uncertain. Such a levy cannot be sustained.

The amount of property taken by the levy exceeds the amount of the execution and fees by the sum of fifty-two cents. This excess, the defendant contends, is so inconsiderable as to fall within the maxim *de minimis non curat lex.* Though it has not been decided what precise sum shall constitute the line of separation between cases falling within the application of that rule, from those which do not, it has been adjudged, that forty-one cents is too large a sum to be deemed trivial by the law. *Boyden* v. *Moore*, 5 Mon. 365. That case has been cited with approbation by this Court in *Huse* v. *Merriam*, 2 Greenl. 375, and *Soper* v. *Veazie*, 32 Maine, 119, and is deemed decisive of the case at bar. The statute referred to by counsel for defendant,

forbidding the holding of Courts on the fourth of July, was approved Aug. 10, 1849, more than a year after judgment in the original action was rendered. The defendant according to agreement must be defaulted.

Hill, *Administratrix, versus* Fisher.

There are cases in which *the time* agreed upon for the payment of money, is not of the *essence* of the contract.

Rights, claimed under this principle, can be enforced only by process in equity.

Thus, for a party who claims under a tender, made after the agreed pay-day, and relies upon circumstances to justify the delay, *a suit at law* is not an available remedy, although the time of payment was not of the essence of the contract.

On Report from *Nisi Prius.*

The opinion of the Court, Shepley, C. J., Wells, Rice, Hathaway and Appleton, J. J., was drawn up by

Hathaway, J. — Debt upon a sealed instrument, dated April 14, 1849, by which the defendant agreed to convey to Abraham Hill (plaintiff's intestate) a parcel of land upon condition that said Hill should pay the defendant therefor $455, as follows, *to wit*, $200, on the 15th June next, $127,50 in one year and $127,50 in two years from date and interest annually, for which sums said Hill gave the defendant his three several notes of hand of same date, which were to be paid according to the terms and meaning of said notes.

The first note was paid at maturity. Abraham Hill deceased April 16, 1850, and his estate was represented insolvent.

The remaining two notes were not paid, and on the 14th Aug. 1851, the plaintiff tendered to the defendant the money and interest due thereon, according to their tenor, together with one year's taxes in arrear and interest thereon, and de-

manded a deed, which the defendant refused to give, whereupon this action was commenced.

By the terms of the agreement the defendant was bound to give a deed upon a condition precedent to be performed by Abraham Hill, *to wit,* the payment of the notes for the purchase money in a stipulated time.

The case finds, that the last two notes were overdue at the time of the tender, one of them for about four and the other about sixteen months.

But the plaintiff's counsel contended, that time was not of the essence of the contract, and argued forcibly in support of her claim.

There are cases in which time is not of the essence of the contract, and in such cases, the party aggrieved may obtain redress by process in equity. *Getchell* v. *Jewett,* 4 Maine, 350; *Rogers* v. *Saunders,* 16 Maine, 92. But in an action at law, when the question is whether a party has performed his part of a contract, which requires performance within a certain time, the Courts cannot say that that is immaterial, which the parties by their contract have made material. *Hill* v. *School Dis. No.* 2, *in Milburn,* 17 Maine, 316; *Allen* v. *Inhabitants of Cooper,* 22 Maine, 133.

Whatever may be the liabilities of the defendants, by proper proceedings in chancery against him, upon the facts agreed, this action at law cannot be sustained, and according to the agreement of the parties a nonsuit must be entered.

Blake, for the plaintiff.

A. Sanborn, for the defendant.

ROBINSON *& ux. versus* ARMSTRONG.

Trover is a transitory action.

It lies for a conversion of property, committed within the bounds of a foreign jurisdiction.

ON FACTS AGREED. If the action is sustainable a default is to be entered.

The plaintiffs declare "*in a plea of the case.*" The declaration then proceeds in the usual form of a count in trover, averring the conversion of a mare, the property of the plaintiffs.

The mare, which was worth $65, was converted by the defendant to his own use, in Canada, where he had purchased her of some person having no right to make the sale, though such want of right was unknown to the defendant.

A. W. Paine, for the plaintiffs.

D. D. Stewart, for the defendant.

1. The action being "*in a plea of the case*," and not "*of trespass on the case*," cannot be treated as a suit in trover or in trespass, and is therefore unsustainable. R. S. ch. 115, sec. 13; 1 Cush. 536.

2. At the common law, *case* could not be maintained upon these facts. As such action could not be maintained in the British Provinces, where the conversion of the property took place, the plaintiffs can have no greater or higher rights *here*, as to the form of action, than would be found there.

3. The purchase by the defendant was made in Lower Canada. By the laws of that Province, no action, in any form, could *there* be maintained against the defendant, upon these facts; and, therefore, he is not liable *here*.

4. The conversion of the property was a tort, committed in the Province, and the defendant was a subject of that Province. A tort is so far local, that no action can be maintained for it beyond the sovereignty where it was committed.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

RICE, J. — This is trover for the conversion of a mare,

the property of the plaintiff. The facts agreed show, that the conversion was in Canada. Both parties are residents of this State as appears from the writ.

Trover is a transitory action, and the venue may be laid in any county. Woodfall's L. & T. 703; 15 Petersdorff's Ab. 136, n.; Bac. Ab. Title Action, Local & Trans. a.; Com. Dig. Trover, art. 7.

In all actions for injuries *ex delicto* to the person, or to personal property, the venue is in general transitory, and may be laid in any county, though committed out of the jurisdiction of our Courts, or out of the King's dominions. 1 Chit. Pl. 273.

Trover will lie in England for conversion in Ireland. *Brown* v. *Hedges*, 1 Salk. 290; Steph. N. P. 2696. Or in another State. *Mather* v. *Trinity Church*, 3 S. & R. 509.

A default is to be entered for damages and cost as per agreement of parties.

MORRISON *& al. versus* JEWELL *& al.*

To a note, given for land conveyed by a warranty deed, it is no defence, either in whole or in part, that the title to the land has *partially* failed.

But, after the death of the payee and insolvency of his estate, the maker of the note, in a suit against him by the administrator, is entitled, *under the insolvency laws*, to set-off the breach of covenant against the note.

To this set-off he is entitled, although his claim may not have been filed before the commissioners of insolvency.

An indorsee, who purchases the note with knowledge of the partial failure of its consideration, takes it subject to the same right of set-off.

ON FACTS AGREED.

ASSUMPSIT by the indorsees against the makers of a promissory note.

By agreement of parties, the case was to be nonsuited, defaulted or to stand for trial, as the Court should determine.

The opinion of the Court, SHEPLEY, C. J., WELLS, HOWARD, RICE and APPLETON, J. J., was drawn up by

Shepley, C. J. — The suit is upon a promissory note made on October 26, 1846, by the defendants, payable to Wadsworth Bolter or order, in part payment for land at that time conveyed, or attempted to be conveyed, by Bolter to them. There is in the deed of conveyance a recital, that the principal tract of the land had before been conveyed to Wadsworth Bolter and Amos Bolter, and that Wadsworth was to procure from Amos a conveyance of his interest, and that the title thus procured should enure to the defendants.

Such a deed does not appear to have been obtained; and it is agreed, that the defendants have not acquired any title to one undivided half of that tract of land.

A partial failure alone of title to land conveyed, constitutes in this State no defence to a note given in payment for it.

This case presents other and additional elements, that must be regarded in coming to a decision upon the rights of the parties.

The payee of the note died during the year 1848; and an administrator on his estate was appointed, who represented it to be insolvent; and it is admitted, that it was deeply insolvent. This note came to the hands of the administrator as part of the assets of that insolvent estate. It was sold at auction by him after notice publicly communicated, that the defendants refused to pay it on account of the facts now exhibited. The plaintiffs purchased it with the same information. They are therefore in a situation no more favorable for a recovery, than the administrator would have been.

In a suit by the administrator of that insolvent estate, the defendants would have been entitled to present their claim for damages for breaches of the covenants contained in their deed of conveyance; and to have any amount justly due to them set off against the amount due upon their note, although they had neglected to file their claim before the commissioners of insolvency. *Knapp* v. *Lee*, 3 Pick. 452.

No set-off of such claims could have been allowed, if both parties had been alive.

When one has deceased and his estate has been represented

to be insolvent, all existing claims are to be set off and a final balance is to be ascertained. *Medomak Bank* v. *Curtis*, 24 Maine, 36.

The defendants have now the like rights in a suit upon the note by those, who have purchased it with a full knowledge of the facts.

According to the agreement of the parties the case is to stand for trial.

Morrison, for the plaintiffs.

Tallman and *Bowker*, for the defendants.

ELDRIDGE *versus* PREBLE.

A brief statement by the tenant in a real action, alleging non-tenure, and pleaded in connection with the general issue, imparts no advantage, unless it be filed within the time allowed for pleas in abatement.

Judgments of Courts, having competent jurisdiction, are presumed in law to have been rendered upon the appropriate preliminary proceedings.

By the common law, the husband had a life estate in land owned by his wife.

Under the Act of 1844, "to secure to married women their rights of property," that life estate was divested from the husband, in behalf of the wife, only upon condition that she proved the title not to have come to her from the husband after coverture.

The amendatory Act of 1847, and the additional Act of 1848, to secure the property rights of married women, were prospective only in their operation.

The levy of an execution against the husband, upon his life estate in the land of his wife, was not defeated by the Act of 1844, unless the wife prove that "the title did not, in any way, come to her from the husband during coverture."

The introduction of her title deed, from a third person, is not of itself sufficient proof that the land did not come to her, in some way, from the husband during coverture.

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

WRIT OF ENTRY brought in 1850. The demandant read a deed of the land from the State to herself, made in 1845. At the date of the deed she was the wife of Leonard Eldridge, and has so continued to the present time.

At the time of the trial, the tenant filed a plea of general issue, with brief statement that he holds merely as tenant to William A. Preble.

The demandant objected to the plea, on the ground that it was in the nature of a plea in abatement, and should have been filed at an earlier stage of the case, as prescribed for such pleas by the Rules of the Court.

The tenant deduced title in himself, under a levy of the land, as the property of Leonard Eldridge, made in 1846, in virtue of a judgment recovered by the assignee in bankruptcy of one Nickerson. The records pertaining to the levy were objected to, for the alleged reasons, "that there was no evidence that the proceedings in the bankruptcy court were regular;" and also because Leonard Eldridge had no leviable interest in the land.

A nonsuit or default is to be entered according to the rights of the parties.

J. H. Hilliard, for the demandant.

1. By the statute of 1844, chap. 117, § 1, the demandant was authorized to purchase and hold the property for her own and separate use. The proviso to that enactment, requiring her to show that the estate did not come from her husband, was repealed by the Act of 1847, chap. 27, § 1. The case is, therefore, relieved from that proviso, and the deed is sufficient evidence of a title in the demandant, indefeasible by any act of her husband or of his creditors. To this extent, these statutes, in connection with that of 1848, chap. 73, § 1, have modified the principles of the common law. By the Act of 1848, "any married woman, who is seized and possessed of property, real or personal, may commence and prosecute any action at law or equity in her own name."

2. The general issue was pleaded with brief statement. The general issue claims the freehold. Stearns on Real Actions, chap. 4, § 16; 10 N. H. 305; 8 N. H. 477. But the facts, alleged in the brief statement, amount to a special non-tenure. Non-tenure cannot be pleaded in this form. But,

if it can, it was not filed at the required term. Rule of Court, No. 18. Another objection to the plea is, that it relies upon certain alleged facts, and yet is not verified by affidavit. *Fogg* v. *Fogg*, 31 Maine, 302; Rule of Court, No. 18.

If the facts set forth in the brief statement had been seasonably pleaded, we might have disproved them.

In short, the whole pleadings can be viewed only as the general issue. The demandant, therefore, is entitled to recover, unless the tenant exhibit a better title. But he makes no title except under the levy of an execution against the husband. The proof of that levy was inadmissible. The husband had no interest in the land. The title was in the demandant from the beginning, and there was no evidence that any part of the consideration for the land moved from the husband.

But suppose a life interest did pass by the levy, it was afterwards conveyed to W. A. Preble, and remained in him at the time of the suit. The tenant's attempt to connect himself with W. A. Preble fails, because, 1st, the supposed tenancy was not pleaded in abatement, and 2d, he is precluded by the general issue, from proving such tenancy. Special non-tenure cannot be proved under the general issue. *Mechanic's Bank* v. *Williams*, 17 Pick. 438; *Alden* v. *Murdock*, 13 Mass. 256; Stearns on Real Actions, chap. 4, § 22.

G. P. Sewall, for the defendant.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

HATHAWAY, J. — The demandant, a married woman, claims the demanded premises under a deed from the State of Maine, dated August 26, 1845.

At the time of the trial she was, and had been for fifteen years, the wife of Leonard Eldridge. The defendant claims title to the same premises by virtue of the levy of an execution thereon, March 7, 1846, as the property of said Leonard Eldridge, which execution was issued on a judgment recovered against said Leonard & al. in favor of Albert Merrill,

assignee of J. O. Nickerson, a bankrupt, upon a note dated Aug. 11, 1841, payable on demand and interest, and the defendant derives title from said Merrill by mesne conveyances to William A. Preble, whose tenant he was as alleged in his brief statement. The defendant can derive no benefit from his brief statement as a plea of non-tenure of the freehold, if it were intended as such, for that is matter in abatement only, statute of 1846, chap. 221, and the plea was not filed in season. The plaintiff objected to the admission of the judgment, execution and levy, because there was no evidence of the regularity of the proceedings in bankruptcy, &c.

The presumption is, that all judgments rendered by Courts of competent jurisdiction are properly rendered and upon due preliminary proceedings, and there being no evidence in the case to the contrary, the documents objected to, were properly admitted as muniments of title.

At common law the husband has a life estate in lands, of which his wife owns the fee. The usufruct is his, and is an estate in the land, which may be taken in execution for his debts. Whatever interest, therefore, the husband had in the land, passed by the levy to Merrill.

But the demandant claims that by statute of 1844, chap. 117, entitled "an Act to secure to married women their rights of property" as amended by statute of 1847, chap. 27, the wife's lands are exempted from liability for the husband's debts; and that therefore nothing passed by Merrill's levy.

The levy of the execution was made March 7, 1846, so that if Merrill acquired any title by it, that title became perfect before the amendatory Act of 1847, and the rights of the parties remain as at common law unless changed by the Act of 1844. The Act of 1847 could not impair those rights.

By the statute of 1844, sec. 1, "any married woman may become seized or possessed of any property, &c. in her own name and as of her own property; provided it shall be made to appear by such married woman, in any issue touching the validity of her title, that the same does not, in any way, come

from the husband after coverture." The demandant cannot avail herself of the benefit of the statute, without a compliance with the requirement of the proviso, and the burden of proof is upon her. *Viles* v. *Jenkins*, 32 Maine, 32.

Whether she has complied with the requirements of the proviso or not, is a question of fact.

By a Resolve of the Legislature, Feb. 22, 1844, the Land Agent was authorized "to sell the State lands in Greenbush for cash, or labor to be appropriated on the river road in Greenbush," and the demandant's deed purports to have been made in pursuance of that Resolve "for the consideration of one hundred dollars, paid for the use of the State by Lucretia H. Eldridge in labor on the river road in Greenbush."

The demandant presented no evidence of her compliance with the requirement of the proviso in the statute, but the deed, and her counsel contend that the deed was *prima facie* sufficient.

We are of opinion that the demandant's deed alone is not sufficient to authorize the Court to decide that her property in the land did "not, in any way, come from the husband after coverture." But if it were so, yet the common law regulating the rights and duties of husband and wife must be regarded as operative so far as it has not been changed by the statute. And in *Swift* v. *Luce*, 27 Maine, 285, it was held that the statute of 1844, ch. 117, "does not determine whether the husband, should he survive the wife, shall be entitled to any right in her personal property or real estate during his life."

A nonsuit must be entered as agreed by the parties.

SOUTTER *& al. versus* ATWOOD *& al.*

Of land held by tenants in common, a conveyance, by one of them, of a part *by metes and bounds* is inoperative, as against the others.

Thus, two persons owned a tract of land as tenants in common. One of them conveyed his undivided half to M, taking back a mortgage of it, to secure the purchase money. The other conveyed his undivided half to G.

These grantees, M, and G, divided the land, to M the North half, and to G the South half; and they made division deeds accordingly. G then conveyed the South half by metes and bounds. That half, under that conveyance, became vested in the plaintiff, who afterwards took from G a deed of the undivided half of the whole tract.

The defendants hold under the mortgage, which was given by M, and which was foreclosed. Their title is, therefore, to an *undivided* half of the tract. They have, however, by their lessees, occupied both halves, and received the rents therefor; —

Held, that the title of G, by his division deed, became limited to the *South half;* and that his subsequent conveyance to the plaintiffs, of the *undivided half* was inoperative; —

Held, that, as the title of the plaintiff extended only to the *South half*, he could maintain no process for partition of the whole tract; —

Held, further, that in a suit at equity, the defendants could not be coerced to convey to the plaintiff any portion of their interest in the tract; nor to apply for a partition of it; nor to account to the plaintiff for any portion of the rents.

BILL IN EQUITY, alleging in substance, the following facts.

Two persons owned a tract of land as tenants in common. One of them conveyed his undivided half to McLaughlin, taking back a mortgage of it to secure the purchase money. The other deeded his undivided half, and it became, through mesne conveyances, the property of Goodhue. McLaughlin and Goodhue divided the land; McLaughlin deeding the South half by metes and bounds to Goodhue, and Goodhue deeding the North half by metes and bounds to McLaughlin. Goodhue then, by metes and bounds, conveyed that (South) half by a deed, under which the plaintiffs hold; and he also deeded to them, afterwards, an undivided half of the whole tract.

The mortgagee entered to foreclose the mortgage, given by

McLaughlin, and then assigned the mortgage to one Porter, by whom it was fully foreclosed.

Upon a petition for partition by these plaintiffs against Porter, 27 Maine, 405, it was held that Goodhue's title was limited, by the division deeds, to the South half *in severalty*, and that, therefore, his subsequent deed to the plaintiffs of an *undivided* half was inoperative; and that, as the plaintiffs had failed to show any *undivided* interest in the land, their petition must be dismissed.

Pending that process, Porter's right, through intervening deeds, was duly conveyed to these defendants, whereby they became the owners of an *undivided* half of the tract.

The defendants then entered into possession both of the North and of the South halves, and received rent therefor from their lessees.

The prayer of the Bill is, the defendants may be compelled to convey to the plaintiffs the *undivided* half of the tract, or *such portion* of it as the plaintiffs are entitled to; —

Or that the defendants may be compelled to commence and prosecute a petition for partition of the tract, the plaintiffs offering to pay the necessary expenses of such process; —

And also that the defendants may be compelled to account for the proportion of the rents and profits, received by them, to which the plaintiffs are entitled.

The defendants demurred generally to the Bill.

Hobbs and *Fessenden*, for the plaintiffs.

The demurrer confesses the facts charged in the bill.

The defendants, then, claiming title to no more than one undivided half of the premises, occupy and take the rents and profits of the whole, and refuse to account to the complainants for any portion of the rents, or to make partition of the premises.

The plaintiffs are the proprietors of all the premises, not the property of the defendants. No other person than the plaintiffs and defendants have any title.

Goodhue, McLaughlin, and all claiming under them, except

these parties, are each estopped to claim any portion. The title must be in some one.

The defendants claim title to one undivided half only. The complainants are then the proprietors of the remainder.

The defendants wrongfully withhold the complainants' right. The Court has decided, in *Soutter & al.* v. *Porter*, that the complainants cannot maintain a petition for partition, but that, if the defendants will petition for partition, the complainants can then have their right assigned to them. The refusal of the defendants to do this, or to make partition by deed, is a wrong. It is a fraudulent holding on their part. It is against equity and good conscience, that they should thus appropriate to themselves the property of the complainants.

The complainants have no remedy unless the Court grant it here. They cannot maintain a writ of entry. They cannot force the defendants to make partition. Will the Court declare there is no remedy?

It is a maxim of law that there is no wrong without a remedy. Have not the complainants been wronged? Where is the remedy?

The Court may well consider the wrongful holding by the defendants of the complainants' property a fraud, although not a technical fraud.

Rowe & Bartlett, for the defendants.

There is not, and never has been, between these parties, any privity in contract or estate. There has been no occasion for a fraud, trust, accident or mistake to arise.

The relief prayed for is beyond the powers of any Court.

The defendants are seized as tenants in common of half of a tract of land, and are in possession of the whole.

Plaintiffs claim half of the land in severalty by a defective title, and pray that the defendants may be compelled; —

1. To convey to them without consideration an undivided half, (which is all the interest which the defendants have,) or —

2. To convey a portion in severalty, (which they have no power to do;) or —

3. To commence and prosecute to judgment, a suit for par-

tition, with those who are not co-tenants; a suit unauthorized by law; a judgment which no court has power to render; and that, too, when the defendants prefer, and by law are entitled, to continue to hold the estate in common with their co-tenants; —

4. And to account for rents and profits with those who have never had possession of, or title to, any part of the estate in common; or any right to occupy any part of the land against these defendants. The Bill, therefore, presents no case within the jurisdiction of the Court.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

RICE, J. — This is a bill in equity to which there has been a demurrer and joinder.

The plaintiffs claim to be equitably entitled to recover possession of, and to hold one half part of certain real estate described in their bill, situated in the city of Bangor.

The subject matter referred to in the bill was before this Court in 1847, on a petition for partition. *Soutter & al* v. *Porter*, 27 Maine, 405. Since that time the interest of Porter has passed by sundry conveyances to the defendants.

It is alleged in the bill, and admitted by the demurrer, that the defendants are the legal owners of one undivided half of the entire estate, deriving their title through sundry mesne conveyances, from one Micajah Drinkwater, and that the title of the plaintiffs is as set forth in the bill, being a claim to represent the interest formerly owned by Stephen Goodhue. The defendants are in possession of the whole estate.

A careful examination of the title was had in the case of *Soutter* v. *Porter*, and the Court then decided, that the petitioners have "failed to establish any title as tenants in common to an undivided share of the premises."

The plaintiffs now pray for relief; and that this Court will, by decree, compel the defendants to convey to them one undivided half of the premises, or such portion thereof, as they are entitled to possess in severalty, or that the defend-

ants may be, in like manner, compelled to enter their petition for partition of the premises, according to the provisions of the statute, and procure partition to be made with the plaintiffs, and also to account for rents, &c.

The defendants claim title to one half of the estate only, and the plaintiffs admit their title to be valid to that extent, and deny their right to any greater interest. Such being the extent of thedefendants' interest in the estate, it is difficult to perceive how, on any equitable principle, they could be compelled, against their will, and without consideration, to convey that interest, or any portion thereof, to the plaintiffs, even if this Court had power to make and enforce such a decree. And it is equally difficult to understand on what principles they should be compelled to convey property to which they claim no title.

The defendants may, if they elect, obtain partition of property which they hold in common with others. The plaintiffs ask that they shall be compelled to do so against their will. The question for consideration is, whether such compulsory power is possessed by the Court.

This Court does not possess general equity powers, but is authorized to act as a Court of equity, in certain cases and classes of cases, pointed out in the statute, but this case in not among them.

It was intimated, at the argument, that this case might fall under the clause of the statute authorizing the Court to act in cases of fraud, though it was not very distinctly pointed out, wherein the defendants had acted fraudulently. The facts seem to be, simply, that the defendants being the undisputed owners of one undivided half of the estate and in the actual possession of the whole, decline to yield that possession until some party, having the right, shall in a legal manner dispossess them. The plaintiffs have attempted to obtain title to a portion of the common property. With that attempt, the defendants have in no way interfered. Thus far the plaintiffs have failed to secure such a title as will enable them to dispossess the defendants. This would rather seem to be

their misfortune, than the defendants' fault. We are unable to perceive any act of the defendants which so savors of fraud, as to authorize the Court to interfere on that ground.

The defendants can only be required to account for rents to the party, who has the legal title to that portion of the estate not owned by them.

The bill is therefore dismissed with costs for defendants.

COUNTY OF PISCATAQUIS.

BRIGGS *versus* DAVIS.

The R. S. chap. 114, sect. 48, authorizing a new summons to be issued and served in certain cases, does not extend to a case in which no summons had been delivered to the defendant, or left at any place or with any person for him.

The taking of depositions in vacation by a defendant to prove the defence, pending a motion by him to dismiss the suit, is not an abandonment of the motion, or a waiver of the ground upon which it had been presented.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

The Opinion of the Court, SHEPLEY, C. J., WELLS, RICE, and APPLETON, J. J., was drawn up by

APPLETON, J. — The plaintiff in this case on the 10th day of August, 1850, sued out his writ returnable to the November term of the District Court, which was forwarded to the sheriff of Somerset county, by whom it was received, but not in season for service. Instead of returning the writ to the plaintiff, he, twelve days before the return day, attached, or claimed by his return that he had attached, all the real estate of the defendant within his precinct, adding by way of excuse for not having left his summons, that the writ was received two days too late for service. The plaintiff, at the

November term, entered his action and on his motion notice was ordered on the defendant by serving him with an attested copy of the writ and the order of Court, thirty days before the next term of the Court. On the third day of the next term it was proved, that notice in conformity with the order of Court had been given, and on the fourth day of the same term the defendant's counsel for the first time appeared, entering a special appearance on the docket, and filed his motion to quash the plaintiff's writ. The cause was continued at that term, without action of the Court upon this motion, and in the vacation the defendant, after giving due notice, proceeded to take depositions to be used in this cause. At the following March term, after duly considering the defendant's motion, the Court sustained the same, whereupon the plaintiff filed his exceptions.

It is insisted, that these proceedings have been in conformity with the provisions of R. S. chap. 114, § 48; that the ordering a new summons to be issued and served, is a matter of judicial discretion, and that, the Court having exercised that discretion in the premises, the defendant is rightly in Court. But upon examining the statute, it will be perceived, that the plaintiff has entirely failed in bringing his case within either its language or its meaning. The defendant is a resident of this State, and is so described in the writ. No service whatever had been made on him before the entry of the action. Indeed, no service whatever had been made. Now the section relied upon refers only to the case, where a summons or copy had been left, but where, by reason of some mistake of the officer or the plaintiff as to the place where, the time when, or the person with whom the same had been left, the service is defective or insufficient, and in such case it gives the Court power, at its discretion, to order a new summons to be issued and served, and provides that such service shall be as effectual as if made on the original writ. But here, no summons having been left, there is no mistake of the plaintiff or of the officer, to be corrected. The order

of Court was improvidently issued, the service was without any authority from the provisions of the statute, the facts, upon which the Court is empowered to act, having never existed.

Though this may be so, the plaintiff's counsel still claim that the defendant has waived these defects, if they are to be so termed, in the service, and that, on account of such waiver, the motion to quash should have been refused. The facts, which, in this aspect of the case, are relied upon, are the lateness of time when the motion was filed, and that depositions, at his instance, were taken in the vacation occurring after the filing of his motion. The appearance was special and for the very purpose of taking advantage of defects. The proof that service had been made in conformity with the order of Court was made on the third day of the term and on the fourth the appearance was entered and the motion filed. The defendant was not bound to appear till after notice had been proved, for till then he could not know that the plaintiff would claim to proceed. Neither was he bound to file any motion till after proof had been given of a compliance with the order of Court. The motion was made on the next day after such proof, and was seasonably made. The rules of the Supreme Court, which have been referred to, have no application, as they were not binding on the District Court, which has its own rules.

The defendant could not know what would be the result of his motion. He therefore made preparation against the contingency of its being overruled by taking depositions. The general issue had not been joined. The motion was then pending, the cause having been continued by mutual agreement. This cannot be deemed a waiver of his motion, but is rather to be regarded as a prudent precaution on his part.

Exceptions overruled.

Holmes, for the plaintiff.

O. D. Merrick, for the defendant.

ANDERSON *versus* FARNHAM *& al.*

In an action, referred by rule of Court to three referees, "*the award of whom to be final,*" an award signed by two of them only, cannot be accepted, although they certify that the other acted with them in the hearing of the parties.

In such a case, evidence is inadmissible to prove that the other referee agreed to sign the award.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

WRIT OF ENTRY. The record shows that the action was referred to three referees, "the report of whom, to be made as soon as may be, judgment thereon to be final."

The award of the referees was signed by only two. They however certified, that the other was present and acted at the hearing, though he refused to join them in signing the report. The plaintiff moved the acceptance of the award of the two referees, and offered evidence that the other agreed to sign. The evidence was excluded and the award rejected. The plaintiff thereupon excepted.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

RICE, J. — This case comes before us on exceptions to the rulings of the Judge of the District Court, rejecting the report of referees. The parties voluntarily referred their action, then pending in Court, to referees, on such terms and conditions as were satisfactory to themselves. Ordinarily, rules of Court provide, that the report of the referees or a majority of them, shall be final, &c. It is, however, competent for parties to insert in their rule other and different provisions. Whatever provisions are thus inserted, unless they are in violation of law, are binding upon the parties. In this case they did not choose to agree to be bound by the judgment of a simple majority of the referees. The Court has no authority to change the provisions of the rule adopted by them against the consent of either party. The defendant was entitled to the judgment of the three referees. The report is made by two only. There does not appear to have

been any wrong practiced by the defendant, by which the other referee has been prevented joining in the report, had he desired so to do.

The parol evidence offered was properly rejected.

Exceptions overruled.

A. M. Robinson, for the plaintiff.

A. Sanborn, for the defendant.

Cilley, *appellant, versus* Cilley.

On the question, whether a will shall be established, there is no legal presumption of the testator's sanity.

It is a fact to be proved.

The subscribing witnesses to a will, though not experts, may give opinions as to the sanity of the testator, when the facts are stated upon which their opinions are founded.

The facts proved upon such a point are to be considered of more importance, in acting upon the appeal, than the opinions of the witnesses.

In such a case, it is not essential to the establishment of the will, that any of the subscribing witnesses should testify to any opinion respecting the sanity of the testator.

To the publication of a will no prescribed form of words is requisite. No other publication is necessary than that the testator, at the time of executing the instrument, was apprized of its contents, and knew and intended it to be his will.

The opinion of the Court, Shepley, C. J., Wells, Rice, Hathaway and Appleton, J. J., was drawn up by

Rice, J. — This case comes before us by appeal from a decree of the Judge of Probate, by which an instrument, purporting to be the last will and testament of Jonathan Cilley, jr., was approved and allowed.

It is contended by the appellant, that the decree of the Judge of Probate should be reversed, because it is alleged, that the deceased was not of sound mind, at the time he executed said instrument, and, because he never published the same as and for his last will and testament.

Section 1, chap. 92, R. S. provides that every person of the age of twenty-one years, and of sound mind may dispose of his estate by will, &c.

The first question presented in this case is, on which party rests the burden of proof, to establish the sanity or insanity of the testator. It is contended by the appellee, that it is a rule of law, of general application, that sanity is to be presumed, and, that such presumption is conclusive until it is overcome by affirmative proof of insanity. And, therefore, that the burden is upon the appellant to show that the testator was not of sound mind at the time the instrument was executed, if he would set it aside as invalid for that cause.

That such is the general rule of law is undoubtedly true. It is also true, that this rule has often been applied to cases of wills, in the same manner as to other written instruments. This application, however, is not co-extensive with the rule. There is in this country much conflict of authority, as to the true application of the rule in this class of cases, depending in some degree, upon peculiar statute phraseology. In this State, the rule is, that the presumption, that a person making a will was, at the time, sane, is not the same as in the case of making the instruments; but the sanity must be proved. *Gerrish* v. *Nason*, 22 Maine, 438.

The opinions of subscribing witnesses as to the condition of the testator's mind, at the time of the execution of his will, may be received in evidence, when the facts are stated on which such opinions are founded, though such witnesses do not fall within that class known to the law as experts. In such cases, however, the evidence on which the most reliance should be placed are the facts proved, rather than the opinions expressed by the witnesses.

In the case at bar, no opinion was expressed by the subscribing witnesses as to the condition of the testator's mind, at the time his will was executed. Nor is it necessary that there should have been, as such opinons are, necessarily, mere inferences drawn by the witnesses from facts observed by them. These inferences may with equal, perhaps greater

propriety, be deduced by the Court or jury from the facts proved. The opinions of witnesses, are by no means conclusive, and are only valuable as they may aid in coming to a correct conclusion.

Then as to publication.—To publish a will requires no set form of words. It is sufficient if it be made to appear, by competent testimony, that the testator was at the time of executing the instrument fully apprised of its contents, that he knew it to be his will, and intended it as such. *Sweat & al.* v. *Boardman,* 1 Mass. 258.

The testator employed the witness, Johnson, to write his will, and gave him instructions as to the disposition he desired to make of his property, declaring that he wished him to make a legal will. These instructions were followed with the exception, that a clause was inserted providing an inconsiderable legacy for the father and mother of the testator, which was deemed necessary by the scrivener to constitute the instrument a legal will.

After the will was thus prepared, the witness, Johnson, testifies that he read it to the testator, omitting only the parts which are merely formal, after which the testator signed it, declaring it to be his will. The other subscribing witnesses concur with Johnson as to the signing and declaration of the testator. They however did not hear the instrument read before it was signed. The reading might have occurred without their knowledge of the fact. To find that it was not read, would be to find that Johnson had testified falsely. There was also opportunity for the testator to have read the will himself. Our conclusion, from the evidence reported, is, that the testator was of sound mind at the time he executed the will, and that it was duly published by him as his last will and testament. The decree of the Judge of Probate is therefore affirmed with costs for the appellee.

COUNTY OF WASHINGTON.

STATE *versus* WALL.

In a prosecution for the unlawful sale of spirituous or intoxicating liquors, it is the province, not of the Court, but of the jury, to determine whether the article sold was or was not of the prohibited class.

ON EXCEPTIONS from the *District Court*, HATHAWAY, J.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

RICE, J. — This is a prosecution originating before a justice of the peace for a violation of the license law which was carried by appeal to the District Court, and comes before this Court on exceptions.

The liquor sold by the defendant was an article known as "Hardy's Bitters," into the composition of which, as the case finds, alcohol enters, so far as is necessary for their preservation.

The Judge, at the trial, was requested to instruct the jury "that if they were satisfied that the bitters are the article sold, and that the alcohol was intended not to be sold as such, but only as a component part, necessary for the preservation of the bitters, the sale was not a violation of the statute."

The Judge declined so to instruct the jury.

The statute under which this process was commenced, not only prohibited the sale of spirituous or intoxicating liquors by persons unlicensed, but also mixed liquors, part of which were spirituous or intoxicating.

Whether liquors are, as matter of fact, wholly or in part spirituous or intoxicating, is to be determined by the jury, from the evidence in the case. That question could not be determined by the Court, as contemplated by the requested instruction. *Exceptions overruled.*

HUCKINS *versus* STRAW.

A writ of entry is maintainable by a mortgager, except against the mortgagee and those claiming under him, notwithstanding that the tenant in the suit has, by long occupation, become entitled to betterments.

ON FACTS AGREED.

WRIT OF ENTRY by a mortgager against a party, who, by more than six years occupation, had become entitled to betterments. If the action is maintainable, a person agreed upon by the parties, is to appraise the land and the improvements.

Cutting, for the demandant.

Peters, *Hodgdon* and *Madigan*, for the tenant.

To maintain a writ of entry, right of possession is essential. The right of a mortgager is only contingent, and cannot prevail against a vested interest. Twenty years adverse possession gives an indefeasible title. Six years adverse possession gives "a title against all who have not a paramount title," an interest, immediate and definite, that cannot be disturbed, except as provided, by the 27, 28, 29, 30, 31, 32, 33 and 34th sections of chap. 145, of the R. S. — 6 Mass. 303.

If a mortgager were permitted to maintain an action against one entitled to betterments, the receipt by him of the adjudged value of the land from the tenant, could not divest the mortgagee of the fee, and a failure on the part of such demandant to redeem, would leave the relative rights of the mortgagee and tenant the same as if no such adjudication and payment had occurred. Whereas, by bringing the suit in the name of the mortgagee, the proceedings would quiet the tenant's title, and the money received in payment for the soil would be deducted in redeeming the mortgage. Or if the mortgager preferred to pay the appraised value of the betterments, he could furnish the mortgagee funds for that purpose.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and HATHAWAY, J. J., was drawn up by

WELLS, J. — The demandant is seized of the fee against all persons except the mortgagee, and may maintain a writ of entry to recover possession against any one not claiming under the mortgage. This principle of the common law has not been changed by the statute in relation to betterment claims. It does not prohibit the mortgager from maintaining an action against a disseizor, but does provide, by chap. 145, sect. 33, that if the tenant be evicted after the land has been abandoned to him, by a better title of any claimant, he may recover back the money he has paid to the demandant.

It is not within the power of the Court to engraft upon the statute any further provision than what it has provided for the protection of those claiming betterments.

According to the agreement of the parties the demandant is entitled to recover, and the appraised value of the land and improvements are to be made in conformity to it.

THOMPSON *versus* LEWIS *&* *trustee.*

A note made payable to a partnership firm, for property belonging to the firm, is the property of the firm, though given after the death of one of the partners, upon a purchase from the survivor.

One, summoned as trustee and disclosing that he is indebted to a partnership firm, of which the principal defendant is the surviving partner, will be charged, unless some interposing claim be made, *in behalf of the firm*, either by some of its creditors or by the administrator of the deceased partner.

The share or aliquot part which a judgment debtor may have in the goods of a firm, of which he is the surviving partner, may be sold on execution against him; unless some interposing claim be made, *in behalf of the firm*, either by some of its creditors or by the administrator of the deceased partner.

Unless such interposition be made, the sale need not be confined to the mere surplus interest, which the surviving partner might have in the goods after payment of all the partnership debts.

Of the methods by which such interposition, in behalf of the firm, may be effectually made, to prevent the surviving partner's share of the estate from being held for his private debt, either upon trustee process or upon execution against him.

ON EXCEPTIONS from the *District Court*, HATHAWAY, J. presiding.

The question was upon the liability of Nickels, the supposed trustee, to be charged.

He disclosed that he was indebted upon an unnegotiable note for logs and other property to the late firm of Hall & Lewis, of which Lewis, the principal defendant, is the surviving partner.

To an interrogatory (objected to as irrelevant,) put by the defendant's counsel to the trustee, "whether Lewis gave him to understand that the estate could not pay the debts," he replied; — "I do not think he did at the time of the sale, I was loth to buy any thing but the logs, but Mr. Lewis said the effects would go to pay their debts in Boston, and probably, if I wished, I could get an extension of the time of payment."

It was admitted, that the note given by Mr. Nickels is in the hands of the administrator, or a person claiming to be such, of Hall, the deceased partner of Lewis, and that the administrator has notified Mr. Nickels, that he requires payment, for the benefit of the creditors of Hall & Lewis, said notice being made subsequent to the service of the trustee process.

The Judge ruled that the trustee was not chargeable, and the plaintiff excepted.

The case was submitted without argument, by —

Freeman, for the plaintiff.

Burbank, for the trustee.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

WELLS, J. — It appears by the disclosure, that the defendant, Lewis, and Charles S. Hall, were partners, and that after the death of Hall, the trustee purchased of Lewis partnership property, for which he gave his note, not negotiable, to Lewis as surviving partner. And the question arises whether he can be holden as trustee of Lewis, one of the partners.

In the cases of *Fisk* v. *Herrick & trustee*, 6 Mass. 271,

and *Upham* v. *Naylor & trustee*, 9 Mass. 490, and *Lyndon* v. *Gorham*, 1 Gallison, 366, it was decided, that the trustee could not be holden, unless it appeared that he had an interest in the partnership effects, after the payment of its debts.

There are numerous authorities in England and in this country, that decide, that partnership effects cannot be taken by attachment, or sold on execution, to satisfy the creditors of one of the partners only, except it be to the extent of the interest of such separate partner in the effects, and that such interest is the undefined surplus after the debts of the partnership are paid. 3 Kent's Com. 65; *Taylor* v. *Fields*, 4 Ves. 396; 1 Story's Equity, 626; *Morton* v. *Blodgett*, 8 N. H. 238, where this subject is very fully considered by Parker, J. The law was formerly otherwise in England, and a creditor of the separate partner took the goods of the partners in execution, and sold the share of his debtor as if he were a tenant in common. *Bathurst* v. *Clinkard*, 1 Show. 174; *Jacky* v. *Buller*, 2 L'd Ray. 871; *Heyden* v. *Heyden*, 1 Salk. 392.

But in Massachusetts, while the doctrine is maintained, that partnership property must be appropriated to discharge its obligations, a creditor of a separate partner may attach the goods of the firm, so far as his debtor has an interest in them, subject to the paramount claims of the creditors of the firm, whose rights by an attachment of the same goods are allowed to be superior. *Pierce* v. *Jackson*, 6 Mass. 242.

In this State a creditor of one of the firm may attach their goods upon his separate debt, subject to the paramount claims of the creditors of the firm, and the members of the firm cannot sustain an action against the officer for making the attachment. *Douglass & al.* v. *Winslow*, 20 Maine, 89; *Bradbury & al.* v. *Smith*, 21 Maine, 117; *Reed* v. *Johnson*, 24 Maine, 322. As the goods may be attached, so they may be seized on execution, and the share of the separate partner sold. The merely selling an undefined surplus interest of the partner, in its practical result would render the attachment and seizure of very little benefit to a creditor, for it would be difficult to find a purchaser of such interest, who must enter

upon a tedious and prolix course in equity to ascertain the amount of it. It better accords with the simplicity, which should govern judicial proceedings, and with that protection, which should be afforded to creditors, to allow the share of the separate debtor in the goods themselves to be sold. The partnership creditors, before the sale takes place, can protect their rights by an attachment or seizure or other appropriation of the partnership property to their benefit, or by process in equity. *Commercial Bank* v. *Wilkins*, 9 Greenl. 28. And when the partnership is insolvent the rights of the partners may be protected from a withdrawal of the partnership effects by a creditor of one of them, by an appeal to the equity power of the Court. Unless the creditors of the partnership, or some injured partner, should assert their superior claims, there does not appear to be any satisfactory reason why the specific and tangible property of an individual partner should be locked up against his creditors.

In the case of *Hawes* v. *Waltham*, 18 Pick. 451, it was decided, that when a person summoned as trustee discloses, that he is indebted to the defendant and a third person jointly, he is not chargeable, and that a joint debt cannot thus be severed. But that question has been otherwise decided in this State and it has been held, that the interest of one of two persons, to whom a debt was due jointly, whether partners or not, might be reached by a trustee process. *Whitney* v. *Munroe & Tr.* 19 Maine, 42. That case is an authority directly in point, and covers the whole ground embraced by the one under consideration. It was considered in that case, that full effect could not be given to the trustee process without adopting a construction, which would create a severance of the contract. In this case a severance has taken place by the death of one of the partners.

There is no legal evidence that debts are existing against the firm; the statement of the defendant Lewis, is not legal evidence of that fact; nor is there any evidence that the firm is insolvent and that the debt due from the trustee is needed for the payment of the debts of the partnership. The cred-

itors of the firm have not interposed in any manner, by trustee process or otherwise, to assert their superior claims. If the plaintiff might have summoned the administrator of the deceased partner as trustee, as is suggested in *Fisk* v. *Herrick*, for the purpose of ascertaining from him the condition of the partnership, such omission does not defeat the suit. The administrator might have exhibited through the trustee such facts as the protection of the estate of the deceased partner might require. By statute, ch. 119, the trustee may allege such facts as are material, the truth of which is unknown to him, and a trial may be had in relation to them by the Court or jury. Or the administrator may claim the credits for the estate, and when it so appears by the disclosure, the Court may permit him to become a party to the suit and have his claim investigated and determined. The provisions relating to this subject are contained in the thirty-third and seven following sections of the before mentioned chapter, and appear sufficient to enable a partner to guard his rights when a debtor of the firm is summoned as trustee in a suit against another partner. And upon *scire facias*, the Court, by the seventy-ninth section of the chapter cited, may permit or require the trustee to be examined anew, and in such case he may prove any matter proper for his defence. So that the administrator, if he has omitted to present all the facts, which might be adduced, and which may be necessary to protect the estate, will still be at liberty to make further defence through the trustee, if justice should require it.

The administrator has not complied with the statute, ch. 107, § 30, by giving a bond as required, to entitle him to take into his own possession the partnership property, and to make the disposition of it directed by the statute.

Upon the facts in this case, as at present exhibited, the trustee must be charged. *Trustee charged.*

TRUSTEES OF PUTNAM FREE SCHOOL *versus* LEONARD FISHER.

Upon a plea of disclaimer in a real action, if the tenant, at the commencement of the suit, was in possession of *any part* of the land disclaimed, the demandant must be the prevailing party.

Under R. S. chap. 91, § 1, the title of a grantor to land will pass, though he may be disseized at the time of his conveyance.

Title in a third person cannot be proved under a plea of disclaimer.

A judgment, to which a person was not a party or privy, cannot be introduced as evidence against him.

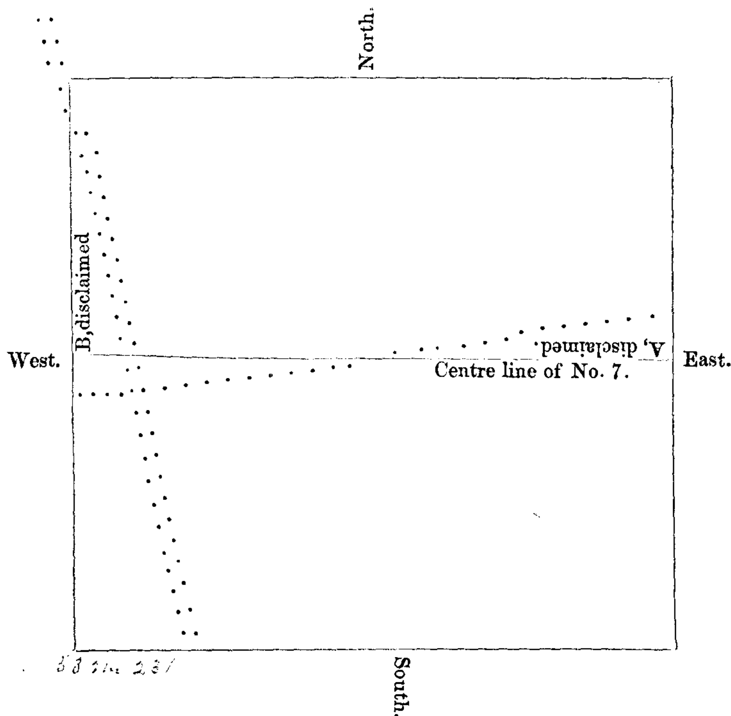
By an entry into land and a visible possession of a part of it, by one claiming title under a registered deed, the true owner is constructively disseized of the whole tract described in the deed.

But such constructive disseizin would not extend to any part of the land, of which some other person was, at the time, seized and possessed.

There cannot be two distinct and independent seizins of the same land at the same time.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

WRIT OF ENTRY. — The subject matter will be explained by the diagram.



The action is brought to recover the *North* half of lot No. 7. The tenant defended, except as to the pieces A and B, which he disclaimed. A is separated from the residue of said North half by a stone fence, indicated by the single dotted line; B is separated from the residue of said North half by a road, indicated by the double dotted line.

The questions for consideration arise in relation to A and B.

One Gardiner owned the *South* half of lot No. 7.

One David Fisher had an occupancy upon lot No. 7 forty years ago. He conveyed the Southern part to Gardiner, and they built for their dividing line a fence or stone wall at the single dotted line, and the evidence tended to show that their respective occupations have conformed to that line, and there was no proof that the defendant, or those under whom he claimed, had any actual occupation South of that line.

David Fisher afterwards mortgaged the *North half* of No. 7. Through successive conveyances, the tenant became assignee of the mortgage, and also of the right of redemption.

As to the disclaimed piece, A, the Judge instructed the jury *that* the demandants could not recover, unless the tenant, or those under whom he claimed, had been in the actual possession of that piece; and *that* the deeds, under which the tenant claimed, and the possession of the defended premises, were not evidence of a constructive disseizin of that piece. To that instruction, the demandants excepted.

Concerning the disclaimed piece, B, the tenant called David Blanchard, who testified that, in 1824, David Fisher abandoned to him the possession of piece B; and that he, Blanchard, held it in subserviency to the demandants' title until April, 1843, when they conveyed the piece to him; *that* the tenant took possession of that piece and built a fence around it, and occupied it as a pasture; this occupation, as the witness thought, was from the fall of 1843 to the fall of 1847, and not after.

The tenant offered in evidence the writ, pleadings and judgment in an action between Blanchard, as plaintiff, against this tenant. That action was commenced in July, 1846, for a tres-

pass alleged to have been committed on the piece B, and a judgment was obtained in favor of Blanchard.

The introduction of those documents was objected to by the demandants, but the objection was overruled, and the papers were admitted. The Judge instructed the jury, that that action was founded upon Blanchard's possession, and could not have been maintained, except upon proof that the defendant had disturbed that possession; and, as the action was maintained, the possession of Blanchard must have been established.

The demandants excepted.

The tenant introduced several depositions. The demandants objected to so much of them as stated any declarations of David Fisher, as to the title or occupancy of the demanded premises. The objection was overruled, and the declarations were allowed to be read, but for the sole purpose of showing the nature of the tenant's claim.

To the admission of the declarations, the demandants excepted.

The opinion of the Court, Shepley, C. J., Wells, Rice, Hathaway and Appleton, J. J., was drawn up by

Wells, J. — The demandants claimed the Northern half of lot No. 7, in the fourth range of lots in the town of Charlotte. The general issue was pleaded as to a part of the demanded premises, and a disclaimer as to the residue, which consisted of two portions of the premises lying on the East and West sides.

Under the issue arising upon the disclaimer, if the tenant had been in possession of any part, which was disclaimed, at the time of the commencement of the action, by statute, chap. 145, § 9, the demandant would have been the prevailing party. For it would then have appeared that the tenant did claim and hold the part disclaimed, and his plea would have been falsified. Stearns on Real Actions, 470.

The part disclaimed on the West side of the lot, was on the West side of a road running through the premises. The tenant called David Blanchard as a witness, who testified,

"that in 1824, David Fisher abandoned to him the possession of all that part of the lot West of the road, and he held in submission to the demandants' title until he took a deed from them in April, 1843; that the tenant took possession of this piece and built a fence around and occupied it as a pasture; thought it was in fall of 1843, he took possession and occupied until the fall of 1847, and not after that." The deed from the demandants to David Blanchard, dated April 28, 1843, and conveying this part disclaimed, is made a part of the case. The testimony of Blanchard and the deed were introduced in evidence without any objection. This evidence did show, that the tenant was in possession when the action was commenced in January, 1847, but it also showed, that it was no invasion of the possession of the demandants, and that they had no right whatever to this part of the premises. The conveyance from the demandants to Blanchard might have been pleaded in bar, for if the demandants had no right, they could not draw in question the tenant's seizin or possession. *Gould* v. *Newman*, 6 Mass. 239; *Walcott* v. *Knight*, 6 Mass. 418. As Blanchard, at the time he took his deed was the tenant of the demandants and held in submission to their title, and there being no disseizin, the deed was operative and effectual to convey their title according to the principles of the common law; and by our statute, chap. 91, § 1, the title of the grantor will pass although he may be disseized at the time of his conveyance.

But this defence was not admissible under the disclaimer, it rests altogether upon a different ground, and the fact, that the title was not in the demandants, although a good defence under an appropriate plea, was irrelevant to the issue upon the disclaimer.

In connection with Blanchard's testimony the tenant introduced the writ, pleadings and judgment in an action entered in this Court between Blanchard and the present tenant. It was commenced in July, 1846, for trespass alleged to have been committed on the land disclaimed, and which was on the West side of the lot, and judgment was rendered in favor

of Blanchard. The demandants were not a party or privy to this judgment, and they objected to the admission of this evidence.

The judgment was not received in evidence as a mere fact, but, as appears from the instructions given by the Court to the jury, as evidence of the facts upon which it was founded, and for the purpose of proving them. The demandants had no opportunity to be heard in relation to the facts upon the supposed existence of which the judgment was founded, and it was therefore inadmissible. 1 Stark. on Ev. 252; *Hammatt* v. *Russ*, 16 Maine, 171. The tenant was at liberty to show that he was not in possession, but that Blanchard was and sought to recover damages against the tenant by an action for disturbing the possession. Such acts as indicated his possession and claim to it, would be admissible, but the judgment could not be used as an instrument of proof, in relation to the facts by which it was established, against a stranger to it.

An objection was made to parts of several depositions, in which the deponents state the declarations of David Fisher in relation to the nature of his possession and seizin of the demanded premises. It is contended that it does not appear that those declarations were made while he was in possession of the land. And it may be that the depositions are justly liable to this objection. But the objection made at the trial was of a general nature and did not point out specifically the illegality in the testimony. This exception could not prevail, but as there must be a new trial for the admission of the evidence before mentioned, depositions can be taken in such manner as to be free from any well founded objection.

It is also contended, that the jury were not properly instructed in relation to the other piece disclaimed lying on the East side of the lot. There was a stone fence running diagonally across the lot, and this piece was on the South side of the stone fence. There was no evidence that the tenant, or those under whom he claimed, ever occupied South of this fence. Jacob D. Gardiner owned the South half of lot No. 7, and the evidence tended to show that the

Fisher and Gardiner lots had been occupied by the tenants for thirty years by a line fence as now existing. The occupation of the respective tenants had been in accordance with the fence where the stone wall is placed.

The jury were instructed, that the demandants could not recover this piece disclaimed, unless they should be satisfied that the tenant, or those under whom he claimed, had been in the actual possession of this piece, that the deeds and possession of the defended premises were not any evidence of a constructive disseizin of the piece disclaimed.

The true inquiry under the issue of disclaimer was, whether the tenant was in possession at the commencement of the action. If he entered under a deed recorded, claiming title to the land and had a visible possession of a part of it, such entry and possession would be a disseizin of the true owner of the whole tract described in his deed. *Kennebec Purchase* v. *Laboree*, 2 Greenl. 275. And in contemplation of law, he would have possession of the whole parcel, and it would be as effectual as an actual possession. Unless such effect should be given to a constructive disseizin, the owner might lose his land by a limitation founded upon it, or be liable to pay a bill of costs in consequence of a disclaimer, if he should commence an action to recover the land. It cannot be considered a possession for the tenant, which may ripen into a title, and not one when he desires to escape from the effect of an action. It must retain the same essential character in relation to both parties to the suit, and whether used for one purpose or another. But if Gardiner was in possession, and had the seizin in fact of the piece disclaimed, that would entirely defeat the constructive seizin of the tenant, although the land was described in his deed. Both the tenant and Gardiner could not have several and independent seizins of the same land at the same time. It is not contended, that there was a joint seizin. Gardiner, if in possession and claiming the land as his own, was the tenant in fact of the freehold, and if not rightfully so he was liable to an action by the lawful owner, and such action would have been barred by a

continuance of the seizin for the time limited in the statute. Whatever constructive seizin the tenant might have, as indicated by his deeds, of the piece disclaimed, if they embraced this parcel, it was entirely taken away by the actual seizin of Gardiner according to the facts stated in the exceptions. Such would be the effect of the continued seizin by Gardiner or of those claiming under him. What would be a correct view, if the question in relation to this piece had arisen under the general issue, it is unnecessary to inquire. It is presented in reference to the issue arising under the disclaimer only.

The exceptions are sustained.

Granger and *Dyer*, for the demandants.

Fuller, for the tenant.

COUNTY OF HANCOCK.

SWETT, *complainant, versus* STUBBS.

After exceptions have been filed and overruled, the prevailing party is entitled to judgment.

In that stage, the case is no longer open to the introduction of testimony to prove a fact, upon a motion to prevent the judgment.

Neither would the *admission* of the fact put the motion in any more favorable position than *proof* of it would do.

ON FACTS AGREED.

BASTARDY PROCESS.

A verdict had been rendered for the complainant. After exceptions had been filed and overruled, 33 Maine, 481, the respondent's counsel suggested that the complainant had been lawfully married to another man, subsequent to those proceedings. The fact was admitted.

The parties submit the case to the full Court for such judgment as they shall think proper.

T. C. Woodman, for the complainant.

1. Judgment should be rendered for the complainant. The objection of coverture could only be taken by plea in abatement, as matter which arose *puis derrein continuance*, and should have been pleaded within the first three days. The counsel for the respondent, however, has merely *suggested* the coverture, and that on the ninth day of the term. He does not plead it.

2. But should the objection prevail, it is agreed by the parties that the husband may be joined. If that be done, judgment may be rendered in their favor, in accordance with the provisions of ch. 115, § 82, R. S., on the ground that a bastardy process is an action, or suit, within the meaning of that section, which provides that the husband may be admitted as a party to a suit commenced by the wife, *dum sola*. *Williams* v. *Campbell*, 3 Metc. 209; *Eaton* v. *Elliot*, 28 Maine, 436.

John A. Peters, for the respondent.

In a proceeding of this kind a husband must join. *Wilbur* v. *Crane*, 13 Pick. 284; 16 Maine, 38.

By common law, if a *femme sole*, in any proceeding where a husband should join, marries during its pendency, it will abate such proceeding. *Haines* v. *Corliss*, 4 Mass. 659; *Swan* v. *Wilkinson*, 14 Mass. 295.

The R. S. chap. 115, § 82, provides that, "in any *action or suit*," the husband may, on motion, come in and be joined.

But this is neither an *action* or *suit*. It is merely a complaint.

In *State* v. *Stuart*, 23 *Maine*, 114, this Court has decided that an indictment cannot be included in the term, "suits at law." If then an indictment is not a suit at law, neither can a complaint be one.

In *State* v. *Bangor*, 30 Maine, 341, there was a remedy for the heirs of an individual by form of indictment, although in reality and effect a civil proceeding; a remedy for *persons*, not for *the State*. It was under § 89, chap. 25 of the R. S. The Court in that case decided it to be so much of a crimi-

nal proceeding that sects. 15 and 16, of chap. 146, which limited forfeitures to persons, would not apply. But the statute in that case was in all respects as much for the benefit of an individual as the chapter upon which this proceeding is founded.

In § 1, chap. 133, R. S., relating to testimony and depositions, it is stated, that depositions may be used in *all civil causes* and also in prosecutions for the maintenance of bastard children. This shows the legislative impression. True, there are incidents to this process of a civil nature, but the same are all specially given. The proceeding is, after all, a criminal one; is founded on a criminal act; has all the form of criminal proceeding, only different where the civil can add to, instead of take from, its rigor of execution.

In *Cummings* v. *Hodgdon*, 13 Metc. 246, there is a late, full review of all the cases, wherein it is decided, that such a proceeding has day in a criminal term and not in a Court of merely civil jurisdiction.

It may present an anomaly, that a husband must join and cannot join. But all special remedy, not in accordance with the great current of the common law, will present imperfection and difficulties. When the statute gives a new proceeding, it is apt to make imperfect provision for the unforeseen positions which may arise.

The opinion of the Court, Shepley, C. J., Wells, Rice, Hathaway and Appleton, J. J., was drawn up by

Shepley, C. J., — A verdict had been found for the complainant in a prosecution alleging, that the respondent was the father of her illegitimate child.

Exceptions having been taken, and a decision having been made overruling them, the complainant was entitled to judgment. The counsel for the respondent interposed to prevent it, alleging that the complainant had been recently married. The objection could not prevail. The case could not be opened to receive testimony respecting her marriage. The fact could not be put in issue. The admission of the fact is not

one that can be regarded as in the case to affect her rights already decided and established.

The paper signed by counsel can have no greater effect than a motion made by respondent's counsel, the truth of which is admitted, and its proposed effect denied. Such a motion could not be entertained to prevent the entry of a judgment. *Judgment on the verdict.*

Lee *& al. versus* Oppenheimer.

Every position, respecting the admissibility of testimony, should be distinctly presented to the presiding Judge for decision, before it can be made the subject of exceptions.

Thus, where evidence had been introduced, from which the jury might perhaps have inferred, that H. was an agent of the defendant, and, in a subsequent stage of the case, the plaintiff offered to prove the declarations of H., though without calling the attention of the Judge to the previous testimony, and the Judge ruled, that the proof was inadmissible, unless it could be shown that H. made the declarations, as agent of the defendant or by his authority, it was *Held,* that exceptions to the exclusion of the testimony were unsustainable.

Where a witness had been restricted by the Judge to a statement of facts prior to a specified transaction, but he voluntarily stated some facts of subsequent occurrence, (no further instructions having been requested,) exceptions to the non-exclusion of the testimony will be overruled.

An officer's authority to receive the attorney's costs of a writ, may be inferred from their previous course of conduct.

On Exceptions from *Nisi Prius,* Howard J. presiding.

Assumpsit, on a book account for $154,74.—See 32 Maine, 253. The plaintiffs reside in New York. The defendant read a receipt signed by them as follows:—"New York, 4 Feb'y, 1848. Received of A. S. Herman, eighty dollars, which is in full for our demand against J. Oppenheimer of Maine, for $154,74, and we agree to discharge said Oppenheimer therefrom, upon payment of the costs incurred therein." When this receipt was given, an action upon the demand had been commenced; the writ had been served, but the return day for entering it in Court had not arrived.

The plaintiffs contended that the receipt had been fraudulently obtained by the false representations of Herman, as to the solvency of the defendant, and also that the costs had not been paid, according to the condition therefor, mentioned in the receipt.

The officer, to whom the writ had been delivered for service, testified *that* he called upon the defendant, who admitted his indebtedness upon the account, but said some discount was to be made, and desired a delay that he might employ a friend in New York to procure a settlement; *that* soon afterwards, he called again at the house of the defendant, who was not then at home; *that* the defendant's wife then exhibited to him the receipt; *that* some time afterwards the defendant paid to the witness $2 for his fees and $3 for the writ; *that, as he thought*, he credited the plaintiffs' attorney $3, on account, for the writ; *that* he notified him, before entry of the action, that the $5 had been paid; *that* the attorney made no objection, and had never called for the money, and the witness has never paid it, but holds it in readiness. The defendant then inquired of the witness what had been the practice and course of business between him and the plaintiffs' attorney, in cases like this. The plaintiffs objected, but the inquiry was permitted in relation to transactions *prior* to the receiving of the $5. The witness stated that, since the time of receiving the $5, he had, without specific instructions, collected costs on writs for the attorney, who had received the same without objection, and *thought* he had done so *before* that time.

Upon this point, the plaintiffs requested instruction to the jury "that, to authorize the officer to receive the costs, so as to affect their rights, an express authorization was necessary from them or some person duly authorized to give it in their behalf." That instruction was not given.

The plaintiffs offered to prove that, at the time of making the receipt, Herman made certain representations to them respecting the pecuniary ability of the defendant, and that those representations were false. This evidence was objected to

and ruled to be inadmissible, "unless it could be shown that Herman made the representations, as agent of the defendant, *or* by his authority."

The Court instructed the jury *that* the receipt introduced by the defendant, with evidence of the payment of cost to the plaintiffs, or some person duly authorized to receive it, constituted a bar to this action; *that* the parties to whom the costs were due, were authorized to receive it; *that* the payment of the $3 to the officer was not a sufficient compliance with the terms of the paper, unless he had authority, either express or implied, from the plaintiffs' attorney, or there had been some subsequent ratification of the acts of the officer, by the attorney, and left it to the jury on the evidence to say whether or not there was such authority or ratification.

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

Herbert, for the plaintiffs.

If the act of Herman, in procuring the receipt, was unauthorized by the defendant, it cannot now be made available in defence, as it contemplates an act agreed to be done by the plaintiffs, to wit, the discharge of the debt on the payment of the costs, which not being binding at its inception, for want of mutuality, cannot become binding except by a consent of the parties; to wit, a new agreement. *Quod ab initio non valet, tractu temporis non convalescit.* Story's Agency, sec. 246; *Right d. Fisher & al.* v. *Cuthill*, 5 East, 498, 499, 500; 1 Story's Equity Juris. § 307.

If the case comes within the principle above alluded to, then the instruction of the Court "that the paper introduced by the defendant, with evidence of payment of costs," &c. constituted "a bar to this suit," is erroneous.

If Herman's act was authorized, then he was the defendant's agent, and the instruction excluding his declarations was erroneous. For the instruction assumed that no agency was proved.

The evidence sufficiently shows, that Herman was the agent of the defendant.

1. One mode of proving an agency is by the acts of the parties. Story on Agency, § 47; 2 Greenl. Ev. § 61.

2. Agency may be proved by implication, from the conduct and acquiescence of the principal. Story on Agency, § 45, 46, 47, 54, 55; 2 Kent's Com. 613, 614, *et seq.*

3. Agency may be proved by subsequent ratification. 2 Greenl. Ev. § 60; Story on Agency, § 45 *et seq.*

From the facts proved, the agency of Herman might fairly be inferred, and therefore the requirement of the Court, that we must go further, and prove agency more distinctly, was unauthorized. Here we have acts of the parties, the conduct, recognition and acquiescence and ratification of the principal. Had the case been left to the jury on this evidence, could the Court have set the verdict aside as against evidence if they had found the agency? Was there not evidence here, which should have been left to the jury?

The second branch of the ruling, excluding the testimony, is more objectionable still, if possible, viz:—That we must prove an authority in Herman to make the representations, in order to make them admissible.

We had, as we supposed, laid the foundation for the introduction of Herman's declarations, by sufficient proof of his agency. Whether we had so done, was a question for the jury, which the Judge assumed to decide.

If the jury had found the agency, we might have shown such fraud, practiced upon the plaintiffs in procuring the receipt, as would have rendered it ineffectual for the defendants.

The instruction, as to the payment of the costs, is objectionable:—

1. Because it assumes, that the payment, if made, was within reasonable time.

2. The witness testified to his *thoughts* upon the matter. The testimony was objected to, but went to the jury.

3. The testimony, as to the practice which had obtained between the officer and the attorney, was inadmissible unless amounting to a *custom* of trade or of a profession, which in this case is not pretended. The rights of parties are to be

governed by law, not by any remissness in the attorney's mode of business.

The requested instruction should have been given. An officer being a legal minister, his acts are supposed to be done as official duties, not under any *implied* arrangements between himself and the attorney. The proof, therefore, in order to justify his acts, must show that he had an *express* authorization.

The instruction as to authorization and ratification of the officer's doing was calculated to mislead. It was uncalled for, since there were no facts from which an authorization or a ratification, either express or implied, could be found.

M. L. Appleton and *Drinkwater*, for the defendant.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The first question presented is, whether the declarations and representations of A. S. Herman were properly excluded.

There can be no doubt, as stated by the Judge, that they were not admissible "unless it could be shown, that the declarations and representations were made as agent of the defendant or by his authority."

It is insisted, that testimony had been already introduced, from which the jury might have inferred, that he acted as agent. It does not appear, that this position was taken at the trial, and presented to the consideration of the Court. Every position respecting the admissibility of testimony should be distinctly presented to the presiding Judge for decision, before it can be made the subject of exception.

If testimony, from which a jury might possibly infer, that one person had acted as the agent of another, of a character, that would not particularly attract attention, had been introduced, before the declarations of the person so acting were offered, the Court would perform its duty by stating correctly the rule of law applicable to it. If the counsel claimed to have the testimony admitted in accordance with the rule stat-

ed, he should have called the attention of the Court to the consideration of the testimony, which was alleged to be sufficient to render it admissible, that the very question now presented might have been before it for decision. To allow him to omit to do so, and after verdict to present such a position as error, would be to authorize a new trial not on account of an erroneous statement of the law, but on account of a want of perfect recollection at the time of every portion of the testimony already introduced.

It is however said, that the law was erroneously stated by the last clause of the sentence. The argument for this appears to be based upon the supposition, that the Judge not only required the agency of Herman to be proved, but that he was also specially authorized to make the representations, which are alleged to have been made by him. The rule was stated by the use of a disjunctive and not by an adjunctive particle, which would have been necessary to render this part of the argument applicable.

To prove that the officer was authorized to receive the costs due to the plaintiffs' attorney, testimony was offered, that the attorney had before and since permitted the officer to settle suits and to receive his costs. This being objected to, the Court restricted its introduction to transactions prior to the payment made in this case. The witness, in violation of the rule, appears to have stated his transactions since as well as before that time. His statements respecting subsequent transactions must have been known to be unauthorized testimony, and it must be presumed to have been so regarded by the counsel and by the jury. If any doubt respecting its effect upon the jury existed in the mind of the counsel, it might have been removed by a request for instructions, that it should be disregarded.

Complaint is made, that the instruction respecting payment of the costs "assumes, that the payment of costs, if made at all, is seasonable; made within a reasonable time." If the officer had become the agent of the attorney, to receive them, they were in contemplation of law received by the attorney.

After payment had been received without objection, it is too late to insist, that it was not made within a reasonable time, and the Court might well assume that the payment was liable to no such objection.

It is further insisted, that the instructions requested should have been given. When the plaintiffs settled their debt at their place of residence and gave a receipt in full for it, on condition that the costs incurred should be paid, the just inference is, that the intention of the parties was, that they should be paid to those who were entitled to them. There was therefore no occasion for "an express authority" from them or from their attorney. The officer's authority to collect them for their attorney might be inferred from their former course of conduct. *Exceptions overruled.*

Clay & *ux.* *versus* Wren.

The cases, in which a mortgagee of real estate may recover possession, before condition broken, are those in which there has not been any "agreement to the contrary."

Such an "agreement to the contrary" may arise by implication from the mortgage and the written instruments executed with it, and intended to carry the purposes of the parties into effect.

In a case, (submitted to the Court, with power to draw inferences of fact,) in which a mortgage, given to secure the price of a farm, was conditioned for the delivery, at the mortgagee's barn, of a specified quantity of hay in each year, for ten years, of an average quality with that cut on the farm, the Court will infer, that the hay was to be cut by the mortgager upon the farm, and that in order to do so, he was to retain possession, until a breach of the condition.

Where the condition of the mortgage was merely for the delivery of the hay, but a note was given by the mortgager to the mortgagee at the same time for the same quantity of hay, deliverable at the times and place specified in the mortgage, and also stating the quality and value of the hay, the Court will consider, that the mortgage was intended to secure that note, although no note be referred to in the mortgage.

Where upon such a note, the mortgager was charged as trustee of the mortgagee, and had delivered to the officer, holding the execution, the annual instalments of the hay, so far as they had become payable, — *Held,* that the condition of the mortgage had not been broken.

ON FACTS AGREED.

WRIT OF ENTRY.

The tenant purchased a farm of Clark Osgood, and gave him therefor a note for six tons of hay, yearly, for ten years, to be delivered at Osgood's barn, of the average quality cut on the farm, and valued at twelve dollars per ton. At the same time he gave Osgood a mortgage of the farm, conditioned for the delivery, at Osgood's barn, of six tons of hay, yearly, for ten years. The mortgage contained no reference to the note. The instalments of hay, due for the first two years, were duly delivered to Osgood. The defendant was then summoned, and he disclosed and was charged, as trustee to Osgood; and upon the executions, issued on that process, he had delivered, at his own barn, to the officer, all the other instalments of hay which had become payable, agreeing to haul it for the purchasers, a distance not exceeding that to Osgood's barn, which agreement he complied with. After the aforesaid proceedings had been had, Osgood assigned the mortgage to the female plaintiff, and this suit is brought by herself and husband, to obtain possession of the land by force of the mortgage. The case was submitted to the Court, with power to draw inferences of fact.

Hinckley, for the plaintiff.

1. A mortgagee may enter immediately, or have a writ of entry against the mortgager, unless there be an agreement between them to the contrary. In this case, there was no such agreement.

2. The condition of the mortgage had been broken by the neglect of the defendant to deliver the hay at the barn of Osgood, where it is reasonable to suppose it would have been more valuable than at the place where the officer sold it. *Jewett* v. *Bacon*, 6 Mass. 60.

The trustee process did not preclude Osgood from conveying a title to the plaintiffs. It only suspended his right of action, during its pendency. The action might have been defeated or settled without, in any way, effecting the mortgage.

The statute on foreign attachment, chap. 119, § 4, provides "that such service on the trustee, shall bind all goods, effects, or credits of the principal defendant, intrusted and deposited in his hands or possession, to respond the final judgment in the action in *like manner as goods or estate when attached by the ordinary process.*

An attachment does not deprive the debtor of the right to convey the property subject to it. *Nichols* v. *Prince*, 18 Maine, 231; *Blake* v. *Shaw*, 7 Mass. 505; *Fettyplace* v. *Leech*, 13 Pick. 388; *Arnold* v. *Brown*, 24 Pick. 89.

It does not appear that the note disclosed has any connection with the mortgage; it is not mentioned in it, and contains provisions different from those in the condition. It is not necessary that any note should accompany the mortgage. *Smith* v. *People's Bank*, 24 Maine, 185.

Drinkwater, for the defendant.

The opinion of the Court, Shepley, C. J., Wells, Rice and Appleton, J. J., was drawn up by

Shepley, C. J. — Clark Osgood appears to have been the owner of a farm and to have conveyed it to the tenant, receiving from him a contract to deliver yearly, for ten years, "six tons of good English hay," with a mortgage of the farm to secure its performance.

According to the agreed statement of facts, there has been no breach of the condition; for the mortgager was by virtue of a judgment, legally entered against him and the mortgagee, obliged to deliver part of the hay to another; and that duty he appears to have performed as perfectly as he could have done it.

By the provisions of the statute, chap. 125, § 2, the mortgagee may recover possession, before there has been any breach of the condition, "when there is no agreement to the contrary, but in such case, if the debt be afterwards paid or the mortgage redeemed, the amount of the clear rents and profits from the time of the entry shall be accounted for and deducted from the amount due on the mortgage." The agreement

named in the statute may be one arising by implication out of the written instruments executed at the time and necessary to carry their designs into effect.

If the mortgager were desirous of paying immediately the amount due and secured by the mortgage, it is not perceived, that he could legally do so. The holder of the mortgage would not be obliged to receive the hay before the times appointed. There might not be any satisfactory mode of ascertaining the quality of the hay to be delivered in future years, or the cost of it to the mortgager. The provision, that it is "to be valued at twelve dollars per ton," can only fix the price to be paid in case of neglect to perform. If the mortgager cannot redeem before the expiration of the time appointed, he must deliver the hay yearly, to prevent an entry for condition broken; and could not safely allow more than the amount to be delivered during the last three years, to remain undelivered, without being liable to incur a forfeiture of the estate. If the mortgagee or any irresponsible assignee might enter and receive the profits during the residue of the ten years, they might amount to a sum much larger than would be then due and secured by the mortgage, and they could not be deducted from the amount due upon the mortgage, according to the provisions of the statute; and if the persons receiving them should be unable to repay the balance, the loss would fall upon the mortgager.

Such results could not have been contemplated by the parties to the contract, or by the framers of the statute. To ascertain the intention of the parties, all the documents executed at the same time as parts of the same transaction may properly be considered together.

The contract does not in terms provide, that the hay to be delivered shall be part of that cut yearly upon the farm; but the provision, that it shall in quality be an average of that cut upon it, discloses the expectation of the parties. It is quite probable that neither the intentions of the parties, nor the provisions of the statute could be carried into effect in this case, if the mortgager should be deprived of the posses-

sion of the farm before condition broken. While there appears to be no obstacle to prevent all parties from obtaining their perfect rights by allowing their contracts to contain by implication an agreement, that the mortgager should retain possession, until there has been a breach of the condition. The cases cited by the counsel for the tenant fully authorize such an implication.

Demandants nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1852.

COUNTY OF LINCOLN.

POTTER *versus* CUNNINGHAM.

Under the lease of a farm and stock of cattle, with stipulation that the rent should consist of a specified part of the products, *except the hay*, which should go wholly to the use of the lessor; the hay belongs exclusively to him though never delivered.

ON FACTS AGREED.

TRESPASS against the sheriff for taking the plaintiff's hay.

The plaintiff let a farm and stock of cattle to one Webber. The rent was to consist of a specified part of the products, (as more particularly stated in the opinion of the Court,) *except the hay*, "all of which was to be used on the farm for the stock." The lessee conducted the farm according to the lease, and fed out the hay to the cattle, until the 23d day of January, when a deputy of the defendant took the residue,

(ten tons,) upon an execution against the lessee. This suit is brought to recover damage for that taking.

Tallman and *Booker*, for the plaintiff.

Gilbert, for the defendant.

Webber having the use of the farm, its annual crops and every thing proceeding from the farm, that might be lawfully severed by him, vested in him with the use ; and, after being severed from the land, became personal property residing in him, until it should be delivered to another, by virtue of some contract. The hay, then, while in existence, was his property, remaining in his sole possession. And the fact that he had promised Potter to use it in a particular manner, could not divest the rights of creditors or purchasers. The failure to perform may subject him to an action by the landlord, but cannot affect the rights of third persons.

Several cases have been decided upon these principles. That of *Turner* v. *Bachelder*, 17 Maine, 257, is in point. There is no possible distinction between that case and this.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD, RICE and APPLETON, J. J., was drawn up by

RICE, J. — The contract between the plaintiff and Webber seems to have been very loose and inartificial in its terms. An examination of all its provisions and stipulations will however disclose the intention of the parties thereto with reasonable certainty. The question to be determined is, in whom was the title to the hay at the time it was attached?

By the terms of the contract, the plaintiff was to stock the farm with a yoke of oxen, and with cows and sheep. Webber was to carry on the farm, and to keep this stock of cattle and sheep thereon, feeding them with the hay which it produced, and render to the plaintiff for the rent of the farm, one half of the wool, one half of the lambs that should come of the sheep, and one half of the productions of the cows and of the crops, except the hay produced on the farm, all of which was to be used on the farm for the stock.

It would seem to have been the intention of the parties to reserve to the plaintiff the hay produced on the farm for the use of his stock, and that Webber should render a personal service to him in feeding out the hay, having no other interest therein, than what he might be incidentally benefited by the increase of the stock. That this is the true construction of the contract is rendered more certain from the language used by the parties when speaking of the *rent* of the farm. After providing that Webber should feed the plaintiff's stock with the hay produced on the farm, they proceed to stipulate that he (Webber) shall "*render to the plaintiff for* the rent of the farm," &c., clearly showing that the possession of the crops and productions of the farm, except the hay, were to be in Webber, and that he was to *render* one half thereof for rent, while as to the hay he was simply to feed it out to stock of the plaintiff's, having no other control over it.

This construction is entirely consistent with the situation of the parties and the nature of the contract between them, which would seem to be rather a special agreement for carrying on the farm, than a lease in the technical sense of the term.

This case is distinguishable from *Turner* v. *Bachelder*, 17 Maine, 257, cited by plaintiff. In that case there was a lease for a term of five years. The lease provided that the lessor should "furnish four cows, one horse, and other stock sufficient to eat up all the hay that should grow on said farm," but contained no stipulation, like that in the case at bar, that the hay produced should be used on the farm for the stock of the lessor.

The case at bar more nearly resembles the case of *Lewis* v. *Lyman*, 22 Pick. 438, in which the lease contained a provision "that the hay and fodder should be fed out on the farm," the stock on the farm being the property of the lessor. The Court in that case held that the hay was not liable to attachment by the creditors of the tenant. We are therefore of the opinion that Webber had no attachable interest in the hay.

According to the agreement of the parties a default must be entered with damages to be assessed by a jury.

THOMPSON *versus* WILEY.

The defendant, under a plea of discharge in bankruptcy, may give in evidence the discharge, without having proved the regularity of the proceedings in the court of bankruptcy.

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

DEBT ON JUDGMENT.

The defendant pleaded *nul tiel* record, with a brief statement of his discharge in bankruptcy. The plaintiff filed a counter brief statement. The defendant's brief statement was objected to, and was amended. In the amended form, as the case shows, it "sets forth more particularly all the proceedings on the defendant's petition for the benefit of the bankrupt act, alleging that the debt sued for was due prior to the filing of said petition on April 2, 1842, and stating, among other things, *that* it was proveable in bankruptcy, *that* it was not created by default in any office, nor incurred in any fiduciary capacity, and *that*, at the time of the filing his said petition and of the said decree of discharge, he resided in said Maine District.

Under this brief statement, the defendant offered in evidence his bankruptcy discharge, which was in the usual form. The plaintiff objected to its introduction, and the Judge sustained the objection, and ruled, that the discharge was inadmissible, until the defendant should show, that it was duly granted by producing a copy of the record of the petitions, papers and proceedings in the bankruptcy court.

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

After the exceptions were entered, the plaintiff in this Court, filed a motion, setting forth, that upon the writ in this suit, an attachment of the defendant's land was made prior to his petition in bankruptcy; that such attachment constituted

a lien or security upon the land, which was not defeated or impaired by the bankrupt law; and, therefore praying the Court to adjudicate upon the plea of *nul tiel* record, and, if judgment should be thereon rendered for the plaintiff, to order a special execution running against the land attached. And, in support of the motion, the plaintiff offered the appropriate proof that such attachment had been made.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was delivered by

HOWARD, J., orally. — The fourth section of the bankrupt law provides that, in a case like this, the discharge certificate shall operate as a complete bar, and be, *of itself*, conclusive. It is not necessary to prove the proceedings had in the court of bankruptcy, preliminary to its decree granting the discharge. *Exceptions sustained.*

The motion, filed by the plaintiff, that judgment may be rendered on inspection of the record under the plea of *nul tiel record*, and that, if in favor of the plaintiff, an execution may be awarded, running against the land, cannot *now* be granted. Further opportunity of being heard must be furnished to the other party. *Motion dismissed.*

Ruggles and *Gould*, for the defendant.

Harding, for the plaintiff.

MURPHY, *complainant, versus* GLIDDEN.

Where one offered as a witness, would be inadmissible upon proof of an alleged fact, and evidence was introduced for the purpose of proving that fact, and the Judge excluded the witness, it not being stated, in the case, whether he considered the fact to have been proved or not; exceptions, reciting the evidence, impose upon this Court the duty of deciding the question of fact, and of adjudging thereupon whether the exclusion of the witness was or was not rightful.

ON EXCEPTIONS from the District Court, RICE, J.

COMPLAINT under the R. S. chap. 131, for the maintenance

of bastard children. The complainant was offered, by her counsel, as a witness to prove the accusation she had made before the magistrate, charging the respondent as the father of her child. She was objected to on the alleged ground, that she had been inconstant in the accusation.

There was much testimony offered to the Court, upon that question. It is all recited in the exceptions. The complainant's counsel then contended, in view of the testimony, that she was by law a competent witness, and that no cause of legal exclusion had been proved. The Judge excluded the witness, and, on motion of respondent's counsel, directed a nonsuit. The complainant excepted.

Lowell, for the complainant.

M. H. Smith, for the respondent.

The competency of the complainant as a witness is preliminary, and to be determined by the Court.

The Judge was satisfied that she had not continued constant, and he had a right to decide this *fact*. *Bradford* v. *Paul*, 18 Maine, 30; see also *McManagil* v. *Ross*, 20 Pick. 99.

It is only where a party is aggrieved by any opinion, direction or judgment of the District Court in *matter of law*, in a case not otherwise appealable, that he can allege exceptions. R. S. chap. 97, § 18. The *facts* cannot be revised on exceptions. *Fletcher* v. *Clarke*, 29 Maine, 485.

The ascertainment of *facts*, within the province of the Judge, is not open to exceptions. *Page* v. *Smith*, 25 Maine, 256.

If it were competent for this Court to entertain these exceptions, and go into a consideration of the matter of fact, they could, under the testimony, come to no other conclusion, than that the complainant was incompetent to be a witness.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was delivered by

TENNEY, J., orally. — It is urged, by the respondent's counsel, that exceptions do not lie to the decision of the Judge

upon a question of fact. As to that position, we have no occasion to express an opinion. For it does not appear what decision he made upon the question of fact, or that he made any.

The fact of the complainant's constancy or inconstancy to the accusation against the respondent not appearing to have been decided, we are left to an examination of the evidence. The burden of proving the inconstancy is upon the respondent, and we think the evidence does not satisfactorily prove it. *Exceptions sustained.*

KENDALL & *al.* *versus* FOLSOM, *administrator.*

The Act of 1850, chap. 159, amendatory of R. S. chap. 125, giving liens upon buildings, was prospective only in its operation. The enlargement which it gave to the rights of lien creditors cannot aid a plaintiff, who, prior to its passage, had attached to secure his lien.

ON FACTS AGREED.

ASSUMPSIT, to recover for materials furnished in June, 1849, to the defendant's intestate, for the building of a chain factory on land, leased to the intestate by a third person.

The factory building was attached to secure the lien, allowed by law, and within the ninety days prescribed by law.

The estate was decreed insolvent, and the administrator sold the factory for the payment of debts by order of the Probate Court in Dec. 1849.

Tallman, for the plaintiffs.

A lien was given by R. S. chap. 125. It was, however, decided in 28 Maine, 511, *Severance* v. *Hammett*, that the lien preference is vacated by the death and represented insolvency of the debtor. But by the Act of 1850, chap. 159, the lien was made to subsist, notwithstanding such death and insolvency. This statute being in addition to the former Act, had a retrospective effect, and gave validity to the lien claimed by the plaintiff. It merely remedied an admitted defect, and

reached back so as to perfect the law from the passage of the first Act.

By the Court, Shepley, C. J., Tenney, Howard and Appleton, J. J. —

The Act of 1850, could only act prospectively. It cannot enlarge or aid the lien rights of the plaintiffs, which had accrued prior to its passage. *Plaintiffs nonsuit.*

Merrill, for the defendant.

Shaw & *al. versus* Keep.

An action upon a bond, brought in the name of the joint obligees, by an assignee of one of them, may be discharged by the other.

On Exceptions from *Nisi Prius*, Shepley, C. J. presiding.

The opinion of the Court, Tenney, Howard, Rice and Appleton, J. J., was delivered by

Howard, J., orally. — This case comes by appeal from the District Court, where the plaintiffs, Shaw & Slocum, obtained a verdict.

The defendant now moves that a nonsuit, without costs, be entered, and introduces an agreement, signed by Slocum, that such shall be the disposition of the suit.

The attorneys, by whose agency the verdict was recovered, object to that course, and offer to prove, *that* they are the attorneys of Kidder & Co. to whom Shaw had assigned his interest in the bond; that Shaw was the only person damnified by the breach of the bond; *that* they, the counsel, have expended a large sum in fees and disbursements, and have made full preparation for a trial in this Court; and *that* in the arrangement between Slocum and the defendant, there was collusion to defraud Kidder & Co., and also the counsel.

The Judge, however, ordered a nonsuit, and Kidder & Co. filed exceptions.

But it appears that the assignees, who claim protection, were but part owners of the bond. Slocum always retained his right in it, as a joint obligee, and that right authorized him to discharge the suit. *Exceptions overruled.*

Porter and *Smith*, for the assignees.

Tallman, for the defendant.

Moody *versus* Hinkley.

A declaration charging a trespass upon the plaintiff's close is bad, *on general demurrer*, if it do not describe the close or allege the venue.

To the decisions of a Judge, in matters of discretion, exceptions do not lie.

On Exceptions from the *District Court*, Rice, J.

The opinion of the Court, Shepley, C. J., Tenney, Howard and Appleton, J. J., was delivered by

Appleton, J., orally.—This is an action of trespass on the case. The declaration alleges, that the defendant's cattle broke into the plaintiff's close, and destroyed his growing crops, but it does not describe the close or specify any venue. A general demurrer was filed and joined. The Judge at the trial ruled, that the demurrer was well taken. The plaintiff then moved for leave to amend by describing the close and inserting a venue. The motion was refused. To that refusal and to the ruling upon the demurrer, the plaintiff excepted.

It has been argued before us that the declaration is sufficient, but we think otherwise.

The refusal to grant the motion was at discretion. To the decisions of a Judge in matters of discretion, exceptions do not lie. *Exceptions overruled.*

Ruggles and *Gould*, for the plaintiff.

Lowell and *Foster*, for the defendant.

RAWSON, *petitioner*, *versus* LOWELL.

A levy of an undivided part of the interest which the execution debtor held in a tract of land jointly with others, is void, unless it specify what the interest was, which the debtor held.

THE executor of John Lowell, in 1849, presented an administration account in the Probate office, and the Judge of Probate decreed its allowance, and thereupon granted a license to sell real estate for the payment of debts. Under that license, the executor conveyed land, in which the petitioner claims an interest, derived under one of the heirs of said John Lowell.

The petitioner represents that he was aggrieved by the decree allowing the administration account, and that his omission to appeal from it arose from a want of knowledge of any probate proceedings in the case, wherefore he prayed this Court now to allow an appeal, under the provisions of R. S. chap. 105, § 30 and 31.

In support of the petition, he introduced evidence tending to prove that it was from want of notice and without fault on his part that he lost the opportunity of appealing in season.

In order to show that he was "aggrieved" by the decree, he proved the following facts: —

John Lowell, by his will, devised land jointly to John C. Lowell and Truxton Lowell. Prior to the allowance of the administration account, this petitioner had set off to himself on execution, four-fifths of all the interest which Truxton held in the land "jointly with John C. Lowell and others."

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD, RICE, and APPLETON, J. J., was delivered by

HOWARD, J., orally. — There is a fatal objection to the granting of the petition. The right of appeal is allowed only to persons "aggrieved." The evidence does not show that the petitioner was "aggrieved."

The levy under which he claims an interest in the estate was

merely void. It was of a fractional part of the estate, which Truxton held "jointly with John C. Lowell and others." What part of the estate Truxton held, whether one-fourth or one-half or two-thirds is not stated in the levy. The levy of a fractional part of an uncertain estate in land is not sustainable.

The petitioner took nothing by his levy. He had no interest in the land; nor does it appear that he had any claims against the estate of John Lowell. He therefore could not be a party aggrieved by the decree complained of.

Petition dismissed.

Gilbert, for the petitioners.

Porter and *Smith*, for the respondent.

Brunswick Bank *versus* Sewall, and Owen, *as his trustee.*

One, having a lien upon goods with power to sell, and being, *before they came to his actual possession*, summoned as trustee of the general owner, (the right to take possession having been postponed for a limited period by the lien contract,) will be charged as trustee, if he afterwards take and sell the goods, at a price more than enough to discharge his lien.

Neither will he be discharged by the fact that he took negotiable notes for the goods, and held the same unpaid at the time of his disclosure.

A placed goods in the hands of his creditor, B, as collateral security, with power to sell, the surplus avails to be accounted for to A, who then, for the purpose of securing C, a second creditor, in the sum of seventy-five dollars, gave to C a draft upon B for the surplus. B accepted the draft, and was immediately afterwards summoned as trustee in this suit. He afterwards sold the property and found the surplus to be $243,33. He paid the seventy-five dollars to C, who for the benefit of A, the drawer, assigned the balance due on the draft to a third creditor. This third creditor drew an order upon B, for $125, "to be paid out of the avails of the sale." B, accepted this order, "to pay when in funds;" —

Held, that, upon the payment of the seventy-five dollars to the second creditor, the draft had fulfilled its office, and ceased to have vitality; and *that* B was chargeable, as trustee, without the right of deducting for his acceptance of the $125 order.

On Exceptions from *Nisi Prius*, Howard J. presiding.

The question is upon the liability of Owen to be adjudged

trustee. From his disclosure and from a deposition given by the principal defendant, the following appear to be the material facts: —

The defendant mortgaged a stock of goods to Joseph Sewall, reserving the right to continue in possession for a limited period. Joseph Sewall assigned the mortgage to Owen, to whom also the defendant transferred his right, (reserving the privilege of making retail sales, for a period not beyond the 10th of March,) upon a stipulation that Owen, after selling the goods and deducting for his own claims, should pay the surplus proceeds of the sale to the defendant, who thereupon drew his draft upon Owen, directing the surplus to be paid to one Russell. Owen accepted the draft on the 1st of March, and was afterwards on the same day summoned as trustee in this suit.

He took no possession of the goods until the 10th of March, when he sold them at auction, taking notes therefor payable to the order of the makers and by them indorsed. These notes exceeded Owen's claims by $243,33.

The draft in favor of Russell was made in order to secure to him a debt of $75, due from the defendant.

That debt was paid by Owen after the sale, and its amount was indorsed on the draft, which was thereupon assigned for the benefit of the defendant by Russell to Frederick D. Sewall, to whom Owen afterwards, on account of it paid $25. Frederick D. Sewall, thus holding the draft as assignee, drew his order upon Owen to pay one Porter $125, "out of the avails of the goods," which Owen "accepted to pay when in funds."

The plaintiffs cited Russell and F. D. Sewall to support their claims under the draft. They did not personally appear, but Porter, as an attorney at law, entered an appearance for them, and offered reasons why the claim under the Russell draft should be sustained. They, however, afterwards filed in the case a denial of Porter's authority to appear for them. Upon these facts, Owen was charged as trustee, and it was ruled, that he was not entitled to deduct for the order

accepted by him in favor of Porter. To this ruling he excepted.

Porter and *Smith*, for the trustee.

1. At the time of being summoned as trustee, Owen was merely a mortgagee, *not in possession*, and having no *present right* of possession. He, therefore, was not liable to this process. 11 Shep. 131, 555; 5 Pick. 31; 18 Pick. 396; 6 Shep. 132.

Had Owen been in possession, he might, on a decree of the Court, after payment, have turned out the goods. R. S. chap. 119, § 58. But, not being in possession, he had no such right.

2. The only property in Owen's hands, at the time of the disclosure, was in negotiable notes, not guarantied by him. A depositary of choses in action cannot be held as trustee. 3 Pick. 65; 32 Maine, 33.

3. The order, drawn upon Owen in favor of Porter, by F. D. Sewall, the assignee of the Russell draft, was made payable out of the avails of the goods. It was accepted by Owen, and that fact was stated in his disclosure. This constituted an assignment to Porter of the balance due upon the original draft. As such assignee, Porter had a right to appear in Court for Russell and F. D. Sewall. They were his assignors, and had no right, (either by neglecting to appear, or by resisting the appearance of their assignee,) to defeat Porter's claim.

He had the right, as assignee, to use their names.

Porter ought to have been cited in, as assignee, to protect his rights. That not having been done, those rights will now be protected by the Court.

The opinion of the Court, SHEPLEY, C. J., TENNEY, RICE and APPLETON, J. J., was delivered by

RICE, J., orally. — The trustee objects to the adjudication of the Court because the property in his hands is now in the form of negotiable securities. This objection cannot prevail. The property at the time of the service of the writ on him

was in specific articles, goods, which he has voluntarily converted into the securities now in his possession. These securities are to be treated as cash in his hands, for which he is clearly chargeable, unless the assignees have established their title to the fund. But when duly notified to come into Court and protect their interest, the assignees refused to appear, and disclaimed the authority of Porter who had appeared in their behalf. If the appearance of Porter was authorized, as he protests it was, still the assignees show no title to the property in the hands of the trustee, as it appears from the case that the Russell draft, under which they have title, if at all, was paid by the trustee, from the proceeds of the goods in his hands, before it was transferred by Russell to them. It was therefore of no validity. *Exceptions overruled.* — *Judgment affirmed.*

Barrows, for the plaintiffs.

Reed *versus* Bachelder *&* *al.*

A part owner of a vessel, who pays money to discharge liens for the expenses of building her, has no right to contribution from the other part owners, if the liens arose wholly from the delinquency of his vendor to pay his proportion of the building expenses.

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

Assumpsit.

The defendants and one Todd agreed with each other in writing that they would build a ship, Todd to build and own two quarters, and the defendants the other two. Todd was to make the necessary purchases and superintend the building, for which he was to be allowed $400. Two or three months after the making of that contract the plaintiff, by consent of Todd and of the defendants, undertook to build and own one of Todd's quarters. While the ship was in building, Todd, from time to time, induced the plaintiff to make advances of money to him, and for security mortgaged his remaining quarter of the ship. A few days before the ship was launched,

he concluded to sell that quarter to the plaintiff, who purchased and paid him for it.

The whole cost was afterwards ascertained by persons mutually chosen for the purpose, and it was found *that* the defendants had fully paid the expenses of their half; *that* the plaintiff had fully paid the expenses of his first quarter; *that* Todd was deficient upon his quarter nearly $4000; and *that* the outstanding bills constituted liens upon the ship to that amount. The plaintiff, in order to relieve the ship, paid those liens, and brings this suit to recover back two thirds of the amount.

The Chief Justice was of opinion, that the action could not be supported, and the plaintiff submitted to a nonsuit, subject to the opinion of the full Court.

The opinion of the Court, TENNEY, HOWARD, RICE and APPLETON, J. J., was delivered by

TENNEY, J., orally. — The defendants paid their proportion. By means of discharging the liens, and of moneys paid to Todd, the plaintiff has expended much more than his half. But he did not pay it for the defendants. The plaintiff and the defendants were not sureties for each other, nor even co-contractors. The liens resulted from Todd's delinquency. The moneys paid by the plaintiff upon the liens, are to be viewed as if placed by him in Todd's hands to discharge those liens. They were advanced, not to the defendants, but to Todd.

But if they could be considered as advanced, for the defendants, there would be no right in the plaintiff to recover. For the defendants were not bound to discharge the liens, and no person could impose such an obligation upon them. They had a right to abandon the ship in preference to paying the liens. That right the plaintiff could not take from them.

Nonsuit confirmed.

Merrill and *Tallman*, for the plaintiff.

Porter and *Smith*, and *Gilbert*, for the defendants.

Moore *versus* Thompson.

In an action appealed from the District Court, the plaintiff, if he recover in this Court more than twenty dollars, as damage, is entitled to full cost in the District Court, although the verdict there in his favor was for less than twenty dollars.

On Exceptions from *Nisi Prius*, Howard, J. presiding.

The opinion of the Court, Shepley, C. J., Tenney, Rice and Appleton, J. J., was drawn up by

Rice, J. — This action was commenced in the District Court, where a trial was had and a verdict obtained by the plaintiff for $17,07. From this verdict the plaintiff appealed to this Court, in which, on trial, he obtained a verdict for $58,96, damages. On rendition of judgment, the plaintiff claimed full costs in the District Court, which was resisted by defendant. The presiding Judge ruled, that the plaintiff was by law entitled to tax and recover full costs in the District Court before his appeal. To that ruling the defendant excepts.

Section 13 of chap. 151, R. S., provides, "If in any action originally brought before the Supreme Judicial Court or any District Court, it shall appear, on the rendition of judgment, that the action should have been originally brought before a justice of the peace or the judge of any municipal or police court, the plaintiff shall not be entitled to recover for costs more than one quarter of the amount of the debt or damage so recovered."

It is contended by the defendant, that it is the judgment of the District Court which should determine whether the action was originally brought before the proper tribunal, at least so far as the costs in that Court are involved. Parties may properly litigate their rights to the highest tribunal open to them by law, and those rights cannot with propriety be said to appear or be determined, until settled by the judgment of a Court of last resort, or until the parties have submitted to the judgment of an inferior tribunal. This action

was appealable from the District Court to the Supreme Judicial Court. It was only when judgment was obtained in the latter Court, which is presumed to be less liable to error than those of a subordinate character, that it did incontestably appear before what tribunal the action should have been originally commenced.

We think the adjudication was correct. The exceptions are therefore overruled, and judgment affirmed.

Ruggles, for the defendant.

May, for the plaintiff.

KNIGHT *versus* NICHOLS.

A conveyance of chattels, *if unconditional in its form*, need not be recorded, although intended merely for security, and although the chattels are permitted to remain in possession of the vendor, and the debt thereby secured is of more than thirty dollars.

Whether the adoption of that form, would be indicative of a fraudulent intent, as against creditors of the vendor, would be for the consideration of the jury.

A deposition is not to be rejected, merely because its caption omits to state at whose request it was taken.

The caption of a deposition sufficiently states the cause in which it is to be used, if it name the parties and the Court in which the trial is to be had.

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

The opinion of the Court, TENNEY, HOWARD, RICE and APPLETON, J. J., was drawn up by

APPLETON, J. — This was an action of replevin, in which the plaintiff claimed title under one Bailey, by virtue of a bill of sale of the articles replevied.

The defendant, a deputy sheriff, justified the taking of the same, under a writ of attachment against said Bailey, as whose property he had seized them.

The plaintiff's bill of sale was accompanied by a delivery of the articles included in it, and was prior in time to the defendant's attachment. There was evidence tending

to show that the plaintiff's bill of sale was given him as security for a debt due from Bailey to him, and the Court was requested to instruct the jury that if the bill of sale was given as security for a prior debt, that in such case the conveyance, though not in form, yet in fact, would be a mortgage, and should be recorded. This request was declined and the jury were instructed that the bill of sale being absolute, need not be recorded to become effectual against the attachment, if the transaction was in good faith. To this instruction the plaintiff excepted. Of the correctness of this instruction there can be no doubt. Bills of sale are not required to be recorded. Mortgages of personal property are alone within the provisions of R. S. chap. 125, § 32. Bills of sale, for whatever purposes intended, yet if not mortgages in form, need not be recorded. Whether the adoption of this course might or might not be considered indicative of fraud, would be a question properly to be submitted to a jury. Indebtedness, and an intention to secure merely, would not be a sufficient consideration for an absolute bill of sale, when the debt remained outstanding and the vendee was under no obligation to pay it. Whether the transaction would constitute an equitable mortgage, which upon proper proof a Court of equity might enforce as between the parties, it is not now necessary to consider or determine. But however that might be, it would afford no reason why the bill of sale should be recorded. It would not for that cause be within the statute, the object of which was to protect the respective rights of mortgager and mortgagee and to give notice to the public, so that a creditor, seeking to enforce his rights, might know where and to whom to apply for the purpose of ascertaining such facts as he might deem necessary for the prudent enforcement of his claims. The first exception is therefore overruled. A deposition offered by the defendant was excluded, and exception was taken to that exclusion. It is insisted that this deposition was inadmissible, because it did not state in the caption at whose request it had been taken. But in R. S. chap. 133, § 17, the facts required to be stated therein are specifically set forth and

this is not among those statutory requirements, and we have neither the power nor the inclination to increase their number.

It is further urged that this caption is insufficient, because it does not state the cause in which the deposition is to be used. The construction of this provision of the statute has been fully considered in *Scott* v. *Perkins*, 28 Maine, 33, and in that case it was determined that it was a sufficient compliance with its requirements to state the names of the parties to the cause and the Court in which the same is to be tried. This construction has been acted upon by the profession, interferes with no rights of parties, is liberal in its character, and no sufficient reason is perceived requiring its reconsideration. It is therefore no longer an open question. As the deposition was admissible according to the principles of the case just referred to, this exception must be sustained, and a new trial granted.

Merrill, for the defendant.

Bronson, for the plaintiff.

COUNTY OF WALDO.

STATE *versus* MCNALLY *&* *al.*

That a person was a public officer, may be shown, in a suit to which he is not a party, by proof that he had been in the practice of acting as such an officer, and he is competent, as a witness, to prove such a practice.

A warrant issued by one as a justice of the peace, purporting to be founded on a complaint sworn to before him, furnishes of itself a legal presumption of his authority.

In a criminal trial, the complainant is not compellable to state, as a witness, the reason which induced him to believe the charge made in the complaint.

A precept or process, though voidable for irregularity or mistake, is a protection to the officer who serves it, if the magistrate, by whom it was issued, had jurisdiction of the subject matter.

A warrant, which the statute authorizes "any sheriff, city marshal or deputy" to serve, may be executed by a deputy of the sheriff, as well as by a deputy of the marshal.

It is not necessary that a magistrate's warrant, issued upon a penal statute, should be under seal, unless the statute expressly require it.

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

INDICTMENT of five counts. It charged substantially a conspiracy to prevent by force the execution of a legal warrant, which it recites at full length.

The warrant had upon it a small piece of paper annexed by a wafer, and was directed to the sheriff or his deputy or the constable of Frankfort. So far as material here, it was as follows: —

"Whereas, (naming six persons,) all being voters in said town of Frankfort, on oath complained to me, that they had reason to believe and did believe that Captain Sanford of the steamer Boston, against the peace, and contrary to the form of the statute in such case made and provided, *then had and kept spirituous and intoxicating liquors intended for sale, deposited in said steamer Boston, situated in Frankfort aforesaid, occupied by him, said Sanford, said Sanford not being appointed as agent thereof to sell therein spirits, wines or other intoxicating liquors, whereby said liquors may have become forfeited to be destroyed, and that said Sanford has forfeited, &c.*, and prayed that due process might issue to search there for the same.

"Therefore in the name of the State of Maine you are required to enter the steamer Boston and search there for the same, *and if* SUCH *liquors be found therein to seize and safely to keep the same* in some proper place of security until final action and decision be had on said complaint, and that you summon said Sanford forthwith to appear at a Court to be holden at my office in Frankfort, *at such time as you may appoint*, to show cause if any he have, &c.

"Archibald Jones, Justice of the Peace."

The government offered evidence tending to prove that Miles Staples, being a deputy of the sheriff of the county

of Waldo, and having in his possession for service the paper purporting to be a warrant, set forth in the indictment, went on board the steamer Boston, then lying at Frankfort in said county, of which steamer McNally was mate, and Taylor agent, and claimed a right, by virtue of said paper, to search for spirituous and intoxicating liquors, as there directed, and was permitted by Taylor and McNally so to do.

That Staples proceeded to search for liquors on the main deck of the steamer, and found there some ten or twelve casks of spirituous liquors, which he marked with chalk with the word "seized." That he afterwards ordered McNally and Taylor, after he had read his precept in their hearing, to assist him in removing said casks from the steamer, that they refused, and ordered him to leave the boat. That Staples then called to others to come on board and aid him in removing the casks, and immediately a forcible resistance was begun by McNally and Taylor and the crew of the steamer, and Staples and another acting under him, were assaulted and beaten, and were prevented from removing the casks. There was other evidence, tending to prove the conspiracy as against these two defendants.

The government also called as a witness, for the purpose of proving the alleged conspiracy, one John Adams, who testified that he, acting as a constable of Frankfort, and having in his possession a warrant, about three hours after the arrival of the steamer at Frankfort, went on board of her and by virtue of said warrant made search for intoxicating liquors on the main deck, and there found several casks which he seized as containing such liquors, that he was prevented from removing them by the threats of Taylor and the hostile attitude of McNally and the crew.

The defendants objected to Adams being allowed to testify to his acts as a constable, until it was proved by competent evidence that he was legally authorized as such. They objected also to the competency of Adams as a witness to prove his own authority, there being no other evidence upon that point. But the Court overruled the objection.

The only evidence offered to show that Jones, when he signed said paper, had legal authority so to do, was the testimony of Jones that he acted as a justice of the peace, and was such. The defendants objected to the admissibility and to the competency of that testimony, but the Court overruled the objection.

The defendants introduced evidence, tending to show that said casks, which Adams and Staples attempted to remove, were brought from Boston on freight in said steamer on her last trip, and had not been landed; and Staples on cross-examination testified that he so understood it, and offered to pay the freight at the time he attempted to remove them.

The defendants also proposed to inquire of Wm. L. Chase, a witness produced by government and one of the complainants in the complaint, "what reason he had for believing at the time he made the complaint, that the charges therein were true." — The County Attorney objected to the inquiry and the Court ruled that the witness was not bound to answer, but might if he chose, or he might decline if he chose, and the witness refused to answer.

The same interrogatories were put to R. B. Curtis, another of the complainants, who was also a witness for the government, who said he had no objection to answer, but the County Attorney objected, and the Court excluded the evidence.

The defendants' counsel then asked the witness whether the complaint was not made with reference to, and for the purpose of seizing liquors, which had been put on board the steamer at Boston, and brought on freight? The County Attorney objected, and the Court ruled that he might answer or decline as he chose, and the witness declined to answer.

It appears that the steamer was a regular licensed coaster plying between Boston and Bangor; and that she arrived at Frankfort on her way to Bangor, and was prevented by the ice from proceeding to Bangor, and the captain was intending to return to Boston on the next day.

It was contended on behalf of the defendants that the acts,

which they were charged with conspiring to do, were not illegal, but were a lawful and necessary defence of property, committed to their charge as common carriers; and that proceedings for the purpose of seizing the liquors, were unauthorized by law, and that the attempt to remove the same was illegal, because: —

1. So much of the Act of 1851, entitled "An Act for the suppression of drinking houses and tippling shops," as is relied on as authority for any of the said proceedings, is unconstitutional and void.

2. And, if constitutional, said Act does not authorize the proceedings set forth in the indictment, nor the proceedings of Staples on board the steamer.

3. The Act did not authorize the seizure of liquors *in transitu* or on freight.

4. The Act does not empower a deputy sheriff to serve warrants for the search and seizure of liquors.

5. The warrant set forth did not command or authorize any one to search for or seize on board the steamer any liquors, which were there on freight.

6. The warrant was not in accordance with the requirement of the Act nor according to law.

7. The warrant was illegal and void, in that it commanded the officer to appoint such time as he might choose for a hearing upon the complaint.

8. The warrant was not, and did not purport to be, under the seal of said Jones.

The defendants requested the Court to instruct the jury that for each of the said eight reasons, the attempt to remove the liquor from the steamer was illegal; and that, therefore, the indictment could not be maintained. The Court declined to give the instructions as requested, but instructed the jury that, if any of the defendants entered into a conspiracy together, or with other persons, not named in the indictment, to resist Staples in the execution of the warrant, they were to be found guilty.

The jury returned a verdict against McNally and Taylor, and they excepted.

Rowe & Bartlett, for the defendants.

The eleventh section of the Act of 1851, "for the suppression of drinking houses and tippling shops," is unconstitutional.

It makes the issuing of search warrants a ministerial, instead of a judicial act; and permits them to be issued without probable cause, in violation of Article 1, § 5, of the Bill of Rights.

At common law, "search warrants are judicial acts, and must be granted upon examination of the facts." 4 Burns' Just. 104, Search-warrant; 4 Burns' Just. 329, Warrant; Chitty's Criminal Law, [*65.]

The constitution, in the article referred to, recognizes and confirms this view, when it requires the existence of probable cause, as a condition precedent to the issuing of them. Probable cause is a judicial inference from certain facts legally proved. Whether it exists, is a matter of judicial inquiry. 2 Greenl. Ev. § 454; Chitty's Crim. Law, [*33;] *Rex* v. *Baker*, Strange, 316.

This statute requires the magistrate to issue his warrant without making such inquiry. Its language is imperative, — "shall issue" on complaint of three voters, &c. By the constitution and by the common law, a search warrant must be founded on the judgment of a magistrate. By this Act, it is founded on the opinion of the prosecutors, without, and, it may be, even in opposition to, the judgment of the magistrate who issues it.

It authorizes the issuing of warrants to seize, without special designation of the thing to be seized. *Sanford* v. *Nichols*, 13 Mass. 287.

It requires a seizure and removal of liquors, lawfully kept for lawful purposes, and against which there is no complaint, if they happen to be found in the same building with suspected liquors; of liquors belonging to one man, on complaint against liquors belonging to another; an unreasonable seizure.

It requires the seizure and removal of liquors which are not liable to forfeiture, even when kept with intent to sell; of liquors of foreign manufacture, in the original packages in which they were lawfully imported, which are expressly excepted by the Act itself from forfeiture or destruction; an unnecessary, useless and vexatious seizure.

In violation of the first clause of the constitution, it authorizes the taking of property from the possession of the owner, by the officers of the law, under the color of process, and then declares it (section 16,) to be out of the protection of the law; forbids redress for its conversion or wanton destruction; and makes no provision for its restoration, even if the owner shall be adjudged entitled to it.

It authorizes the seizure, condemnation and destruction of property by a judgment of Court, without notice to the owner. It imposes upon the ministerial officer, to whom the warrant is committed for service, the judicial duty of inquiring and deciding who is the owner of the property seized; and if such officer decides wrongly and summons the wrong party, and the liquor, in consequence thereof, shall be condemned in default, the owner is without remedy.

It authorizes a conviction and punishment upon a criminal prosecution, without any trial, or even notice to the party to be affected, and without accusation. Whether liquors are liable to destruction under this Act, depends, not on the character or description of the liquors, nor on the place or the manner, in which they are kept, nor on any thing that has previously been done with them, but solely on the intent with which the owner keeps them. Their forfeiture is part of the penalty which the law imposes upon the criminal intent of the owner. Before he can be convicted of such intent, he has a right to a trial; before he can be punished, he must, at least, be accused.

This whole provision for the seizure is senseless. If the owner appears, no judgment of condemnation can be rendered of any liquors over five gallons in quantity, without his consent; for the Act provides (section 13,) that on conviction by

the jury, after an appeal, the appellant shall be adjudged a common seller and be subject to punishment as such. Such judgment cannot be rendered, for it imposes a penalty upon the exercise of the constitutional right of appeal to a jury. No other judgment can be rendered, for the offence, process and proceedings are alike unknown to the common law; and the Act gives the Court no power to affirm the judgment of the justice.

Further, any one, not the owner or keeper of the liquors, may defeat the whole proceedings. He has but to appear, claim the liquor, appeal, and, as no conviction of keeping with guilty intent can be had against him, the whole proceedings must fail.

It subjects a citizen to the hazard, cost and disgrace of a criminal prosecution, and deprives him of the possession of his property, upon the suspicion of unofficial and irresponsible persons, without the sanction of any officer of the law, or any legal investigation; all which is at war with the spirit of the constitution, subversive of well settled principles of the common law, and in derogation of common right.

The Act does not empower a deputy sheriff to serve warrants to search for, and seize liquors. That officer is not mentioned in section 11; and neither sheriff or deputy sheriff are mentioned in section 14. *Wood* v. *Ross*, 11 Mass. 277; See Mass. Law, Act of May 18, 1852, § 14.

The fact that the warrant is directed to such an officer gives him no authority to serve it. *Reynolds* v. *Orvis*, 7 Cow. 269; *Grant* v. *Bagge*, 3 East, 128; *Commonwealth* v. *Foster*, 1 Mass. 488.

The warrant is no justification to the officer, if the magistrate in issuing it, exceeds his jurisdiction, as to the place to be searched, or as to the process. *Sanford* v. *Nichols*, 13 Mass. 288-9; 1 Conn. 40; 5 Wend. 181; Com. Dig. Imprisonment, H. 9; *Wise* v. *Withers*, 3 Cranch, 331.

A steamboat is not "a place," or "building," liable to be searched, within the meaning of the statute. *Verba generalia, &c.*, Bac. Max. Reg. 10.

A sweeping clause in a deed, refers to things of the same nature and description, &c. Lord MANSFIELD, *in Moore* v. *Magrath*, Cowp. 12.

Under 29 Car. II. c. 7, which enacts, that "no tradesman, artificer, workman, laborer, or other person whatsoever, shall do any work on Lord's day," it is held that a farmer is not a "person" within the meaning of the statute, not being a person *ejusdem generis* with those named. *Rex* v. *Whitnash*, 1 M. & R. 452; S. C. 7 B. & C. 596; and so an attorney, *Peate* v. *Dicken*, 1 C. M. & R. 422; 5 Tyrrwh, 116; so as to stage coach owner, *Sardeman* v. *Breach*, 7 B. & C. 96; *S. P. in Clark* v. *Gaskarth*, 3 Taunt. 431; Smith on Contracts, 86, [*171.] See 1 Hawk. P. C. chap. 38, § 17, and 1 Hale's P. C. 557.

"Building" does not include vessel, in the ordinary meaning of the term; nor is it intended to include it in the statutes. See R. S. chap. 155, § 5 and 11; Chap. 156, § 2 and 3; *Commonwealth* v. *McMonagle*, 1 Mass. 517; Stat. 1784, chap. 66; Mass. Law, Act of May 18, 1852, § 14.

Sales on board vessels are not the mischiefs to be remedied by this section of the statute. The object was to give towns power to break up, in a summary manner, all drinking establishments, intended to be permanent, within their limits.

Liquors *in transitu* are not liable to seizure. Process issues only at the instance of three voters of some town or city, against liquors, kept in some building or place in such town, and intended for sale in that building or place.

The liquors found by Staples, on board the steamer, were *in transitu*, known to be so by him. He was ordered, by his warrant, to seize only liquors kept for sale on board the Boston and in Frankfort. His attempt at removal was, therefore, a trespass, the resistance to which, on the part of defendants, was a lawful act.

This complaint, if made for the purpose of seizing said liquors *in transitu*, was a fraud upon the law, and the complainants are trespassers; and the warrant would furnish no protection to the officer, if he knew the design and aided in

the execution of it. The examination of such of the complainants as were witnesses, upon that point, should have been admitted. The witnesses should have been compelled to answer.

The process in this case exceeded the jurisdiction of the magistrate, and was not in accordance with the statute. It requires the officer to summon the keeper to appear, and to make return of the warrant, at a court to be holden at such time as he, the officer, might appoint. By the Act, the hearing must be had forthwith; and by the constitution, an accused party is entitled to a speedy trial. *Pearce* v. *Atwood*, 13 Mass. 348–9.

There is no sufficient evidence that Jones was a magistrate.

A seal is an essential part of a warrant. 4 Bl. Com. 291; 2 Hawk. P. C. 136, c. 13, s. 21; Com. Dig. "Imprisonment," H. 7; 9 N. H. 240.

There was no evidence, either in the warrant itself, or *aliunde*, that the bit of wafer attached to the warrant in this case was the seal of the magistrate, or was ever adopted by him.

It is only the seals of States, or of higher law tribunals, which are recognized by courts. Other seals must be proved. 3 East, 221; 3 Johns. 310; *Tebbetts* v. *Shaw*, 1 App. 208-9.

The testimony of Adams was improperly admitted, there being no sufficient proof that he was a constable, or had any warrant authorizing him to search or seize.

Tallman, Attorney General, for the State.

The opinion of the Court, SHEPLEY, C. J., WELLS, HATHAWAY and APPLETON, J. J., was drawn up by

HATHAWAY, J. — The testimony of Adams, as to his acting as constable, &c., (objected to by defendants) was properly admitted, and also that of Jones, that he acted as justice of the peace. *Potter* v. *Luther*, 3 Johns. 431; *McCoy* v. *Curtis*, 9 Wend. 17.

The testimony of Jones that he *was* a justice of the peace, was immaterial, for it appears by the warrant as copied in the

indictment, that the complaint was made to him as a justice of the peace, that he received it as such, and signed and issued the warrant in that capacity. The presumption therefore is, that he was legally authorized so to do. *Lowell* v. *Flint*, 20 Maine, 401.

The reasons which induced Chase and Curtis to believe that the charges in the complaint were true, and their purpose in making it, could have no effect upon the rights or liabilities of the defendants in this case, and their testimony upon that subject was rightly excluded. The first instruction requested and refused by the Judge presiding at the trial was, "that the acts with which the defendants were charged with conspiring to do were not illegal acts," &c. The first count in the indictment charges them with a conspiracy to commit an assault and battery upon Miles Staples, a deputy sheriff, for the purpose of preventing him from performing the duties of his office. The instruction requested was, therefore, that an assault and battery upon a deputy sheriff, to prevent his doing his duty was not an illegal act. It was properly refused.

The correctness of the instructions given, and the propriety of the refusal to give the other instructions requested, may depend upon the question whether or not the warrant, under which Staples acted, was such a precept as he was legally authorized to obey, for if it were so, he was bound to execute it and the defendants had no right to resist him.

Officers whose duty it is to execute legal processes committed to them for service, should have reasonable protection in the discharge of their duties. Where the process is void it is no justification to the officer, but where it is merely voidable for irregularity or mistake he is protected by his precept.

In delivering the opinion of the Court in *Sanford* v. *Nichols & als.*, 13 Mass. 286, PARKER, C. J. said, "It is a general and known principle, that executive officers, obliged by law to serve legal writs and processes, are protected in the rightful discharge of their duty; if those precepts are sufficient in point of form, and issue from a Court or magistrate having jurisdiction of the subject matter; but it is necessary, that

the precept under which the officer acts should be lawful on the face of it.

It was no part of the officer's duty to examine into and decide upon the constitutionality or construction of the statute which authorized his warrant.

It is sufficient where the magistrate has jurisdiction of the subject matter, if the process is regular on its face and does not disclose want of jurisdiction. *Savacool* v. *Boughton*, 5 Wend. 170; *Earl* v. *Camp*, 16 Wend. 562.

The counsel for defendants objected, that statute of 1851, chap. 211, § 11, by virtue of which the warrant was issued, does not authorize a deputy sheriff to serve it, and contended in his argument, that the punctuation of the printed statute sustained this objection. The language of the statute is, "said justice, &c., shall issue his warrant of search to any sheriff, city marshal or deputy."

The printer's punctuation of the published laws, might be an uncertain guide in their interpretation. We think the term "deputy," in the statute, relates to both the marshal and sheriff preceding it.

It was also contended that the proceedings for seizing said liquors were unauthorized by law, because the warrant commanded the officer to appoint such time for the hearing of said complaint as he might choose. The language of the statute is, "the owner or keeper of said liquors, &c., shall be summoned forthwith, before the justice or Judge by whose warrant the liquors were siezed." The command of the warrant in this case was "to summon said Sanford forthwith to appear at a Court to be holden at my office in Frankfort *at such time as you may appoint.*" Although this might have been an irregularity on the part of the magistrate, it did not render the warrant void and the rights and duties of the officer were not affected thereby.

The defendants' counsel also objected that a steamboat is not a "place" liable to be searched within the meaning of the statute. The language of the statute is "any store, shop, warehouse, other building or place in said city or town."

This language was evidently intended to comprehend all places (in the city or town,) in which the mischief intended to be remedied could exist.

A steamboat or vessel moored at the wharf is a place, as much as is a shop standing upon the wharf. It may be stationed there, and used for the same purposes as the shop. The defendants say the warrant was void because it was not and did not purport to be under the seal of the magistrate.

R. S. chap. 170, § 15, provides that a warrant of search for stolen goods, &c., shall be issued by the magistrate *under his hand and seal.* The statute of 1851, under which the warrant in this case was issued, provides merely that the justice shall issue *his warrant* of search. In *Padfield* v. *Cabell & als.* Willes, 411, it was held that a warrant need not be under seal unless required by the statute. In that case WILLES, C. J., said, "a *warrant* does not *ex vi termini,* imply an instrument under seal; it signifies no more than an *authority.* All the books, in which it is said that a warrant must be under seal, are founded on a case in the year books, where it is said that a justice of the peace is a Judge of record and *hath a seal* of office." A justice of the peace in this State has no seal of office.

But whether a seal was necessary or not becomes immaterial, for it appears there was a wafer attached to the warrant as a seal. Defendants' counsel insisted that "there was no evidence either in the warrant itself, or *aliunde,* that the bit of wafer attached to the warrant was the seal of the magistrate or adopted by him." A wafer attached to the warrant is the usual seal in such cases and the fact that it was there, was *prima facie* sufficient. *Exceptions overruled.*

NOTE. — This case, though belonging to the Middle District, was argued at Bangor, for convenience of the parties.

COUNTY OF KENNEBEC.

STATE *versus* BONNEY.

Upon a verdict, rendered in this Court on an indictment found in the late District Court, for an offence of which that Court had exclusive jurisdiction, the judgment will be arrested, if the case was erroneously transferred to this Court for trial, while that Court was in existence.

Of an indictment for having in possession *upon a specified day*, ten counterfeit bank bills, with intent to pass the same, the District Court alone, until the time of its abolishment, had the jurisdiction, unless the indictment alleged, that the accused had the bills in possession, all *at one time*.

Jurisdiction cannot be imparted to the Court by the consent of parties merely.

INDICTMENT founded upon R. S. chap. 157, § 5. It was found in the District Court and, for a supposed want of jurisdiction in that Court, was transferred to this Court for trial. It charges that on the fifteenth day of April, the said Bonney had in his custody and possession ten false, forged and counterfeit bank bills, in the similitude of, and purporting to be ten bills payable to the bearers thereof, and purporting to have been signed in behalf of, and issued by the president, directors and company of the Mahaiwe Bank, for the sum of three dollars each, the same being a corporation by law established as a bank within the Commonwealth of Massachusetts, which said ten false, forged and counterfeit bank bills, were then and there retained and kept in the possession of the said Bonney, so that the jurors aforesaid cannot set forth the tenor thereof; and, that he did then and there have in his custody and possession as aforesaid, each of the false, forged and counterfeit bank bills as aforesaid, with intent to utter and pass the same, and thereby to injure and defraud the said president, directors and company; against the peace of such State and contrary to the form of the statute in such case made and provided.

A waiver of objections to any irregularity in the finding of

the indictment and to the jurisdiction, was entered of record by the defendant.

After verdict against the defendant he moved an arrest of judgment. — "Because the indictment no where avers, that the defendant had the ten bills, alleged to be counterfeit, at one and the same time," and because this Court has no jurisdiction of the case.

The opinion of the Court, SHEPLEY, C. J., TENNEY, WELLS and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The case is presented on a motion in arrest of judgment.

The indictment alleges, that the prisoner "on the fifteenth day of April in the year of our Lord one thousand eight hundred and fifty-one, had in his custody and possession ten false, forged and counterfeit bank bills," knowing them to be counterfeit with the intention to pass the same.

At the time of the trial this Court had jurisdiction of the offence described in the fifth section of the statute, chap. 157, which provides, "if any person shall have in his possession at one time ten or more" such bills with such knowledge and intention, he shall be punished by imprisonment for life. It had not at that time jurisdiction of the lesser offence described in the sixth section.

The possession of ten such bills at one time, with such knowledge and intention, is an offence of a much more aggravated character, than that of having any number of such bills with such knowledge and intention at different times during the same day.

The greater offence is not committed by the possession in that manner of ten such bills at different times during the same day. *Edwards* v. *Commonwealth*, 19 Pick. 124.

It must appear from the averments contained in the indictment, that the accused had the ten bills in his possession at one time.

It is insisted, that the averment, that the ten bills "were then and there retained and kept in the possession of the said

Horace Bonney, so that the jurors aforesaid cannot set forth the tenor thereof" is equivalent to an averment, that he had possession of them at one time.

The words "then and there" have reference to the day before named, and the averment amounts to no more than, that the ten bills were retained and kept on that day so that the jurors could not set forth the tenor thereof. That averment might be true, and yet some of them might have been destroyed or otherwise disposed of before others came into his possession.

A waiver of "all objections to any irregularity in finding of indictment and to jurisdiction," was voluntarily entered of record by the prisoner; but this Court cannot acquire jurisdiction by consent, and a waiver can amount to no more.

It is insisted, that this Court may nevertheless impose a sentence by virtue of the statute, ch. 166, § 7, which provides, that when a person is acquitted of part of the offence and found guilty of the residue thereof, he may be sentenced for the offence, of which he is found guilty, although such offence, is not within the jurisdiction of the Court.

The case provided for in that section is not presented by the proceedings in this case; for the prisoner was not indicted for an offence, of which this Court had jurisdiction, and acquitted of a part of that offence.

The prisoner is charged with an offence, over which the late Distict Court had jurisdiction. It could not be transferred to this Court for trial, and the proceedings, by which it was attempted, were of no effect.

If that Court were now in existence the indictment would be remanded to it for trial. The cases pending in that Court having been transferred by law to this Court, which has now jurisdiction of the offence, the case may be called up for

trial at the next term of this Court for the trial of criminal cases.

The verdict rendered in this Court is set aside.

Baker and *Paine*, for the defendant.

Vose, County Attorney, *contra.*

STEVENS *versus* ROLLINS, *administrator.*

A suit by one, *as surviving partner*, for money paid upon a liability for the defendant, is not supported by proving, that the survivor paid the money, after the death of the other partner, without also proving, that he paid it *in behalf of the partnership.*

ON EXCEPTIONS from *Nisi Prius*, WELLS, J. presiding.

ASSUMPSIT, by William Stevens, as surviving partner of the firm of Hiram & William Stevens.

The firm owned one quarter of a schooner. They aver that they paid a bill for materials used in repairing her, and this suit is brought to recover for one half of that payment, on the ground that the defendant's intestate owned one half of the vessel.

Several defences were set up and there was much testimony. Some of it tended to prove that the payment was made by the hand of William Stevens.

The Judge instructed the jury, that if, at the time when the bill accrued, the defendant's intestate owned any part of the vessel, and Hiram and William Stevens also owned a part; and if William Stevens, the plaintiff, had paid the bill, the plaintiff was entitled to recover the proportion thereof, of which the intestate was the owner, it having appeared that the intestate requested the materials to be furnished for the schooner. The defendant excepted.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD, RICE and APPLETON, J. J., was delivered by

TENNEY, J., orally. — William Stevens sues as surviving

partner. The action then is to be considered as brought by the firm. Before a recovery can be had, it must be proved, that the firm paid the bill.

But the instruction allowed a recovery, if William alone paid it upon his individual account. That was erroneous.

Exceptions sustained.

Evans, for the defendant.

Whitmore, for the plaintiff.

MARSHALL *versus* MITCHELL.

In an action against the indorser of a promissory note, proof that he had received property of the maker for security, will not excuse the indorsee from showing demand and notice, unless the property, so taken, was sufficient, or was all that the maker owned.

ON FACTS AGREED.

ASSUMPSIT against the indorser of a negotiable note, dated April 3, 1848, payable in two years.

This note, and another of the same date and amount, payable at one year, together with fifty dollars in cash, were given to the defendant by one Merrow for a shop, being personal property, sold by the defendant to Merrow. At the same time, Merrow gave to the defendant a mortgage of the shop to secure the notes. On April 6th, 1850, the shop was consumed by fire. There was no seasonable demand upon the maker or notice to the defendant of non-payment by the maker. If these facts do not make a sufficient case for the plaintiff the action is to stand for trial.

Paine, for the plaintiff, to show that a demand on the maker and notice to the defendant were unnecessary, on the ground that the note was secured by the mortgage, cited *Mead* v. *Small*, 2 Greenl. 207; *Andrews* v. *Boyd*, 3 Metc. 434; *Bond* v. *Farnham*, 5 Mass. 170.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD, RICE and APPLETON, J. J., was delivered by

HOWARD, J., orally. — The case does not satisfactorily show that the defendant had sufficient security, by the mortgage, nor that the mortgage embraced all the property which the maker owned. He had therefore a right to notice.

Action to stand for trial.

Danforth and *Woods*, for the defendant.

SAWTELLE *versus* SAWTELLE.

In action of covenant broken, for not delivering articles according to the obligation, a traverse of the plea, "that the defendant *had not broken his covenant*," places the *onus* upon the *plaintiff* to prove *negatively*, that the articles had *not* been delivered.

ON EXCEPTIONS from the District Court, RICE, J.

COVENANT BROKEN, brought upon an obligation to deliver certain articles of produce to the plaintiff annually.

The declaration specified the defendant's omission to perform, and closed with the general averment, that "so the defendant his covenant aforesaid hath not kept, but hath wholly broken the same."

The defendant pleaded, that he "had not broken the covenants," in the plaintiff's declaration mentioned, and issue was joined upon that plea.

The defendant introduced no proof of performance, and the Judge instructed the jury that the burden of proof was on the plaintiff to show that the defendant had not performed his covenant, and to show what damage the plaintiff had sustained thereby.

The plaintiff introduced proof that the value of the several articles, which the defendant had covenanted to furnish, was $200. The jury returned a verdict that the defendant has "broken the covenants contained in the instrument mentioned in the plaintiff's declaration," and assessed damage in the sum of $4,33. The plaintiff excepted to the instructions.

Paine and *B. A. G. Fuller*, for the plaintiff.

The general rule of law is that he, who has the affirmative in pleading, is bound to supply the proof.

The defendant has the affirmative plea in this case, viz; that he has kept and performed his covenants.

The plea of performance, or payment is always an affirmative plea. 1 Ala. 401; 2 Greenl. Ev. § 516.

Nor can the burden be changed by any form of pleading. Regard is had to substance and not to form. 1 Greenl. Ev. § 74.

This is the rule in covenant broken. 2 Greenl. Ev. § 247; 8 Conn. 296; 3 Yeates, 84; 1 Greenl. 189.

The law does not require impossibilities.

The rule laid down by the Judge would require this of plaintiff. No number of witnesses testifying that the defendant had *not*, to their knowledge, delivered the articles, would establish the *negative* required.

But the positive *fact* of payment was peculiarly, (if ever made) within the defendant's knowledge and easily susceptible of proof by him.

Where a breach of the covenant against incumbrances is alleged, the plaintiff must show that the premises were *not* free from incumbrance; but the *negative* allegation consists virtually of an *affirmative* charge, viz; that the premises *were* incumbered, which can be shown. So for quiet enjoyment.

Upon a note of hand for the payment of money, the plaintiff always alleges a breach, viz; that the defendant has *not* paid; but it would be a novel doctrine, if he should be compelled to prove it. So on a note for delivery of specific articles.

In action upon a covenant to pay rent, the burden is on the defendant to prove payment, if he would avoid on that ground. *March* v. *Cooper*, 2 Str. 763.

So where he would set up want of consideration in defence. 25 Maine, 171, 337.

So if he would justify an act alleged to be done without license, to show that he had the license. 6 Maine, 307.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was delivered by

Shepley. C. J., orally. — On which party is the burden of proof? The mode of pleading, adopted by the parties, is unusual. The plea is that the defendant's covenants were not broken. The issue is taken upon that plea. What then is the plaintiff to prove? She alleges that there was a breach. The defendant says there was not. She has taken the affirmative, and must establish it. It is therefore upon her to prove the breach.

But it is argued that she cannot be required to prove a negative. She must however establish a cause of action. This she cannot do, without proving that the defendant failed to perform, and what amount of damage she has sustained.

Exceptions overruled.

Vose and *Titcomb*, for the defendant.

Bachelder *versus* Sanborn *& al.*

The discharge certificate, given by two justices of the peace and of the quorum, to a poor debtor, of his having taken the poor debtor's oath, furnishes *prima facie evidence* that the justices were duly selected and qualified to act in granting the certificate.

When a poor debtor, in his disclosure, shows that he holds unsettled accounts, it is his duty to cause his interest in them to be appraised.

On Facts agreed.

Debt upon a poor debtor's relief bond.

The defendants offered a discharge of the debtor, issued in due form of law by two justices of the peace and quorum, upon the taking by him of the poor debtor's oath. The plaintiff objected to its introduction, until the record of the organization of the justice's court should be produced, showing that they had been rightfully selected. The objection was overruled and the certificate admitted, as containing within itself *prima facie* evidence of a rightful constitution of the Court.

The plaintiff read the debtor's disclosure. It showed, among other things, that at the time of disclosing, he had an account

against one Marston, and that Marston had one against him, and that they were about even; also that he had $1,60 in money, which he showed to the justices.

The parties then agreed to submit the whole case to the Court.

The opinion of the Court, SHEPLEY, C. J. TENNEY, HOWARD, RICE and APPLETON, J. J., was drawn up by

RICE, J. — It has been adjudged by this Court, that the certificate of two justices of the peace and quorum, when in due form, is *prima facie* evidence, that the provisions of the statute have been complied with, and, unless invalidated, such certificate constitutes a bar to an action upon the bond. A certificate, regular in form, having been produced by the defendant in this case, the burden of proof to show want of jurisdiction in the magistrates, or irregularity in the proceedings was upon the plaintiff.

When the debtor discloses real estate, if the creditor desires to avail himself of his rights under § 33, chap. 148, R. S., he should apply to the magistrates for the certificate provided for in said section.

By the disclosure of the defendant, a certified copy of which was introduced by the plaintiff, it appeared, that he had an unsettled account with one Marston which was "about even." It is the duty of the debtor, when he discloses unsettled accounts, to cause his interest therein to be appraised, unless he will swear that such accounts are of no value.

The defendant also disclosed that he had in his possession one dollar and sixty cents in money, which he exhibited to the Court. It was his duty to surrender the money disclosed for the benefit of the creditor. By neglecting to do so, as well as by neglecting to have the Marston account appraised, he failed to discharge himself from his bond. A default must therefore be entered, and damages assessed according to the provisions of chap. 85 of statute 1848. The damage we ad-

judge to be one dollar and sixty one cents, and one quarter of that sum additional for costs.

Kempton, for the plaintiff.

Vose, for the defendant.

INGALLS *versus* FISKE *& al.*

Where money for the payment of a debt had been left with a depositary for the creditor, and the creditor, with knowledge of all the circumstances, had ratified the act of deposit for his use, it will be deemed a payment.

ON REPORT from the *District Court*, RICE, J.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was drawn up by

APPLETON, J. — This was an action of assumpsit upon a note given by the defendants to the plaintiff payable to his order, dated March 3, 1849, for the sum of seventy-five dollars to be paid in June next. There was evidence tending to show, and of the admissibility of that evidence there can be no doubt, that the following words in pencil had been written upon the note and underneath the defendant's signature, "to be paid at Morton's store in Hallowell, June 20, 1849," and that the same had become obliterated at the time of the trial of this action. It appeared in evidence that at the time and place specified, the defendants had paid at Morton's, in Hallowell, the sum of fifty dollars, which Morton had applied to his own use. The balance of the note had been paid as appeared by the indorsement thereon. There was evidence tending to show that this money was left with Morton in pursuance of the agreement between the parties, and that the plaintiff, with full knowledge of all the facts, had assented to and ratified the acts of the defendants in leaving the same in part payment of the note.

Upon these facts the presiding Judge instructed the jury "that if both parties agreed that the fifty dollars might be

left with Morton as the agent of the plaintiff, or if, after the same was left and known to have been left by defendants, the plaintiff ratified the act of leaving and consented to the leaving the fifty dollars in Morton's hands as payment to himself, then the defence would be made out. To this instruction, the plaintiff excepted. But of its correctness there can be no question. The facts assumed in this instruction the jury must have found, and if so, the plaintiff legally as well as equitably should be the sufferer, in case Morton, with whom the money was to be left, had misappropriated it. The defendants should in no degree be responsible for his neglect or breach of good faith.

The instruction, that "if it was agreed that the money should be paid at Morton's store, that if it were left with Morton, it would not be enough," was favorable to the plaintiff, inasmuch as it required a special performance by the payment at the place specified, and as it further gave the jury clearly to understand, that if the money had been left with Morton at any other place, it would not constitute a defence.

It is unnecessary to consider the other rulings of the Court, as their correctness is conceded.

Exceptions overruled and judgment on the verdict.

Hutchinson, for the plaintiff.

Abbott, for the defendants.

Greaton *versus* Pike.

Trespass against an officer for selling on execution, *by virtue of an attachment on the writ*, property which the debtor claimed to hold exempt from liability for debt, cannot be maintained, *unless* it was by law exempt, *when attached on the writ.*

On Report from *Nisi Prius*, Tenney, J.

Trespass against the sheriff for taking and selling on exe-

cution two colts, alleged to be the property of the plaintiff. They had been previously attached on the writ. That attachment had been continued in force, and the sale was made in virtue of it.

The case was submitted to the Court for a legal decision, with authority to draw inferences as a jury might do.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD, RICE and APPLETON, J. J., was drawn up by

RICE, J. — The plaintiff claims to recover on the ground that the colts were exempt from attachment and seizure on execution, by virtue of the provisions of chap. 32, § 2, of statute of 1847. Against this right to recover, several distinct answers are urged by the defendant.

Without expressing any opinion as to the soundness of the objections of the defendant, we are of opinion that this action cannot be maintained. The original attachment of the colts, in the hands of the trustee, was on the 20th of November, 1847. If any trespass was committed it was at *that* time, as the property was finally sold by virtue of that attachment, and all the subsequent proceedings relate back to that transaction. The colts were sold on execution in November, 1848, one year after they had been attached on the original writ, which attachment had been duly preserved.

There is evidence tending to show the condition of the plaintiff, as to property, at the time the colts were sold on execution, but the case is entirely silent as to his condition at the time of the original attachment. For aught that appears, at that time, the plaintiff may have been possessed of all the property which was by law exempted from attachment, in addition to the colts, and may have divested himself of it, in whole or in part, prior to the time they were sold on execution. Such change of condition could not change the rights of the parties as they were fixed at the time of the attachment.

The burden of proof is upon the plaintiff, not only to show that the colts were by law exempt from attachment, but

that they were so exempt when the original attachment was made. This he has failed to do. A nonsuit is therefore to be entered.

Webster, for the plaintiff.

Abbott, for the defendant.

State *versus* Boies.

An allegation that the defendant and others, being assembled, did in a violent, tumultuous and riotous manner, perform a described unlawful act, to the terror and disturbance of the people, is a sufficient charge of a riot.

To obstruct and break up a "justice's Court" in a violent and tumultuous manner, to the disturbance and terror of the people, is an unlawful act, whether the person, acting as a justice, was or was not duly commissioned, and whether he was proceeding lawfully or unlawfully in the business before him.

On Exceptions from the *District Court*, Rice, J.

Indictment for a riot.

The second count charged that "the defendant, together with divers others, to the number of ten, on, at, &c., with force and arms, did unlawfully, riotously, routously and in a violent and tumultuous manner assemble to disturb the peace of the State, and being so then and there assembled, did unlawfully, riotously, routously and in a violent and tumultuous manner then and there disturb, obstruct, hinder and break up a justice's court, then and there held before Joseph Barrett, one of the justices of the peace within and for the county of Somerset aforesaid, to the terror and disturbance of others of the good people of the said State, against the peace of the said State and contrary to the form of the statute in such case made and provided."

On this count, the defendant was found guilty, and after verdict moved in arrest of judgment for the following alleged causes : — The count is too general, indefinite and uncertain in its description of the offence attempted to be charged. It is not alleged, that said Barrett was then and there hearing

or trying any action, civil or criminal, or that he was then and there engaged in the trying of any action, plea or complaint of which he, as magistrate, could or did have jurisdiction.

It is not alleged that Barrett was then and there a justice of the peace duly commissioned.

It is not alleged what act or breach of the peace said Boies and divers others assembled to commit.

It is not alleged who assembled at the time and place named with the defendant.

It is not alleged what act was done by said Boies and others, when so assembled, and in what manner they proceeded to break up, disturb, obstruct and hinder said justice's court.

It is not alleged to the terror and disturbance of whom said act was done.

It is not alleged that these acts were done and committed with the intent to disturb and put in terror any individual or individuals of the people of this State.

The Judge refused to arrest the judgment, and the defendant excepted.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was delivered by

SHEPLEY, C. J., orally. — The indictment charges, that the defendant and others, being assembled, did, in a violent and tumultuous manner, obstruct and break up a justice's court, held by one Barrett, to the terror of the people. To break up a court in such a manner was an unlawful act whether Barrett was or was not commissioned, and whether he was or was not proceeding lawfully in the business before him.

The allegations of the indictment sufficiently charge the offence of a riot. *Exceptions overruled.*

Hutchinson, for the defendants.

Tallman, Att'y Gen., for the State.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1852.

COUNTY OF YORK.

BLAKE, *complainant*, *versus* JUNKINS.

To the success of a complaint under the Bastardy-Act, it is indispensable that the complainant be admitted and testify, as a witness.

ON EXCEPTIONS from the *District Court*, EMERY, J.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was drawn up by

APPLETON, J. — This was a complaint founded on the R. S. chap. 131, which relates to bastards and their maintenance. This statute introduces provisions differing most materially from the course of proceedings of the common law, and the rights of the parties will depend on their construction. At the trial, before the District Court, the complainant was excluded, the presiding Judge being of opinion, upon the evi-

dence, that she had not accused the respondent with being the father of the child, of which she was about to be delivered, at the time of her travail. The complainant being thus excluded, testimony of the acts and declarations of the respondent were offered and received, for the purpose of satisfying the jury of his guilt, and upon such testimony, to the reception of which exceptions were seasonably taken, and, upon the ruling of the Court, that it was competent for her to make out her case, if she could, by evidence *aliunde*, a verdict against the respondent was rendered.

It is therefore to be considered, whether proceedings under this statute can be sustained, when the mother has for any cause failed to comply with those provisions, which are necessary and indispensable to her admission as a witness, and whether the cause can then proceed without her testimony.

The facts necessary to establish paternity are in the more exclusive and certain knowledge of the mother. The putative father may have reasonable grounds of belief, but he can rarely have assured and unquestionable conviction. The statute has therefore required, that the mother should make her accusation under oath, that during the time of her travail and while the pains and perils of child birth are upon her, she should accuse the respondent with being the father of the child about to be born and should remain constant to the truth of such accusation. It was deemed, that in the hour of her agony and under the danger of immediate death, there would be little fear of the utterance of falsehood or the concealment of truth on her part. Obligations equivalent to the sanctions of an oath, and securities for trustworthiness greater than any derivable from cross-examination, result from the critical nature of her position. These statutory requirements already alluded to, are specially defined and clearly prescribed, and, if neglected, the prosecution must fail. If a prosecution could be sustained by proof of the defendant's guilt from other sources, because the mother may have negligently omitted to comply with these salutary prerequisites to her admission, it may be equally well sustained, when her non-compli-

ance is the result of deliberate intention. The Legislature could never have designed that the complainant should sit by during the progress of the trial, and the jury should decide in utter ignorance of what her testimony would be in relation to the principal fact in dispute. Indeed, little reason exists for the extension of a provision, by which ascertained guilt is made the essential condition of the admission of testimony, and where presumed innocence is invariably excluded. Accordingly, previous to the revision of our statutes, it had been decided that the omission of the mother to accuse the alleged father during the time of her travail, was a fatal defect to a prosecution on her part. *Dennett* v. *Kneeland*, 6 Greenl. 460; *Loring* v. *O'Donnel*, 3 Fairf. 27; *Stiles* v. *Eastman*, 21 Pick. 132. The principle of these decisions was further sanctioned in *Rice* v. *Chapin*, 10 Met. 5.

But had there been no adjudicated decisions, the express provisions of the Revised Statutes would lead to the same result. In *Foster* v. *Beatty*, 1 Greenl. 304, this Court decided that after the action is entered in the Court below, and before the cause can be put to trial, the complainant must file a declaration stating all the material facts, which are necessary to sustain the prosecution. In their opinion, the Court specifically set forth, what those material facts are. Upon the revision of our statutes a new section, adopting almost verbally the language of the Court in *Foster* v. *Beatty*, is inserted. This must be deemed a legislative adoption of the principles of that decision. In section 7, which is the one referred to, it is provided, that the complainant shall file a declaration, and that this declaration must be filed "before proceeding to trial." In this section the facts necessary to the success of the prosecution are designated and are specially required to be set forth in the declaration. The facts to be thus set forth, must be proved on the trial. They are all essential prerequisites, and the Court can no more dispense with one than with all.

It having been decided by the District Judge that the complainant did not in the time of her travail accuse the respon-

dent with being the father of the child of which she was about to be delivered, in the present aspect of the case, we must deem that decision as correct, it not being before us upon exceptions. But as it has been settled by repeated decisions, that no prosecution can be maintained without proof of this fact, the mother not being incompetent by reason of a conviction of crime, the exceptions must be sustained and a new trial granted.

Leland, for the respondent.

Wilkinson, for the complainant.

COUNTY OF OXFORD.

Parsons *versus* Bridgham.

By the Act of 1846, chap. 205, the sale of *spirituous* liquors was restricted. By the Act of 1848, the sale of *spirituous or intoxicating* liquors, was restricted. The repeal of the Act of 1848, by that of 1851, chap. 211, § 18, does not defeat prosecutions under the Act of 1846, for the sale of *spirituous* liquors.

Leading questions to a witness are such as suggest answers favorable to the party asking them.

A Judge may, in some cases, allow leading questions to a witness.

If answers are rejected by a Judge, because given in answer to questions, which he may suppose to be leading, the rejection is ground of exception, if in fact the questions were not leading.

On Exceptions from the *District Court*, Emery, J.

Debt, for that the defendant on the 30th day of December, 1849, sold a quantity of spirituous and intoxicating liquor to John Morrell, viz: — one glass of rum; viz: — one glass of gin, not having been licensed, &c.

The defendant urged in defence that the Act, upon which the suit was brought, was not in force, but had been repealed.

The Judge however ruled otherwise.

To disprove the plaintiff's allegation, the defendant introduced the deposition of Morrell, which contained the following interrogatories, with a negative answer to each.

Did you call for any rum or gin of me on the 30th December, 1849?

Did you pay for any rum or gin to me on December 30, 1849?

Have you at any time paid me for any rum or gin sold you December 30, 1849?

Did you bargain in any way with me for any gin or rum on the 30th December, 1849?

The interrogatories were objected to at the taking of the deposition, and the Judge directed that so much of the deposition as was responsive to them, should be disregarded by the jury.

The verdict was against the defendant, and he excepted.

The opinion of the Court, Shepley, C. J., Tenney, Wells, Howard and Appleton, J. J., was drawn up by

Wells, J. — The declaration in the plaintiff's writ alleges, that the defendant sold "a quantity of spirituous and intoxicating liquors, &c., to wit, one glass of rum, to wit, one glass of gin." The charge is limited to the sale of rum and gin, which are spirituous liquors, the sale of which without a license is prohibited by the Act of 1846, chap. 205, which is so far in force as to authorize the prosecution of this action, as appears by the Act of 1851, chap. 211, § 18.

If the liquors sold had been intoxicating but not spirituous, then the argument of the defendant's counsel, that the Act of 1848, chap. 67, which prohibits the sale of intoxicating liquors, has been repealed, and that the action cannot be maintained, might have been satisfactory. For the Act of 1848 is broader in its prohibitions than that of 1846, inasmuch as the term intoxicating embraces other liquors than those denominated spirituous. But the plaintiff's declaration confines the description of the liquors to those which are spir-

ituous by a particular designation of them, and no proof could be offered of the sale of any other liquors than rum or gin. The facts alleged bring the case clearly within the Act of 1846, and the repeal of the Act of 1848 has no effect upon it.

The Judge of the District Court ruled, that the interrogatories to the deponent, which are stated in the bill of exceptions, were objectionable in law, and instructed the jury to disregard so much of the deposition as was responsive to them. The exceptions do not exhibit the ground of objection to them, but it was probably on the ground that they were leading. A Judge may in certain cases authorize leading questions to be put to a witness. *Woodman* v. *Coolbroth*, 7 Greenl. 181. But where the answers are rejected because the questions are leading, in the opinion of the Judge, and they are not so, their rejection is erroneous. Leading questions are such as suggest answers favorable to the interests of the party asking them. 1 Stark. Ev. (7th ed.) 169. If the interrogatories mentioned in the exceptions are suggestive of answers, the two *first named* would rather appear to suggest affirmative answers, which would be against the interest of the defendant, who proposed them. No injury could arise to the plaintiff by interrogatories put to the deponent suggestive of answers unfavorable to the defendant, and they ought to have been received.

As a new trial must be granted, it is unnecessary to examine the propriety of the other interrogatories. If the defendant desires to have the benefit of them, he can take the deposition anew, and obviate the objection to them, by putting them in such form as will render them free from any question.

Exceptions sustained and a new trial granted.

J. Goodenow, for the defendant.

Walton, County Att'y, for the State.

State *versus* Bigelow.

Proof that a part of the proceedings, for the establishment of a *town* road, were legally conducted, will authorize a jury, after the lapse of thirty years, to infer that all the other requisites of the law were complied with, and that the road was legally established.

On Exceptions from the *District Court*, Emery, J.

Indictment for obstructing "*a common and public highway* for all the citizens of the State to travel upon at their will and pleasure."

To establish the existence of the *highway*, the government introduced evidence tending to prove that for more than thirty years it had been used as a highway.

The defence was, that it was not a "*common and public highway*," but a *town road*, established by the town, and that it had been discontinued by the town prior to the incumbrance complained of. The defendant read in evidence certain of the town records showing *that*, in 1816, a town meeting was called by a warrant containing, among other things, an article "to accept and discontinue roads;" *that* the constable returned upon the warrant that he "had warned all the male inhabitants according to law;" and *that*, at said meeting, "the town voted to accept this road."

He also introduced evidence tending to show that, in 1817, the town paid to the land-owners the damages created by the location.

He also read from the town records of 1851, showing that, prior to the incumbrances named in the indictment, certain proceedings were had by the town and its officers, purporting to constitute a discontinuance of the road.

He then requested instructions to the jury, that they were at liberty to infer from the evidence that it was a town way, and not a common and public highway, as alleged in the indictment; and that, if satisfied that it was a town way, they should acquit the defendant.

The Judge declined to give those instructions, but instruct-

ed the jury that the evidence introduced by the defendant constituted no defence. The defendant excepted.

Paine, for the defendant.

As the indictment charges the obstruction of a common and public highway, the character of the way must be proved as laid, or the indictment is not sustained. *Com.* v. *Newbury*, 2 Pick. 51; *State* v. *Sturtevant*, 18 Maine, 66; *State* v. *Strong*, 25 Maine, 297.

If the road obstructed was originally a town way, the town might discontinue. Stat. of 1786, chap. 67, sec. 7; R. S. chap. 25, sec. 30.

The record introduced shows a discontinuance before the obstruction complained of.

Upon both grounds it was important for the defendant to show the road to be a town way. Whether a town way or public way was a question for the jury, with proper instructions from the Court.

The article in the warrant of 1816, though general, is definite enough. *Williams* v. *Lunenburg*, 21 Pick. 75; *Torry* v. *Millbury*, 21 Pick. 64; *Davenport* v. *Hallowell*, 10 Maine, 317; *Deane* v. *Washburn*, 17 Maine, 100; *Avery* v. *Stuart*, 1 Cushing, 496.

The return of the constable is sufficient. *Briggs* v. *Murdock*, 13 Pick. 305; *Houghton* v. *Davenport*, 23 Pick. 235; *Alna* v. *Clough*, 8 Maine, 334.

Though a town way cannot be proved by parol, the existence of such way may be *inferred* as well as the existence of a public highway. *Stedman* v. *Southbridge*, 17 Pick. 162; *Com.* v. *Belding*, 13 Met. 11; *Avery* v. *Stuart*, 1 Cush. 496.

After the lapse of thirty years the fact of regular location may be presumed from other facts proved. *Coleman* v. *Anderson*, 10 Mass. 105; *Pejepscot Proprietors* v. *Ransome*, 14 Mass. 145; *Blossom* v. *Cannon*, 14 Mass. 177; *Batley* v. *Holly*, 6 Maine, 145; *Copp* v. *Lamb*, 12 Maine, 312; *Freeman* v. *Thayer*, 33 Maine, 76.

The Judge erred in saying to the jury that the evidence constituted no defence. If they believed the facts which that

evidence tended to establish, they should have been told that they made a good defence. *Or*, if the evidence left it in doubt whether the road was a public highway or a town way, then they should have been told to acquit.

Tallman, Attorney General, for the State.

The case is against the defendant, unless he prove that the way was a town road. That must be shown by the records. The records are all in Court. If the establishment of a town road cannot be proved by proceedings of record, all had and conducted in conformity to the requirements of law, there can be no town road. It cannot be shown by a grant, for a way by grant is not a town way. Neither can presumption from lapse of time avail to establish it, for it would be in contradiction to the records. The authorities from Massachusetts, cited on the other side, are not binding here. They are in conflict with the earlier and better decisions, the soundness of which will commend them to the approval of this Court.

The argument was had, by consent of parties, at Augusta.

The opinion of the Court, SHEPLEY, C. J., HOWARD, RICE and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The defendant was indicted for obstructing a highway in the town of Livermore. Testimony was introduced to prove, that it had been used as such for more than twenty years.

In defence, a record of certain proceedings of that town with proof of its acts, was introduced, tending to show, that the way was laid out as a town way, and that it had been discontinued by a vote of the town, before it had been obstructed.

The presiding Judge, probably considering that this Court had decided, that a town way could be established only by a record exhibiting a compliance with the provisions of the statute, instructed the jury, that the evidence introduced by the defendant constituted no defence.

The Supreme Court of Massachusetts having expressed an opinion, in the case of *Commonwealth* v. *Low*, 3 Pick. 408,

"that a town way can be established only in the mode prescribed by statute of 1786, chap. 67;" this Court, in the case of the *State* v. *Sturdivant*, 18 Maine, 66, yielded its assent to that decision not without some reluctance.

In the case of *Commonwealth* v. *Belding*, 13 Metc. 10, that Court reëxamined the question, and came to the conclusion, that "with the proper evidence it would seem reasonable, that a town way might be shown, as well as a public highway, without in all cases producing a record of its establishment as a town way." The instructions were held to be correct, which had authorized the jury to infer from testimony introduced, that a way was laid out as a town road.

This was followed by the case of *Avery* v. *Stuart*, 1 Cush. 496, in which the opinion states, "we cannot doubt, that this evidence was admissible, although it might appear, that the laying out of the way was not strictly regular and definite as to its location." And the Court held, that it had been properly left to the jury to decide on the whole evidence, whether the way was a public way or a town way.

The later decisions are more satisfactory, being more in accordance with established principles and with the law as applied in analogous cases.

The record of the proceedings of the town and the other testimony tending to prove, that the way was laid out as a town way, appear to have been properly received.

The effect of that testimony should have been submitted to the jury under proper instructions, that they might consider, whether it was sufficient to rebut the presumption of law arising from the proof of its long continued use by all the citizens having occasion to use it, that it was a highway.

If they had so found, the defendant would have been entitled to an acquittal, for he was not indicted for obstructing a town way. *Exceptions sustained, verdict set aside and new trial granted.*

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, }

CUSHMAN *versus* SMITH.

An article of the Constitution provides, that "private property shall not be taken for public use, without just compensation."

By the *taking* of property, within the scope of that provision, is meant such an appropriation of it as deprives the owner of his title or of a part of his title.

That provision, when applied to real estate, precludes the acquisition of any title or easement or permanent appropriation without the actual payment or tender of a just compensation.

It did not dislodge the paramount dominion, which the sovereignty has over the property-rights of each individual. It merely relaxed that dominion so far as to provide that property, *taken by the exercise of that dominion*, should be paid for.

It does not preclude the Legislature from authorizing acts, for the public benefit, though operating injuriously, and without compensation, upon private property, *unless* such property is *taken* and *appropriated*, or is *attempted* to be taken and appropriated from the owner.

It does not preclude the Legislature from authorizing an exclusive occupation, temporarily, of real estate, belonging to an individual, without previous compensation, as a proceeding incipient to the acquisition of a title or of an easement, for public use.

The right to such temporary occupation, as an incipient proceeding, will become extinct by an unreasonable delay to make actual payment or tender of compensation, and to complete the proceedings requisite for acquiring the intended title or easement.

An action of trespass, *quare clausum*, may be maintained to recover damages for the *continuance* of such occupation, unless within a reasonable time after its commencement, compensation be made or tendered.

Under such circumstances, an action of trespass or an action on the case, may be maintained to recover damages for *all the injuries*, occasioned by the prior occupation.

It is requisite that enactments, in order to justify the taking of private property for public use, should designate the means to be pursued for obtaining the compensation.

It seems, that the distinction, which asserts that private property *may* be taken for public use, without previous compensation, when the payment is charged upon a *public* corporation, and that it may *not* be so taken, when the charge is attached to a mere *private* corporation, is untenable.

By the charter of the Buckfield Branch Rail Road Company, it was not the intention to require the compensation of land-owners to be paid, before a right should vest in the corporation to take exclusive occupation of land, for the purpose of making the road.

ON FACTS AGREED.

TRESPASS, *quare clausum*.

The facts called for a construction of that article of the constitution which provides that, "*private property shall not be taken for public use without just compensation.*"

The Buckfield Branch Rail Road Company was chartered by the Legislature, with authority to locate and construct a rail road, and to run engines and cars upon it; — and to take and hold land for the location, construction and convenient use of the road, "to be held, as lands taken and held for public highways;" and the damage thereby occasioned to the land-owner, when not otherwise agreed upon, was to "be ascertained and determined by the County Commissioners, under

the same conditions and limitations as are by law provided, in case of damage by laying out highways."

The mode, prescribed by law for the ascertainment of damage by the laying out of highways, is by application to, and by proceedings in, the Court of County Commissioners.

On an application to that Court for an ascertainment of the damage, the land-owner might request, that the rail road company be required to give security, to the satisfaction of the Commissioners, for the payment of such damage and cost as might be finally awarded;—and "all the right or authority of the corporation, to enter upon or use the land, except for making surveys, was to be suspended, until they shall give such security.

No application for the assessment of such damage was to "be sustained, unless made within three years from the time of taking such real estate."

The corporation located and constructed the road, crossing the plaintiff's land. In June, 1849, and within the three years, he presented a petition to the Court of County Commissioners, praying that his damages might be assessed, and that the corporation should be required to give him security therefor. A decision was accordingly made by that Court, in December, 1849, assessing the damage, but omitting to require the security. The plaintiff being dissatisfied with that assessment, in June, 1850, filed a petition, in the nature of an appeal, (jointly with other claimants for land damage, who were also dissatisfied with the decision of the County Commissioners upon their several applications,) praying that the damages might be assessed by a jury. This petition, however, contained no request for security. Upon this petition, such proceedings were had, that the plaintiff's damage was fixed at $250, and the Commissioners, in December, 1850, rendered judgment for that sum, with costs, and ordered that security should be given therefor by the corporation.

Upon that judgment a warrant of distress issued, Feb. 6, 1851, which was returned in no part satisfied. And the dam-

age thus awarded has never been paid or tendered, nor has any security for it been given.

The corporation, in Oct. 1849, mortgaged to the defendant the road and franchise, together with their engines and cars; and he, in May, 1851, having previously taken possession as mortgagee, run the engines and cars upon the road across the plaintiff's land, which is the alleged trespass for which this action is brought, the writ being dated Oct. 10, 1851.

"If the foregoing facts do not constitute a defence; or if, under the constitution of the State, the corporation had no authority so to enter and use the plaintiff's land, without just compensation paid or secured to the plaintiff, judgment is to be entered for twenty dollars damage with costs."

Fox, for the plaintiff.

Fessenden & Deblois, for the defendant.

1. The rail road was legally located. The plaintiff's right to enter upon it, or to maintain trespass on account of it, was thereby lost. By that location, the corporation, and this defendant, as their mortgagee, took a perpetual easement; an absolute right of possession for all the purposes of a rail road; which necessarily excludes all right of possession in the owner of the soil, so long as the rail road exists.

2. If the plaintiff has not realized all the remuneration to which he was entitled, it has not resulted from any fault of the corporation or of the defendant. To entitle him to security for the amount of his damage, he must not only apply for it upon the petition for an assessment, but must obtain an order of the County Commissioners to that effect. That security they cannot adjudge to him, except upon his express application for it.

The plaintiff did, indeed, in his *first* petition, apply for such an order, but it was not allowed. No adjudication for it was made. His right thereby became extinguished.

True, in the proceedings of the County Commissioners, upon the *second* petition, they ordered that such security should be given, but that order was unauthorized. For, upon *this*

petition, no such order was requested. There was no basis, upon which it could rest; it was, therefore, merely void.

The two petitions might be considered continuous or connected, for the purpose of an *assessment;* but for the purpose of *obtaining security*, there was no connection between them. The first judgment closed all question as to the matter of security. *Woodman* v. *Somerset*, 25 Maine, 300. The omission in the second petition to request security was an implied and effectual waiver of the right to it.

But, further, the issuing of the warrant of distress against the corporation, was a waiver of all other remedies.

Again, as another evidence of such waiver, it will be noticed that, after the plaintiff's petition for security had been neglected or refused by the Commissioners, he suffered the corporation to proceed and expend large sums of money, in constructing the road and putting cars upon it, without interference or objection by him. *Goodwin* v. *Hallowell*, 12 Maine, 300; *Barre Turnpike Co.* v. *Appleton*, 2 Pick. 430; *Ipswich* v. *Essex*, 10 Pick. 519; *Merrill* v. *Berkshire*, 11 Pick. 269.

3. It is incident to the sovereignty of every government, that it may take private property for public uses, *of the necessity or expediency of which the government must judge.* 1 Baldwin's R. 220; 1 U. S. Digest, 560; *Cooper* v. *Williams*, 4 Ham. (Ohio,) 253; *O'Hara* v. *Lexington R. R. Co.* 1 Dana, (K'y,) 232; *Perry* v. *Wilson*, 7 Mass. 395; *Boston Mill Dam* v. *Newman*, 12 Pick. 467; *Spring* v. *Russel*, 7 Greenl. 273.

The government must alone judge of the necessity and expediency. *Spring* v. *Russell*, 7 Greenl. 273.

The provisions of the Act incorporating this rail road, enabling those, whose lands are taken, to obtain their damages, answer all the constitutional requirements, relating to compensation. *Deering* v. *York and Cumberland Rail Road Co.*, unreported; *Boston Dam* v. *Newman*, 12 Pick. 467.

SHEPLEY, C. J. — The action is trespass *quare clausum.* The plaintiff is admitted to have been the owner of land, upon which the Buckfield Branch Rail Road has been made.

The alleged acts of trespass are admitted. The justification presented is, that the rail road was legally located, constructed and used, upon the plaintiff's land; and that the acts alleged to have been trespasses were done in the rightful use of that road.

The Act creating the corporation, authorized it to locate, construct and complete a rail road on a prescribed course between certain places. It required, that the corporation should "pay such damages as shall be ascertained and determined by the County Commissioners for the county, where such land or other property may be situated, in the same manner and under the same conditions and limitations, as are by law provided in the case of damages by the laying out of highways." And it provided, that the land so taken should "be held as land taken and appropriated for public highways." The corporation by its charter, is entitled to all the powers, privileges and immunities, and subjected to all the duties and liabilities prescribed in the eighty-first chapter of the Revised Statutes. By that chapter it was authorized to take and hold so much real estate, as might be necessary for the location, construction, and convenient use of the road. That statute provides, that when application for an estimate of damages is made, either by the corporation or by the owner of real estate, the Commissioners, if requested by any such owner, shall require the corporation to give security to the satisfaction of the Commissioners, for the payment of all such damages and costs, as shall be awarded and finally determined by a jury, or otherwise, for the real estate so taken; and the right or authority of said corporation, to enter upon, or use said real estate, except for making surveys, is suspended, until it shall give such security.

The plaintiff appears to have presented to the County Commissioners at their session, held in the month of June, 1849, a petition to have his damages assessed. It contained a request, that the corporation should be required to give security for the payment of them. An assessment of damages was made by the Commissioners, and entered of record at their

session, held in the month of December, 1849. At their session held in the month of June, 1850, the plaintiff united in a petition with others to have his damages assessed by a jury. The parties agreed upon a committee instead of a jury, and that committee made a report of their revision and assessment of damages at the session of the Commissioners held in the month of December, 1850; and an order was then made, that the corporation should give security for payment of the damages awarded. A warrant for collection of the damages issued on Feb. 6, 1851, which was returned on April 28, 1851, in no part satisfied. The damages awarded, have never been paid or tendered; nor has any security been given for their payment.

The provision of the statute, authorizing petitions for the assessment of damages to be presented at any time within three years, and not afterwards; and, that requiring that the damages should be assessed as in laying out of highways, and, that respecting security for their payment, clearly indicate, that it was not the intention of the Legislature, to require an assessment and payment of damages to be made before an exclusive occupation of the land was authorized, for the purpose of making the road.

If such be a correct construction of the Act, and of all other Acts, respecting the construction of rail roads in this State, deriving their powers from the general Act regulating the construction and use of such roads, the public must suffer great inconvenience, if they must be regarded as in conflict with any provision of the constitution. If a rail road or highway cannot be established and constructed without a previous assessment and payment or tender of damages, great obstacles and delays will be interposed to prevent the completion of such public improvements.

These considerations would however afford no justification for an attempt to uphold such statute provisions, and to continue the long established course of proceedings, in violation of any provision of the constitution.

There has been a serious difference of opinion respecting

the requirements and construction of those constitutional provisions, which declare in the same or similar terms, that "private property shall not be taken for public uses without just compensation."

How far legislation may proceed to authorize acts to be done, without first making or tendering compensation, and where it becomes arrested by the provision, has been considered by many of the ablest men and most distinguished jurists of the country. And yet there is an indication arising out of the conflict of opinion, and the difficulty of reconciling the positions attempted to be established with each other, and with any sound and pervading principle, that the whole truth has not been reached.

The more thoroughly it has been examined in connection with legislative enactments, the more clearly has it been perceived, that serious difficulties, or inconveniences, or losses, may arise in the rigid and uniform application of any suggested construction to the proceedings required in all classes of public improvements. How can a construction be correct, which will allow acts to be done for the purpose of making one kind of public improvement, and prohibit the like acts to be done under like circumstances for the purpose of making another kind of public improvement? Which will authorize acts for the purpose of making a public highway, and prohibit them for the purpose of making a rail road? Which will authorize them for the purpose of making a canal or railway, when made by a State, county, city or town, and prohibit them when the same public improvement is made by a private corporation? And yet such may be the effect of many, if not of most, of the constructions suggested or insisted upon. If, upon principle and sound reasoning, the provision must operate alike upon the construction of all classes of public improvements made by the appropriation of private property to public use, the effect of any proposed construction of the clause may be examined in its practical operation, to ascertain if such could have been the intention of the framers of the constitution.

If the construction be such as to require payment in all cases for private property so taken before it can be exclusively *occupied* for public use, the result must be, that no such improvement can be effectually or beneficially commenced even by a State, county, city, or town, without waiting to have an assessment of damages first made for each person, whose estate is in some degree to be occupied, upon the whole line of the contemplated improvement.

Such a construction would prevent the laying out and making of highways and streets over private estates believed to be benefited and not injured thereby, before there had been an adjudication obtained, that no damages were occasioned; and it would deprive persons thinking themselves aggrieved by such an adjudication or by one estimating the damages to be too little in their judgment, from having such adjudications revised and finally determined by some other tribunal without delaying the progress of the public improvement.

It is believed to have been the long established course of proceeding in this part of the country at least, to authorize the exclusive *occupation* of land required for such public uses as the laying out of highways and streets, by making provision by law for compensation to the owner, to be subsequently paid. And in many cases authorizing the damages to be finally ascertained as well as paid subsequently. This course of proceeding existed, so far as is known, without complaint, long before the revolution, which cast off the British dominion; and of course was well known to the framers of the constitution which first contained this prohibitory clause for the protection of private property. Was it the intention to interrupt such course of proceeding and to provide a remedy for a grievance already experienced, or only to prevent private property from being taken from the owner and permanently appropriated to public use without compensation? Constitutional provisions are often and legitimately explained by considering the actual state of facts at the time of their adoption. Thus the provision in the constitution of the United States for the regulation of commerce is explained to include navi-

gation, by reference to the state of facts existing at the time. By these, or other considerations, many minds appear to have been led to the conclusion, that private property might be absolutely taken and permanently appropriated to public use without compensation being first made, when provision was made by law for compensation to be subsequently made from the treasury of the State, or of a county, city or town.

Does experience teach, that the owner, in such cases, will always be certain to obtain compensation? History informs us, that kingdoms and states have not always paid their just debts in full, that they have often paid them only in promises, which would not command gold or silver without a large discount.

When the private property of citizens residing in a county, city or town, may be taken to pay the debts of the corporation, there may be reason to expect, that its debts will be certainly paid. But the law making private property liable to be taken for payment of the debts of such corporations may at any time be repealed or altered; and the corporation in its corporate capacity may not have property, from which payment can be obtained.

Is the distinction attempted to be made between taking private property, without first making compensation, when provision is made for payment by a State, county, city or town, and when it is made for payment by a private corporation, a sound one? Can that be a correct construction of the provision, which would authorize legislation, by which the owner of an estate might be deprived of it without being first paid, whenever in the judgment of some Court or tribunal, it might be morally certain, that he could afterwards obtain compensation; and which would not authorize it, whenever in the judgment of such Court or tribunal it was not so certain, that he could obtain it? That would make the title pass from the owner to the public use, not upon payment of compensation, but upon the opinion of certain official persons, that a fund or other means had been provided, from which he might obtain payment. If such be a correct construction, it

would follow that the title to private property may be made to pass from the owner to a private corporation for public use, when that corporation should be found to possess the means or to furnish security, which would render it as certain, that compensation could be subsequently obtained from it, as from the treasury of a State, county, city or town.

These and other considerations present themselves as serious objections to a construction, which would permit an owner of property to be deprived of it without compensation actually paid or tendered to him, whether it be taken for public use by a State, county, city, town or private corporation.

If such a construction be inadmissible, as well as one which would prevent an exclusive occupation of a temporary character, without payment of compensation, the inquiry is suggested, whether by a correct construction such results may not be avoided.

This provision of the constitution was evidently not intended to prevent the exercise of legislative power to prescribe the course of proceeding, to be pursued to take private property and appropriate it to public use. Nor to prevent its exercise to determine the manner, in which the value of such property should be ascertained and payment made or tendered. The legislative power is left entirely free from embarrassment in the selection and arrangement of the measures to be adopted to take private property and appropriate it to public use, and to cause a just compensation to be made therefor.

The provision was not introduced or intended to prevent legislation, authorizing acts to be done, which might be more or less injurious to private property not taken for public use. It is not unusual to find, that private property has been greatly injured by public improvements, when there has been no attempt to take it for public use. The records of judicial proceedings show, that private property in rail roads, turnpike roads, toll bridges, and ferry ways has been often greatly injured, and sometimes quite destroyed by acts authorized by legislation, which, according to judicial decisions, did not violate any provision of the constitution.

Private property is often injured by the construction and grading of highways and rail ways, when no attempt has been made to change its character from private to public property. The cases of *Day* v. *Stetson*, 8 Greenl. 365; *Callender* v. *Marsh*, 1 Pick. 418; *Canal Appraisers* v. *The People*, 17 Wend. 571; and *Susquehanna Canal Co.* v. *Wright*, 9 Watts & Sergt. 9, present examples of it.

The provision was not designed, and it cannot operate to prevent legislation, which should authorize acts, operating directly and injuriously, as well as indirectly upon private property, when no attempt is made to appropriate it to public use. An instance of this kind of legislative action will be found in the case of the *Commonwealth* v. *Tewksbury*, 11 Metc. 55, where a person was held indictable for the removal of gravel from his own land contrary to a statute provision, which did not assume to appropriate it to public use, or to make compensation for it.

The design appears to have been simply to declare, that private property shall not be changed to public property, or transferred from the owner to others, for public use, without compensation; to prevent the personal property of individuals from being consumed or destroyed for public use without compensation, not to protect such property from all injury by the construction of public improvements; not to prevent its temporary possession or use, without a destruction of it, or a change of its character. It was designed also to prevent the owner of real estate from being deprived of it, or of an easement in it, and to prevent any permanent change of its character and use without compensation. While it was not designed to prevent legislation, which might authorize acts upon it, which would by the common law be denominated trespasses, including an exclusive possession for a temporary purpose, when there was no attempt to appropriate it to public use. Such acts of legislation might be very unjust, and it may be presumed, that no legislative body would make such enactments without making provision for the compensation of injuries to private property, occasioned by acts designed to

promote the public good. The claim upon the justice of the State for compensation might be perfect, while compensation would not be secured by any provision of the constitution.

If this provision of the constitution does not prevent enactments, authorizing an exclusive possession of land owned by an individual for a temporary purpose, without compensation, when there is no attempt to appropriate it to public use, will it operate to prevent an exclusive occupation of it temporarily as an incipient proceeding to the acquisition of a title to it, or to an easement in it? Will it prohibit legislation authorizing acts to be done, when the intention is by them and by other means to be adopted, to secure finally a title to the land or to an easement in it for public use, and allow the same acts to be done upon the same land, when done without any such intention? Was it the design to make the intention, with which the act was performed, the criterion to determine, whether it could or could not be authorized by the legislative department?

This leads to a further inquiry to ascertain the sense, in which the word *taken* was used in the constitution.

That word is used in a variety of senses, and to communicate ideas quite different. Its sense, as used in a particular case, is to be ascertained by the connection in which it is used, and from the context, the whole being applied to the state of facts, respecting which it was used.

It cannot well be denied, and it is generally admitted, to have been used in constitutions containing this clause, to require compensation to be made for private property appropriated to public use, by the exercise on the part of the government of its superior title to all property required by the necessities of the people to promote their common welfare. This appears to have been denominated the right of eminent domain, of supereminent dominion, of transcendental propriety. These terms are of importance only to disclose the idea, presented by them, that the right to appropriate private property to public use rests upon the position, that the government or sovereignty claims it by virtue of a title superior

to the title of the individual, and that by its exercise the individual and inferior title becomes wholly or in part extinguished; extinguished to the extent, to which the superior title is exercised. To take the real estate of an individual for public use, is to deprive him of his title to it, or of some part of his title, so that the entire dominion over it no longer remains with him. He can no longer convey the entire title and dominion.

The exclusive occupation of that estate temporarily, as an initiatory proceeding to an acquisition of a title to it, or to an easement in it, cannot amount to a taking of it in that sense. The title of the owner is thereby in no degree extinguished. He can convey that title while thus exclusively occupied, as he could have done before. Should he do so by a conveyance containing a covenant, that it was free of all incumbrances, that covenant would not make him liable for such an exclusive occupation, unless it be admitted, that a title to the land or to an easement in it can be acquired without making compensation, and this is denied.

A construction of the provision, which would permit legislation authorizing private property to be exclusively occupied, without first making compensation as an incipient proceeding to the acquisition of a title to it, or to an easement in it, and which would not authorize the title of the owner to be extinguished or impaired without compensation, may be somewhat novel, but it will not be found to be unsupported by positions asserted and maintained in judicial opinions. It is generally admitted in them, that examinations and surveys may be authorized by legislative enactments without a violation of the constitutional provision and without provision for previous compensation. Where is to be found the limit of the legislative power to authorize trespasses of a more extensive and injurious character, which do not extinguish or entrench upon the title of the owner? Does that provision of the constitution permit the legislative power to authorize trespasses not very injurious to private property without providing for previous compensation and prohibit it from authorizing those of a

little more or much more injurious character, which do not in any degree impair or affect the title of the owner? It was not the intention to make the exercise of the legislative power depend upon the extent of the injury, which the authorized acts might occasion, if the title was not invaded.

There are cases, in which an opinion is expressed, that all injuries to private property authorized by the legislative power, can only be authorized by the exercise of the right of eminent domain; and that a temporary injury or occupation amounts to a taking of the property.

If it be admitted, that such an injury or occupation of the property amounts to a taking of it, in the sense in which the word taken is used in the constitution, it will follow, that measures must be taken to ascertain the damages occasioned thereby, and that compensation must be actually made, before it can be so injured or occupied; or that the right to do it, without compensation first made, must be admitted, leaving the party injured to the chance of obtaining compensation as he may best be able. If the former alternative be adopted, private property cannot be injured or temporarily occupied, however urgent and immediate may be the public necessity, without waiting for the final completion of all proceedings to ascertain the compensation. And how the amount of compensation can be satisfactorily ascertained before the acts occasioning damages have been performed, it is not easy to perceive.

If the latter alternative be adopted, and the right to cause a temporary occupation or injury be admitted before compensation is made, the party injured must depend upon a legislative provision for his compensation; and the prohibitory clause of the constitution will fail to secure to him, with entire certainty, a compensation. In other words, it will of itself afford him no protection against such temporary injury or occupation; and would leave him in the position, in which he would be by a construction of that clause which would only protect him against a permanent appropriation of his property, or an extinguishment or diminution of his title to it.

Many of the judicial opinions urgently restrictive of the leg-

islative power assert, that the title to land taken or to an easement in it, cannot be transferred from the owner to others for public use without compensation actually made; that the acts of payment and of transfer are simultaneous. If this be true, it is immaterial, so far as it respects the acquisition of a title to land or to an easement in it for public use, when compensation is made. It can only be material to insist, that compensation shall be made before an exclusive occupation is permitted, to prevent a temporary inconvenience and loss. An attempt has already been made to show, that such was not the design of the prohibitory clause.

In the case of *Callender* v. *Marsh*, 1 Pick. 430, the opinion states, that the clause "has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government."

In the case of *Hooker* v. *The New Haven and Northampton Co.* 14 Conn. 146, WILLIAMS, C. J., says, that the canal being made in the place designated "and the damages assessed and paid, it became a canal legally authorized and the company became vested with the legal right to the enjoyment of their property." And SHERMAN, J., says, "that the only limitation at common law or by any constitution to the legislative power over individual property is, that what is taken must be paid for."

In the case of *Bradshaw* v. *Rogers*, 20 Johns. 103, SPENCER, C. J., says, "it is true, that the fee simple of the land is not vested in the people of the State, until the damages are appraised and paid; but the authority to enter is absolute and does not depend on the appraisal and payment."

In the case of *Bloodgood* v. *The Mohawk and Hudson Rail Road Company*, 18 Wend. 9, MAISON, Sen., insists, that an entry and possession of the land taken in defiance of the rights of the owner, is a taking of it in the legal sense, and yet he admits, that the "legal fee may not be in them."

In the case of *Baker* v. *Johnson*, 2 Hill, 342, the opinion states, "Although the absolute fee did not pass to the State, until the appraisement of damages, yet the right to enter and

use the property was perfect the moment the appropriation was made." It is submitted, that a payment, as well as an appraisement, should have been required to pass the title.

In the case of *The People* v. *Hayden*, 6 Hill, 359, the opinion states, "the statute places the right to have compensation made, where the principle of the constitution places it, viz. upon the forcible devestment of the use and enjoyment of private property for the public benefit." If the devestment intended was of a permanent character there would be no objection made to it.

In the case of *Smith* v. *Helmer*, 7 Barb. 416, the opinion states, — "It is sufficient for this case, that the settled construction of the constitution, which prohibits private property to be taken for public use without just compensation, actual compensation need not precede the appropriation."

In the case of *Rubottom* v. *McClure*, 4 Black. 505, it was decided, that private property might be taken for public use, upon provision being made for a subsequent compensation.

In the case of *Thompson* v. *Grand Gulf R. R. Co.*, 3 How. Missis. 240, it was decided that compensation must be first made, the constitution of that State requiring that it shall not be taken "without a just compensation first made therefor."

In the case of *Pittsburg* v. *Scott*, 1 Penn. 309, it was decided, that it was not necessary, that compensation should be actually ascertained and paid before private property is appropriated to public use. That it was sufficient that an adequate remedy was provided by which compensation could be obtained without any unreasonable delay. To the construction of the prohibitory clause proposed, it may be objected, that it will not prevent the exercise of legislative power to authorize the commission of serious injuries upon private property without making provision for compensation.

A construction so broad as to prevent this, would greatly limit the legislative power, and bring it within a much narrower sphere of action, than it was accustomed to claim and exercise without complaint, before the constitutions contain-

ing this clause were framed. Reliance must be placed upon the justice of legislation, and upon the administration of the laws for a recompence for such injuries, and not upon a provision of the constitution, not designed for such a purpose.

Another objection to this construction may be, that the owner will not be able to recover compensation for the exclusive occupation of his land, and for the injuries thereby occasioned, when the proceedings are not so completed and compensation made as to transfer any title to land or to an easement in it for public use.

This objection is believed to be founded upon an incorrect position. If compensation be not made within a reasonable time after the land has been exclusively occupied, the right to continue that occupation will become extinct. It being authorized only as a part of the proceedings permitted for the acquisition of title, when it becomes manifest by an unreasonable delay, that the avowed purpose is not the real one, or that, if real, it has been abandoned, the measures permitted for that purpose will no longer be authorized; and if the occupation be continued after that time, the occupants will be trespassers, and liable to be prosecuted as such. The damages occasioned before the right of exclusive occupation became extinct may be recovered by an action of trespass or by an action on the case containing in the declaration averments, that an exclusive occupation was authorized for the purpose of acquiring title for public use, and that no such proceedings have taken place as would transfer any title within a reasonable time, with other suitable averments. If the occupants should be regarded as trespassers *ab initio*, it would not be, as has been supposed, because they had omitted to make compensation, but because they had continued to occupy or commit trespasses after it had become manifest, that their avowed was not their real purpose, or after their real purpose had been abandoned.

It is not necessary to decide, whether such an action could be maintained, for the distinction between the actions of trespass and case has been abolished in this State.

After some difference of opinion it may now be regarded as settled, that enactments, which authorize private property to be taken for public use must provide the means or course to be pursued to have compensation made for it.

The conclusions to which this discussion leads are: —

1. The clause in constitutions, which prohibits the taking of private property for publie use, was not designed to operate, and it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it or to an easement in it.

2. It was designed to operate and it does operate to prevent the acquisition of any title to land or to an easement in it or to a permanent appropriation of it, from an owner for public use, without the actual payment or tender of a just compensation for it.

3. That the right to such temporary occupation as an incipient proceeding, will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land or of an easement in it.

4. That an action of trespass *quare clausum* may be maintained to recover damages for the continuance of such occupation, unless compensation or a tender of it be made within a reasonable time after the commencement of it.

5. That under such circumstances an action of trespass, or an action on the case, may be maintained to recover damages for all the injuries occasioned by the prior occupation.

In this case as no compensation or tender of it was made to the plaintiff within a reasonable time after his estate was occupied by the corporation, no title to it or to an easement in it has been acquired, and the occupation, although legally commenced, has ceased to be legal.

As the corporation acquired no title to the land or to any easement in it, the defendant could acquire none by his conveyance from that corporation. *Defendant defaulted.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1852.

COUNTY OF AROOSTOOK.

ELEAZER PACKARD & *als. versus* INHAB'TS OF NEW LIMERICK.

A town is not responsible for the failure of title to land sold and conveyed by their collector for town taxes.

Taxes upon the land, having been once paid by the money received upon such a sale, cannot be re-assessed, although, through deficiency in the proceedings, either of the assessors or of the collector, the title of the owner was not impaired by the sale.

The risk of title in such sales is upon the collector and the purchaser.

It is upon the purchaser, except so far as he may be protected by covenants of the collector.

For the breach of such covenants, there is no recourse to the town. The remedy is only upon the collector personally.

Where a judgment against a town was satisfied by the collector, out of money received by him upon a sale of land for taxes, and the purchaser failed to get title, through want of authority in the collector to make the sale, such failure confers no right to revive the judgment.

ON FACTS AGREED.

The County Commissioners had established a public road through the defendant town, and had appointed a committee to enter into contracts for making and opening the same. The committee made a contract with these plaintiffs for building a part of it, and with other persons for building the residue. Whereupon the County Commissioners adjudged, that the town should pay a specified amount, being the sum requisite for paying the contractors and for expenses and costs, and issued a warrant of distress against the town for the amount, directed to the sheriff, commanding him to collect the same and pay to the county treasurer. Packard, one of these plaintiffs, assigned his contract to William Webster.

The town voted to raise the money by a tax. An assessment was accordingly made and committed to one Spooner, as collector.

The tax assessed upon twenty-six lots of land not having been paid to Spooner, he sold the same at public auction. They were bid off by Webster, to whom Spooner made deeds of conveyance. Webster paid the purchase by furnishing a certificate from Packard, that he had received the amount from the county treasurer in part payment of the warrant of distress. The residue of the warrant of distress was paid from other sources, except that the sheriff's fee is yet undischarged, and the sheriff accordingly returned the precept fully satisfied, with that exception.

The plaintiffs now contend that the collector's sale passed no title to the purchaser, because of some illegalities in the tax proceedings and sales. The facts in that respect are spread before the Court for their adjudication.

This is an action of debt to revive so much of the original judgment of the County Commissioners against the town as the twenty-six lots were sold for by the collector, there being that deficiency in the *actual* receipts upon the warrant of distress.

Chase and *Hodgdon & Madigan*, for the plaintiffs.

A. Sanborn, for the defendants.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — Upon a warrant of distress issued by the County Commissioners, in favor of the treasurer of the county against the inhabitants of the town, for the amount remaining unpaid to the plaintiffs and others, for opening and making a highway in the town, the sheriff of the county returned, under date of April 2, 1842, that he had received the contents, and that he returned the same satisfied except for his fees.

The treasurer of the county appears to have given receipts to the sheriff, stating that he had received of him at different times a large proportion of that amount. Eleazer Packard, one of the plaintiffs, gave receipts to the treasurer of the county for the amounts received by him, stating them to have been received in part payment for the labor of the plaintiffs in opening and making the highway. The contract for doing this appears to have been assigned by Packard alone to William Webster.

The action is debt upon the judgment of the County Commissioners, upon which that warrant of distress was issued.

The ground, upon which the plaintiffs claim to recover, is, that payment was not made in cash to the sheriff for a large part of the amount due upon that warrant; that an assessment was made upon the property liable to assessment in the town; that Charles Spooner, acting as a collector of taxes for the town, advertised and sold at auction, for neglect of payment of the sums assessed upon them, twenty-six lots of land and conveyed them by deeds to William Webster, who paid the amount bid for them to the collector, by procuring Packard's receipt to the county treasurer, that he had received that amount in part payment of the warrant of distress; that the taxes upon those lots were not legally assessed; that Spooner was not legally chosen collector or constable; and that Webster acquired no title to the lands conveyed by Spooner to him.

When a collector of taxes makes sale of lands assessed in a town for a sufficient amount to pay the taxes and expenses,

and receives that amount from the purchaser, all further claim upon the lands or the owner of them for those taxes, is extinguished, whether the title conveyed to the purchaser be or be not a legal one. The town can only claim payment from its collector to whom the taxes have been committed for collection. Its connexion with the sale and its proceedings ceases. It cannot be permitted to collect those taxes again upon the ground, that its collector was not legally chosen or qualified. The risk respecting the title and proceedings rests upon the collector and purchaser. When the purchaser acquires a good title, he is compensated for his risk, by being allowed at the rate of twenty per cent. for the use of his money, if the lands are redeemed, and if they are not, by becoming the owner of the lands, usually, for a small part of their value. When the title does not prove to be good, he may be subjected to a loss of the amount paid for it. The town assumes no part of the risk, and does not become responsible for the goodness of the title conveyed to the purchaser, who must rely upon the covenants contained in the deed of the collector. The lands sold not being the property of the town, it can derive no benefit from a failure of the title of the purchaser. If required to compensate the purchaser for his loss of title, it would lose the amount of the taxes assessed upon the lands, and the risk respecting the title would be shifted from the purchaser, who had been paid for assuming it, to the town, which might be subjected to numerous suits, and be unable to know the actual condition of its financial concerns.

A collector is authorized to receive payment for land sold to collect the taxes assessed upon it in cash only, and he becomes accountable to the town for cash. If by any arrangement between him and the purchaser payment is made otherwise, that is a matter with which the town has no connection, and for which it is not responsible.

If in this case the purchaser of the lands had paid the amount bid for them in cash to the collector, and that amount had been paid in cash by the collector to the treasurer of the

town, and by him to the treasurer of the county, who had paid it to the purchaser on account of the amount due him for opening and making the highway, and the purchaser of the lands had failed to acquire any title, he could not reclaim the amount of money paid to the collector without making the town, upon principle, responsible to every purchaser of lands sold for the collection of its taxes, for the goodness of the title conveyed to him. The supposed course of proceedings differs from the actual one only, that instead of passing the purchase money from one to another, the person to pay and the person entitled finally to receive the money, being the same, receipts were made and delivered for it to the respective parties, who were entitled to receive it.

This mode of transacting the business for their convenience cannot vary the legal rights of the parties or impose upon the town a responsibility never assumed.

It will not be necessary to consider the other points presented. *Plaintiffs nonsuit.*

COUNTY OF PENOBSCOT.

Roby *versus* Skinner.

A bill for the redemption of mortgaged land, may be maintained without a previous payment or tender, if the mortgagee or person claiming under him, shall have neglected on request to render, before the commencement of the suit, a true account of the sum due and secured by the mortgage.

After such request, the mortgagee is to be the moving party, not only in making up the account, but also in rendering it to the mortgager.

For the making up and rendering such an account, a reasonable time is allowed to the mortgagee.

Though the mortgager in demanding the account, may have prescribed a time unreasonably short, in which it should be rendered, that will not excuse the mortgagee for a neglect to do it within a reasonable time.

In adjudging upon the question of cost, the conduct of the parties toward each other, in relation to the whole subject, may be taken into consideration.

BILL IN EQUITY, for the redemption of mortgaged land.

The opinion of the Court, SHEPLEY, C. J., WELLS, HOWARD and RICE, J. J., was drawn up by

SHEPLEY, C. J. — The case is presented for decision upon bill and answer.

The bill has been filed to obtain a decree for the redemption of an estate conveyed by the plaintiff in mortgage to the defendant.

An entry for condition broken appears to have been made on June 3, 1848, when the defendant entered into possession of the premises.

On December 21, 1850, the plaintiff handed to the defendant, in the street, near his house, and during a storm of snow, a written request to render an account before the close of the twenty-third day of the same month. Upon the invitation of the defendant, the plaintiff declined to go into his house, the object not appearing to have been stated.

The defendant made out an account on the day of the demand and kept it ready for delivery to the plaintiff, who does not appear to have been notified of it or to have called for it.

The bill was filed and service thereof made upon the defendant on March 15, 1851, and on the 27th of the same month the defendant caused an account to be left at the house of the plaintiff.

By the provisions of the statute, chap. 125, § 16, a bill may be sustained, " provided the mortgagee, or person claiming under him, shall have refused or neglected on request to render a true account of the sum due, before the commencement of the suit."

No account was rendered until after the suit had been commenced, or until after the expiration of more than eighty days after the demand for it had been made. If the suit can be maintained, it must be upon the ground of the defendant's

neglect to render an account, and not on the ground that the account, when rendered, was not a true one.

A mortgagee or his assignee, when called upon to render an account of the amount due, is entitled to a reasonable time to make up an accurate statement of the rents, profits and expenditures, and of the amount due. He cannot be expected to have it prepared, unless the demand be made at a time very near the expiration of the right to redeem. The mortgager cannot reasonably be expected to continue in attendance upon the mortgagee while the account is being prepared. He would not be informed of the time, when it might be expected to be prepared and presented. The account is to be rendered by the mortgagee. He is, by the statute, after demand made the active party. When the parties, as in the present case, reside in the same town, it is not unreasonable to expect, that he should cause his account when prepared to be presented to the mortgager.

It is objected, if this be required, he may be required to do it, when the residence of the mortgager is at a very great distance from him. The answer is, that the law does not exact the performance by him of any thing oppressive or impracticable. The demand in such case may be accompanied by a notice of a place not far distant, where the amount may be presented, or that it may be forwarded by mail. It would seem to be the duty of the mortgagee after request to render an account, if proper opportunity be afforded, within a reasonable time.

The demand in this case, that an account should be rendered by the close of the second day afterward, may or may not have been reasonable. If it were unreasonable, that would not excuse the defendant for omitting to do it within a reasonable time. Nor would the threats of the plaintiff, at variance with the written request presented by him, have such an effect. His course of proceeding may have placed him in the wrong to such degree as to deprive him of costs.

The statute does not require, that the mortgagee shall in all cases be decreed to pay costs, when he appears to have refused

or neglected to render a true account. It only protects him from the liability to pay costs, when he has not refused or neglected to do so.

The question of costs will not arise in this case, until a final decree is made, when all the conduct of the parties to the close of their relations is presented.

The plaintiff is entitled to redeem and —— —— is appointed master to take an account and to report the amount due and secured by the mortgage; and the case is reserved for further proceedings on the coming in of his report.

A. Sanborn, for the plaintiff.

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

Bicknell *versus* Trickey *& al.*

In determining what shall constitute an attachment, regard must be had to the nature of the property, its situation, the expenses of a removal, and to the kind of possession of which it is susceptible.

Thus, to preserve an attachment of mill logs, found in a river or upon its banks, it is not necessary that there should be the same manual possession or the same constancy and extent of supervision, as would be requisite in case of many other sorts of property, less cumbrous and more easily moveable.

A laborer's claim of lien on lumber is defeated, if, in the judgment which he recovers for it, any non-lien claims are also included.

When a creditor's demand is partly upon a lien claim, and partly upon a non-lien claim, he may maintain separate actions, with a recovery of cost in each, notwithstanding the general rule of allowing cost in one suit only, if the matters sued might have all been united in one action.

On Report from *Nisi Prius*, Tenney, J. presiding.

Trover for 6000 mill logs. The defendants pleaded the general issue severally.

Evidence both documentary and oral was introduced by the respective parties, though much of it was objected to. The case was then withdrawn from the jury and submitted to the Court to be decided upon such of the evidence as was

legally admissible, with power to draw inferences of fact as a jury might do.

The decision does not indicate what part of the evidence, if any, was inadmissible. But that which was rightfully admitted appears, in the estimation of the Court, to have established substantially the following facts.

The defendants owned timber land. They employed one Decker to cut logs upon it, and to haul them to the river in the forest, and to drive them down the river to the Penobscot boom, at an agreed price per thousand feet. It was a part of the contract that Decker should pay all the laborers whom he should employ, or procure their release of all liens upon the logs. Decker associated one Tewksbury with himself in the work, and they jointly cut, hauled and drove the logs, and reached the boom with them in the fall of 1849.

The defendants paid Decker for the whole work according to the contract. But the laborers were not paid, nor had they relinquished their liens.

Soon after the logs arrived at the boom, the defendants, the owners of the logs, at a pitch of high water, in November, drew them upon the Eastern shore of the river, in Milford and Oldtown.

Afterwards, in the same November, seven of the laborers sued out their respective writs, upon accounts for their services, against Decker and Tewksbury; and caused the logs to be attached thereon. Some of these accounts contained items of charge other than lien claims. The attachments were made December 6, 1849.

In February, (after the attachments,) Trickey, one of the defendants, sold all his rights in the logs to Cushing, the other defendant. On the 2d of May, 1850, being after the sixty days allowed for enforcing a lien upon lumber, three other of the laborers instituted suits for their services, and caused the logs to be attached subject to the previous attachments. About the sixth of May, the defendant Cushing, one of the owners, notwithstanding the alleged attachments, took

the logs to his own mill in Frankfort, and applied them to his own use.

The plaintiff is the deputy sheriff, by whom the attachments were all made. Subsequently to said month of May, judgment was recovered by default in each of said actions, ten in number, and the executions were placed in the hands of the plaintiff, with orders to sell the logs. Not being able to find the logs, he brought this action of trover for them.

The manner in which he attempted to *make* the attachments and to *preserve* them; and also the evidence by which he claims to connect Trickey with the conversion of the logs, will appear in the opinion of the Court.

C. P. Brown, for the plaintiff.

McCrillis and *Crosby*, for the defendants.

1. Trickey is not liable. The defendants pleaded severally. After the attachment, Trickey sold his interest to Cushing, who alone took the logs. The owner of personal property attached may make a valid sale and, if permitted, a valid delivery, subject to the attachment lien. *Nichols* v. *Patten*, 18 Maine, 232; *Fettyplace* v. *Dutch*, 13 Pick. 388; *Dunny* v. *Willard*, 11 Pick. 519, 525; *Arnold* v. *Brown*, 24 Pick. 89; *Whitaker* v. *Sumner*, 20 Pick. 399, 405; *Whipple* v. *Thayer*, 16 Pick. 25, 27.

2. The suits, upon which the last three attachments were made, were commenced long after the time, in which liens on lumber must be enforced.

3. No sufficient attachment of these logs was made; or if made it was abandoned. R. S. chap. 114, § 39, 40; *Nichols* v. *Patten*, 18 Maine, 232, 238; *Waterhouse* v. *Smith*, 22 Maine, 337; *Weston* v. *Dorr*, 25 Maine, 182; *Wheeler* v. *Nichols*, 32 Maine, 233, and the cases cited on page 240; *Sanderson* v. *Edwards*, 16 Pick. 144.

4. There has been a fraudulent alteration of the officer's return on the back of all but the three writs on which he made the last attachments.

The return of the officer is only *prima facie* evidence that he has done what his return shows.

5. The lien of laborers does not extend to cases where the operators are trespassers.

Decker and Tewksbury were trespassers. The contract with Trickey was made with one of them only. That one took the other in as a partner.

A permit to cut timber cannot be assigned. *Emerson* v. *Fiske*, 6 Maine, 200.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

APPLETON, J. — The plaintiff, a deputy sheriff, having writs in his hands against John P. Decker & al., attached or claimed that he attached, on the sixth of Dec. 1849, five thousand logs in the Penobscot river, opposite the head of Indian Oldtown islands, upon which the several plaintiffs in those writs had a lien by virtue of "an Act giving laborers on lumber a lien thereon," approved Aug. 10, 1848. He went on to the logs, marked some of them "attached Dec. sixth, 1849, by A. H. Bicknell, deputy sheriff, for men, who have a lien for their labor," and made a return of his doings on the several precepts in his hands. Of these proceedings he seasonably notified the general owners of the lumber. He further requested Charles P. Brown, the attorney for the plaintiffs in those suits in which the attachments had been made, to take a general oversight of the logs, which he agreed to do, and occasionally during the winter went up to look after and see that no one interfered with them. The defendants, who were the general owners of the lumber, requested the plaintiffs not to keep any one upon the logs, as that would cause unnecessary expense. On the second day of May following, additional writs were placed in the plaintiff's hands, who went on to the logs and attached them, subject to prior attachments. On the sixth of May, or about that time, the defendant, Cushing, drove the logs in dispute to his mills in Frankfort, for the purpose of manufacturing them.

Some of the prominent facts have thus been briefly indi-

cated. Reference will be had hereafter to others material for the just determination of the rights of the parties.

That upon the facts proved an attachment has been made, cannot be a matter of doubt. The officer went on to the logs, marked a part as attached, made a return of all, and gave notice to the general owners of his proceedings. In determining what shall constitute an attachment, regard must be had to the nature of the property, its situation, the expenses of removal and to the kind of possession which the owner retains of it. The officer may be rash in attaching property exposed as this must necessarily be, but if he assumes the risks incident to its retention and preservation, he should in this, equally, as in other cases, receive the protection of the law. The proceedings of an officer must necessarily differ in case of attaching logs floating on the waters of a river or lying on its banks, from what they would be in reference to the attachment of goods on the shelves of a store. *Hemenway* v. *Wheeler*, 14 Pick. 408. If the property had not been liable to attachment, the officer by his interference with the logs had done enough to render himself responsible for their value to the owner, and if they were attachable for these debts, to the plaintiffs in the several writs he had for service, so that he was holden to one or the other for the property accordingly, as either event might happen. It is difficult to perceive what more, under the circumstances, the officer could have done in making an attachment. He was not merely in view of the logs but he was on them with power of controlling them and of taking them into his possession, so far as in reference to this description of property it could conveniently be done. *Nichols* v. *Patten*, 18 Maine, 238; *Mills* v. *Camp*, 14 Conn. 219.

It is not denied, that the identical logs upon which the several laborers who had been employed in cutting and hauling had a lien, have been attached. It is well known, that logs for the purpose of identification are designated by various, distinct and separate marks. The officer, it is alleged, originally in his return misdescribed these marks, and subse-

quently made alterations therein, so that they should correspond with those actually on the lumber attached. The defendants insist that this is proved by a comparison of the copies of the returns left with the town clerks of Milford and Oldtown, with the originals on the writs. But the evidence offered does not necessarily establish this fact. The returns and copies are both official acts, and have equal claims to official verity. The logs might have been described by right marks in the original returns, and the difference may be accounted for as the result of haste or carelessness on the part of the officer.

But if the fact of an alteration had been established, the consequences claimed to result, that thereby, the attachment was lost, might not follow, if the officer had preserved it by retaining possession. While the writ is in the hands of the officer, and before its return, he may correct any error, or supply any omission, so that thereby it may more entirely correspond to the truth. If in a large attachment, articles should be omitted by mistake, or an error in quantity should occur, while the process was in his hands, and before its return, the officer might correct any mistake which had arisen in the pressure of business. He is liable to all parties for the truth or falsehood of his return, and until that is made, and the return day has arrived, the correction of errors is in his hands subject to his legal responsibilities. After the return day, and when the process is in the presumed custody and under the control of the Court, he would not have authority to vary in any way his returns, except by its permission. The identity of the logs, subject to the lien, with those attached being undisputed, the necessity of particularly describing them did not exist. They were in his possession by the act of attachment, and there was no need of designating any marks to make the attachment valid. If it were necessary to correct the misdescription arising from the omission of a mark, the officer might well do it while the process was in his hands and before its return.

If an attachment has been made, still the defendants claim

that it has been abandoned. The plaintiff, to show that it is still in force, relies on the provisions of R. S. chap. 114, § 39, as well as on a continued possession of the property attached. In ordinary cases a change of possession follows an attachment, and in such cases officers, and all who may be interested in knowing, are advised of the lien thus created upon the property attached. One object of this section would seem to be to provide a substitute for this change of possession and the notice therefrom resulting. The returns on the writs describe the marks of the logs with accuracy, while the copies to the clerks of Milford and Oldtown differ in the omission or transposition of some of the marks which the owners affixed to the logs as essential to their identification. The defendants, therefore, deny the continued preservation of the attachment in consequence of this difference. Whether, if this was the only mode in which the attachment has been preserved, it would be sufficient for that purpose, it is not necessary now to determine, inasmuch as we rest our decision of this branch of the cause on other grounds.

The plaintiff, by his attachments as returned on the several precepts committed to him, assumed important liabilities to the defendants as well as to the several attaching creditors. The property thereby was under his control, and he was liable to all parties interested for the use of at least ordinary care for its protection and preservation. With obligations thus onerous assumed, from which he could in no way relieve himself, he appointed Mr. Brown to take charge of the logs, who testifies that he was there repeatedly, and that on the second day of May he was on the logs with the officer and caused additional attachments to be made, subject to the first. At this time the officer must be deemed to be in possession. Prior to this date there is not the slightest proof of any interference on the part of either of these defendants with the logs. Instead of that, the proof shows that they entered into negotiations in reference to a settlement of all the attachments which had been made before that date. The return of the officer on that day, negatives entirely the idea of an intentional aban-

donment on his part. That no one was specially placed and continued in the possession of the logs, other than Mr. Brown, was in consequence of the expressed wishes of the defendants that it should not be done. On or about the sixth day of May, the logs were removed by one of the defendants, with a full knowledge on his part of what had been done. No more should be required of an officer, for the preservation of his rights against the owner of property attached, than would be expected in the case of sale, so far as regards the continuance of possession. During a portion of the fall and winter, the logs were frozen in the ice and immoveable, or moveable with great labor and difficulty. No owner would keep a man on the watch day and night. The officer had, and continued a possession, such as would have sufficed for the general owner, and is equally entitled to protection. *Jewett* v. *Wyman*, 12 Mass. 300. "It is not necessary, to continue an attachment, that an officer or his agent should remain constantly in the actual possession." *Hemenway* v. *Wheeler*, 14 Pick. 408. There are no conflicting rights of creditors. Any removal of the property by the officer would have been attended with great and unnecessary expense, and would have been positively injurious to those interested. The attachment must be considered to have been preserved and the property to have remained in the possession and under the control of the officer, until its removal through the wrongful acts of the defendant Cushing.

The plaintiffs, in the several suits in which the logs were attached, claim to recover by virtue of "an Act giving to laborers on lumber a lien thereon." Irrespective of this lien, the logs were not liable to seizure on their behalf.

The statute provides that "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 stipulated amount to be paid for his personal services and actually due. And such lien shall take precedence of all other claims except liens reserved by the State of Maine or the Commonwealth of Mas-

sachusetts for their own use," &c. The rights given by this statute confer on the laborer special privileges, and he must strictly comply with its terms, if he would claim the benefit of its provisions. The owner of the lumber may have contracted for its hauling and may have fully paid the individual with whom such contract was made, yet by virtue of this statute, the laborers may interpose their claims and assert their liens, and he may thus be compelled to pay twice for the same services.

The proceedings under this statute are therefore to be viewed in a double aspect. So far as the debtor is concerned they are *in personam*, and, as against him, the plaintiff may insert any and all claims, which by law can be joined. So far as regards the general owner of the property, and against whom the laborer has no legal claim, when the person with whom he has contracted is other than the owner of the lumber, the proceedings are strictly *in rem*. Without contract, without personal liability on the part of the general owner, the laborer claims to seize his property to satisfy the debt of another. His rights and his position are different from that of the debtor with whom the contract to labor was made.

Now this being a proceeding, so far as concerns the general owner, strictly *in rem*, the laborer's rights, under the statute, depend upon the special claim thus protected, and upon continuing its identity as well as that of the property upon which it is imposed. No special rights are granted save to the lien claim, and only to its extent. No other property is liable except that upon which the lien attaches. This claim is distinct from and takes precedence of all others. The identity of claim and of property must coexist, and must be traceable till the fruits of the judgment have been obtained by a satisfaction of the execution. The identity of the property must be established, else the lien cannot attach ; the labor must be shown to have been done upon the specific property seized, for provision is made for nothing else.

In some of the suits the plaintiffs have obtained judgments in which debts for labor upon the property claimed as security

have been joined with others having a different origin. The question thus arises, as to what shall be the effect of this course on the enforcement of the rights conferred by this statute.

In this case the judgment is for one sum, the new debt which the plaintiff has is one and indivisible. The several distinct claims have become united and merged. In *Thompson* v. *Hewitt*, 6 Hill, 254, BRONSON, J., says, "the original debt has been merged in and extinguished by the judgment. The judgment is a new debt not affected by the discharge." The laborer, instead of having a judgment for a distinct and separate claim has seen fit to prefer one not for his lien debt, but for an aggregate of claims of which that is a part. The original lien debt enters into and combines with other claims and it may constitute an indefinite and unascertainable fraction of his judgment. The same plaintiff may have a lien debt for labor on lumber, a lien debt for lumber furnished to his debtor in erecting a dwellinghouse, and another claim on account, each for the sum of one hundred dollars, and these may all be contested and the amounts so reduced that his judgment shall be only for the sum of one hundred dollars. His claims will in this event have been reduced two thirds. Now of these three several claims the jury may have negatived any two and allowed the third in its entirety, and they may have allowed any conceivable fractions of each, which upon addition shall make that sum. In what mode is the amount of the lien claim to be determined? Was the whole or none, or if any what fraction of the lien debt allowed? No possible mode of determining exists. To use the quaint but expressive language of the law, "the debt is drowned in the judgment." It henceforth becomes impossible to analyze the judgment, to ascertain the several items which go to make it up and redistribute and apportion them among the different species of property upon which the creditor has his several specific claims.

It has been determined in case of numerous defendants that whatever extinguishes or merges the debt as to one,

merges it as to all. *Roberts* v. *Smith*, 18 Johns. 478. "Taking a bond and warrant of attorney from one of two partners for a partnership debt extinguishes the liability of the other copartners. The debt as copartnership debt becomes merged in the judgment, and the individual liability of the judgment debtor in the place of the joint liability of the other partners." *Averill* v. *Loucks*, 6 Barb. 20; *Woodworth* v. *Spafford*, 14 Vermont, 447. NELSON, C. J., in *Pierce* v. *Kearney*, 5 Hill, 86, says, "the original security and consequently the remedy upon it becomes merged and extinguished by the higher security obtained through the judgment. The effect of the recovery, as it respects the further remedy against all the parties, does not turn upon the inquiry whether the merits of the claim have been determined, and so are *res adjudicata*, but upon the fact that by proceeding to judgment against one, the plaintiff has elected to change the nature of his security." In *Ward* v. *Johnson & al.* 13 Mass. 148, the Court say, that by the recovery of judgment in assumpsit the contract is merged.

Indeed all the analogies of the law are against the preservation of the lien after the lien debt shall have been joined with other claims, and been made a component part of a new judgment. The lien by attachment is only preserved by the continued identity of the creditor's claims. If under leave to amend new demands are added the lien acquired by attachment becomes vacated. *Clark* v. *Foxcroft*, 7 Greenl. 348. When the plaintiff elected to join a non-imprisonment cause of action with one of a different character, he shall be deemed to have elected to take his remedy against property alone, and not against both person and property, because the law will not allow him to prejudice the rights of the defendant by mingling his damages. *Miller* v. *Scherder*, 2 Coms. 268. The principle to be deduced from the last case, is that where a creditor has two classes of claims against his debtor, by uniting them in one suit and obtaining judgment, he reduces that in which his rights are superior to the level of that in which they are inferior; in other words, that by joining his lien debts with

others the lien is abandoned, and that claim ceases to have the priority of right upon property to which, without such joinder, it would be entitled.

It is insisted, that by R. S. chap. 115, § 93, the plaintiffs in the suits for labor were compelled to include all claims in one suit, at the peril of losing costs in any suit which might be commenced for other than the lien claims. The object of this section is to prevent the unnecessary multiplication of suits, by prohibiting the recovery of costs on more than one suit, "unless the Court shall certify that there was good cause for commencing them." But when the party has lien debts, and to enforce them is compelled to bring several suits against each piece of property upon which a separate lien attaches, this provision does not apply. In such case, as matter of right, he would be entitled to the certificate of the Court to enable him to recover his costs in each suit he might be compelled to bring to enforce his rights.

That the logs in dispute have been taken away by Cushing, and that if the attachment has been preserved, a right of action for their conversion as against him has accrued to the plaintiff, will not be questioned. The liability of Trickey is however denied. It is conceded that the defendants were jointly interested in the lumber at the time of its attachment. The evidence shows Trickey sold out to Cushing in the February after the attachment, of the existence of which both defendants were fully aware. In the winter, while, as has been seen, the attachment was in full force, Trickey told Johnson, who was in their employ, "that there was nothing to detain him from driving the logs;" and Johnson further adds, that "he should not have driven the logs unless he had had this information from Trickey." Brown testified that Cushing told him the day before the term of the Court at which the action was tried, that "he, Cushing, meant to have had this matter settled, and that Trickey of late had shown a disposition to work himself out of it, and that it would have been much more to his credit if he had never been connected with Trickey." It further appears that the defendant Trickey was

present at the taking of the depositions used in this case, and that to the inquiry, on the part of the plaintiff's counsel, "if he meant to deny that they took these logs, he said they did not." The conclusion from the whole testimony is irresistible that Cushing in all he did, acted with the knowledge and concurrence of Trickey; that Trickey meant to avoid the payment of the lien claims; that he told the man who drove the logs, that there was nothing to detain them, and that he expressly admitted they took them, thus giving the attorney of the plaintiff to understand that he should not contest their joint liability. Precedent authority or subsequent assent will make him responsible for the wrongful acts of his associate. The conclusion therefore is, that both must be held responsible for the conversion of the property.

It only remains to determine when the time elapses in which, if ever, the lien must be asserted. The statute provides that "it 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." By the contract between Decker and Trickey, the former agreed to cut, haul and drive the logs to the Penobscot boom. The place then of destination specified in the contract under which the logs were cut was the Penobscot boom. That would ordinarily be considered the primary place of destination before sale or manufacture and it is specially contracted to be so here. It preceded the sale to Cushing and the manufacture of the logs by him. The logs arrived, it would seem from the evidence, at the boom in the fall, and if so, the attachments made in May cannot be sustained.

Judgment, therefore, is to be rendered in favor of the plaintiff, for such sum as upon the principles determined in this case he is entitled to recover.

Defendants defaulted.

McCrillis *versus* Wilson.

By including in the same judgment a lien claim and a claim to which no lien attaches, the creditor waives his right of lien.

The lien, given by statute upon lumber, for the personal services of a laborer, does not extend to the hire of his team of cattle, though employed upon the same lumber.

The personal service, which the lien protects, embraces the time during which the laborer is detained at the employer's request, while the business is getting into a condition for the labor to be resumed.

Where laborers, in separate crews and in separate places, work for the same employer in cutting and hauling lumber in the woods; *it seems,* that each one of them has a lien for his services on any pieces of the lumber when at the place of manufacture, though without showing that he, or the crew with which he labored, did any work upon such pieces.

On Facts agreed.

Trover. — The plaintiff owned a tract of timber land. He contracted with J. H. Haynes & Co. to cut and haul masts to the river and drive them to the town of Brewer. They performed the contract, and he paid them in full.

They employed Samuel Nash, Royal F. Nash and James Nash, as laborers in the cutting and hauling. These laborers brought their several suits against Haynes & Co., and attached the masts, claiming the statute lien. Masts enough to pay their claims were sold by the officer upon the writs. Afterwards judgments in the suits were duly recovered by the laborers, and the executions were within thirty days afterwards, placed in the hands of the defendant, who is the officer, (a deputy sheriff,) by whom the attachment and sales were made. It is for making those attachments and sales, that this action is brought against him by the general owner.

In the suit by *Samuel Nash,* he charged and recovered judgment for his personal labor and also for the labor of eight oxen, $112,46, and for one ox-sled, to haul supplies, $5.

In the suit by *Royal F. Nash,* he charged and recovered judgment for his personal services, and also for $2, "being the amount agreed upon on an exchange of watches."

In the suit by *James Nash*, he charged and recovered judgment for his personal services and for five days detention in the woods at their request.

Haynes & Co. had several teams hauling the masts. These teams, with the crews attached to them, worked separately on several parts of the tract. The defendant was unable to prove that any one of the laborers worked upon the identical masts which were attached in his suit, or that any one of such masts was cut and hauled by the crew and team with which he worked.

McCrillis and *Crosby*, for the plaintiff.

Hobbs and *Fessenden*, for the defendant.

The opinion of the Court, SHEPLEY C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

APPLETON, J. — The plaintiff, owning certain lands, contracted with J. H. Haynes & Co. for cutting and hauling logs and other lumber and for running the same, for all which he has paid them in full, according to the provisions of his contract. The defendant, a deputy sheriff, seized the same on writs in favor of the several plaintiffs in those suits, who claimed a lien thereon for their labor. It is for this seizure this suit is brought.

It has been decided, in *Bicknell* v. *Trickey & al.*, that in enforcing the lien for labor upon lumber, the proceedings must be regarded strictly *in rem*, and that by joining such privileged claim with others, the laborer must be considered as having waived his special rights, and as merely standing on an equality with the general creditors of his debtor.

The only questions arising in this case are, in what suits, under which the defendant justifies, has the lien been lost ?

In the suit, *Samuel Nash* v. *J. H. Haynes & Co.*, are found charges for " the labor of eight oxen three months and nineteen and half days, at thirty dollars per month, $112,46, and one ox-sled, to haul loads in the woods, $3.

The Act is entitled an Act giving " to laborers on lumber a lien thereon." The lien thus given is " for the amount stip-

ulated to be paid for his personal services and actually due." The object of this statute was to protect the laborer and for that purpose alone. The claim for the labor of oxen, or for the value of the sled, can upon no reasonable principles of construction be regarded as for personal services. The same remark applies to the difference between watches, included in the judgment, *Royal F. Nash* v. *J. H. Haynes & al.* The sales by the officer, on the executions obtained in these suits, are without justification, and for these he must be held responsible.

In the suit, *James Nash* v. *J. H. Haynes & al.*, is an item for five days detention, $5, which makes part of that judgment in favor of the plaintiff. The lien for the rest of the claim is unquestioned. It would seem that the plaintiff, remaining with his employer, ready to render such services as should be required of him, might be viewed as remaining under his contract, and that he ought not to suffer because no special services were required of him. The detention might have been as a matter of prudence on the part of his employer, in the expectation that it might be expedient to continue longer in the work in which they were engaged, or in the anticipation of a rise in the water, which did not occur. If he was detained by his employer, ready to do service for him, but from any unforeseen cause, his labor was not needed, he is certainly entitled to his compensation. That he remained with his employer, that he was rightfully there, and that he is justly entitled to compensation for this as his other time, is conceded by the default in that action. The service in this instance was in remaining with those for whom he was laboring at their instance and for their benefit.

The defendant must be defaulted for the value of the masts sold to pay the judgments in favor of Samuel Nash and Royal F. Nash.

CUSHMAN *& al. versus* HOLYOKE *& al.*

The sale of an article, delivered and carried away, may be valid, although the price remains to be ascertained by an admeasurement at another stipulated time and place.

The admeasurement, when so made, although differing from one made at the time and place of the delivery, will control in determining the price.

Thus, saw logs, at the river in the forest, were there sold and delivered at an agreed price per thousand, to be driven by the purchaser, and to be paid for at a scale made at the place of manufacture; *Held,* that a survey there made will be binding, although it shows the quantity to be less than was shown by a scale of them, made at the time and place of delivery.

Where the quantity was to be ascertained by a survey of an agreed surveyor, if the purchaser should desire it, such desire may be inferred from the fact that the purchaser procured such a survey, although without notifying the seller.

Where saw logs were purchased, to be driven to the boom by the purchaser, and to be paid for at a scale there to be made, and a part of the logs were left by the way upon the intervales and shoals; *Held,* that the purchaser was not chargeable for any logs so left, if, in the driving, he used such care and diligence as prudent men ordinarily use in their own affairs.

ON EXCEPTIONS from *Nisi Prius,* TENNEY, J. presiding.

ASSUMPSIT for a quantity of saw logs.

The plaintiffs having drawn the logs to the landing on the bank of the river in the forest, sold and delivered them there, to be driven down the river by the defendants. By a scale made when the logs lay upon the bank, there was one lot. 1515 in number, amounting to 528,100 feet, and another lot amounting to 23,000 feet, the number not being recollected.

The plaintiffs made inquiry of a witness, concerning the terms of sale. The defendants objected to the testimony, upon the ground that the contract was in writing, and introduced a paper signed by the plaintiffs as follows: — $500. No. 5, Range 8. March 25, 1850. Received of C. & R. Holyoke, [the defendants,] $500 in part pay for logs bought of us at $10 per M, on the bank, marked A. & J. C. at Howard's scale, if required below boom.

The boom is at Oldtown, one hundred and twenty-five miles below the landing at which the logs were sold.

The defendants contracted with one Stinson to drive the logs.

Whether Stinson had made a clean drive, or whether he had left many logs upon the intervales and shoals, there was conflicting testimony.

In the spring, after the drive had arrived, the boom broke, and there was evidence tending to show that some of the logs were carried away by the current and lost, and there was evidence tending to show that the defendants secured them below the boom. The defendants introduced bills of a scale made by Howard below the boom, showing the quantity to be 1205 sticks, amounting to 347,610 feet, also scale bills by other surveyors of 18 other logs amounting to 5,780 feet. For these quantities the defendants had accounted to the plaintiffs.

The Judge instructed the jury that, if the defendants had used such fidelity, care and diligence to drive the logs from the bank to the boom, as prudent men use ordinarily in their own affairs, and also due diligence to preserve and secure the logs that passed through the boom, they would be liable for the logs that were scaled below the boom, by Howard, at his scale, also for logs which passed below the boom, scaled by other persons; and also for such as had not been scaled by any one below the boom, also for such as failed to come to the boom by reason of defendants' negligence and want of ordinary care, *and for no others.*

The verdict was for the defendants, and the plaintiffs excepted.

McCrillis and *Crosby*, for the plaintiffs.

The contract shows the logs to have been sold at $10 per thousand feet, upon the bank, though at Howard's survey, *if required.* There was a delivery and part payment before the logs were started from the bank. The defendants then took possession and control. The risk as to the driving was with them. The instruction placed the risk wholly upon the plaintiffs. This was erroneous, for the defendants were not acting as agents for the plaintiffs. They had the option whether to

drive the logs, or leave them to rot upon the bank. Suppose the Howard scale had overrun the forest scale, and the plaintiffs had claimed to recover to that extent, the defendants might reply, that the property had passed to them, when upon the bank.

There was a loss of 358 logs. The ruling of the Judge cast this loss upon the plaintiffs, unless there had been a want of ordinary care on the part of the defendants. But we submit that this was erroneous. *Barry* v. *Palmer*, 19 Maine, 303; *Adams* v. *Nichols*, 19 Pick. 275; 2 Black. Com. 488; *Wing* v. *Clark*, 24 Maine, 366; *Henry* v. *Mangles*, 1 Camp. 452; *Phillimore* v. *Barry & al.* 1 Camp. 513; *Harmon* v. *Anderson*, 2 Camp. 242; *Hinds* v. *Whitehouse*, 7 East, 558; *Rugg* v. *Minett & als.* 11 East, 211.

No notice was given by the defendants, that they required a survey by Howard. But they were bound to give such notice. It was not their right to keep silent upon that matter, to find which of the two scalings should be most favorable to them, before deciding which they would adopt. Chitty on Contracts, 733; *Osgood* v. *Jones*, 23 Maine, 312; *Lunt* v. *Padelford*, 10 Mass. 230.

Cutting, for the defendants.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and HATHAWAY, J. J., was drawn up by

RICE, J. — The defendants purchased of the plaintiffs a quantity of pine mill logs, which were lying upon the bank of the east branch of the Penobscot river. The logs, before they were removed from the bank, measured, according to the scale bills introduced at the trial, five hundred and fifty-one thousand one hundred feet, board measure. On a resurvey, after they had been driven to Howard's boom, the place of destination, there was a large deficiency in the amount of timber when compared with the original survey in the woods. The plaintiffs contend that this loss occurred from a want of proper care and diligence in driving the logs, and the acci-

dental breaking of the boom in which they were lodged after they had been driven, but before the second survey.

The question at issue between the parties is, which shall sustain this alleged loss. By the terms of the contract, a survey might be had below Howard's boom if desired.

The Judge instructed the jury, that if the defendants had used such fidelity and care and diligence to drive the logs from the bank to the boom, as prudent men use, ordinarily, in their own affairs, and due diligence to preserve and secure the logs that passed through the boom, they would be liable for the logs that were scaled below the boom by Howard, at his scale; also for logs which passed below the boom scaled by other persons, and those not scaled by any one below the boom; also for logs which failed to come to the boom on account of defendants' negligence and want of ordinary care, and no others.

The plaintiffs' counsel contended that the logs were delivered on the bank, before they were driven, and that the title thereby passed to the defendants, and that consequently they were at the risk of the defendants from and after that time.

The title to the logs is not now matter of controversy, nor can that question be of any importance only as it may be supposed to bear indirectly upon the question of loss. It is no uncommon thing for property to be sold and delivered, and the quantity be ascertained at a subsequent time and place. Such was the case in *Macomber* v. *Parker*, 13 Pick. 175, and *Riddle* v. *Varnum*, 20 Pick. 280. It was undoubtedly competent for the parties to transfer the logs at one place and to determine the quantity at another.

Every practical lumberman understands that there is a wide difference between selling logs at the woods scale, and selling at a resurvey after they have been driven to market. The price, at the latter scale is always much higher than at the former. This arises from the fact that there is always incident to driving more or less depreciation and loss.

The contract, as has been seen, provides for a resurvey below Howard's boom if desired. The fact that such a survey

was desired is fully established by the acts of the parties. What then was the intention of the parties ? Manifestly that the purchaser should have the benefit of a survey after the logs had been driven.

By undertaking to drive the logs, the defendants assumed to act with due care and diligence. To this obligation they were held by the instructions of the Judge, and they were also held accountable for all losses, except such as were incidental to driving with proper care, &c. We think if either party has occasion to complain of the rule prescribed by the Court, it is not the plaintiffs.

Exceptions overruled.—*Judgment on verdict.*

State *versus* Woodward.

In a prosecution by the State, the competency of a witness for the State is not taken away by the fact that he is an inhabitant of the town to which the law appropriates the penalty, if recovered in the prosecution.

In a criminal prosecution for unlawfully selling intoxicating liquor, if the defendant relies on a license for the sale, the onus of proving such license is upon him.

In a criminal prosecution for presuming to be a *common seller of intoxicating liquor*, proof that the defendant had license as an *innholder*, and as a *common victualer*, establishes no defence.

On Exceptions from the *District Court*, Hathaway, J.

Indictment for the common selling of intoxicating liquors in the city of Bangor. The penalty for such an offence is, by the statute, appropriated to the town or city within which it was committed.

The government offered as a witness one of the inhabitants of Bangor. For that reason, he was objected to. He was, however, admitted.

The government offered no evidence, that the defendant had not been licensed to sell. The Judge ruled such evidence to be unnecessary.

The defendant proved, that for the time alleged in the in-

dictment, he held a license as an innholder and victualer. The Judge ruled that this furnished no defence.

The verdict was against the defendant, and he excepted.

Blake, for the defendant.

1. The witness was inadmissible, by reason of his interest, being an inhabitant of Bangor. At the common law that interest would clearly disqualify. The statute, chap. 115, § 75, has changed the rule only so far as relates to "suits at law." But an indictment is not a "suit at law." To describe an indictment as a suit at law, or to describe a suit at law as an indictment, is a violation of language. *State* v. *Bishop*, 15 Maine, 122; *Commonwealth* v. *Odlin*, 23 Pick. 275.

2. Every thing is to be presumed in favor of innocence, not inconsistent with the facts proved. To test the ruling, we may suppose the liquor to have been imported; or that it was on hand prior to the passage of the prohibitory Act; or that the defendant sold merely to his boarders. The prohibition of such sales was not the intention of the statute. Again, the defendant was a licensed innholder and victualer, and as such, had authority for selling to his guests and boarders. *State* v. *Burr*, 1 Fairf. 438. All the laws of 1821, pertaining to innholders, upon which that decision was made are yet in force. They were reënacted in the R. S. chap. 36, and were not repealed by either the Act of 1846, or that of 1851, not being inconsistent with them.

3. The allegation of the indictment is, that the defendant had no authority to sell. This allegation has not been proved. Persons authorized to sell under the Act of 1851, were those who had been *appointed* as agents. A mere certificate of the appointment, given by the clerk of the city, is not the best evidence. The record is the only allowable evidence. When a seller was authorized under the former law, a *license* was handed to him, which of itself was the highest evidence, whether the clerk had or had not made a record of it. The decisions, therefore, that a defendant, who relied upon *a license*, was bound to show it, are not now ap-

plicable. The government, then, having failed to show *by the record*, that the defendant had not been appointed an agent to sell, the prosecution must fail.

The case was submitted for the State without argument.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE and APPLETON, J. J., was drawn up by

APPLETON, J. — On the trial of an indictment, the inhabitants of the town, where the offence is alleged to have been committed, are competent witnesses, notwithstanding the penalty in case of recovery would enure to their use. *State* v. *Stuart*, 23 Maine, 111.

In an indictment for presuming to be a common seller without a license, the defendant, if he would avail himself of one, must prove it. Though the indictment must negative the fact of being licensed, yet proof thereof is not required of the government to authorize a conviction. *State* v. *Crowell*, 25 Maine, 171. *State* v. *Churchill*, 25 Maine, 306. The reasoning of the Court in those cases applies with equal force to the present, and must be considered decisive of this point.

The defendant was licensed as an innholder and common victualer, and it is insisted that as such he might sell liquors to his guests. In support of this proposition, the Court are referred to *State* v. *Burr*, 1 Fairf. 438. It is true that the provision upon which that decision was based has been reënacted by R. S. chap. 36, and if there had been no subsequent legislation this decision would apply. But the Act of 1846, "to restrict the sale of intoxicating drinks," and the Act of 1851, "for the suppression of drinking houses and tippling shops," prohibit by the most general language the sale "directly or indirectly of any spirituous or intoxicating liquors, or any mixed liquors a part of which is spirituous or intoxicating," with the single exception of sale, for medicinal or mechanical purposes. All statutes may be repealed or modified by subsequent legislation and the repeal or modification may be by express language a necessary and unavoidable implication. The statute of 1821 does not contemplate the granting

a license to any one. The language of the recent statutes on this subject is too general, the object of the legislature too apparent, to leave it a matter of doubt, that it was their intention to embrace within its provisions every citizen within the limits of its jurisdiction and to prohibit the sale of all intoxicating liquors, whether imported or not, except for certain specified purposes. All Acts or parts of Acts inconsistent with this Act are repealed. The granting a license to a common victualer to sell to those who may board with him, or to others, would be not merely inconsistent with, but would be a palpable violation of the first section. No sale by any person whatsoever can be justified under the statute, except by an agent duly appointed and within the scope of his appointment. *Exceptions overruled.*

Judgment on the verdict.

COUNTY OF WASHINGTON.

McAllester *&* *al.* *versus* Sprague and Morgan.

In assumpsit against joint debtors, it is no defence, that one of them has been discharged from *his share* of the debt by an unsealed instrument in writing, although founded upon an adequate consideration.

Should the discharged debtor be afterwards molested on account of the debt, his remedy is against the creditor by a special action, founded upon the discharge.

On Exceptions from the *District Court*, Hathaway, J.

Assumpsit on an unsettled account. The demand had been sued, and thereupon the plaintiff received from Sprague a horse, and gave to him a memorandum, signed by them, in the following form; viz. "received of Jotham L. Sprague one red horse," (described,) "in full for his half of our account against him and E. L. Murphy, * * * to be his discharge in

full for debt and cost but no discharge for Murphy." The defendants introduced that document, and the Judge ruled that it was a bar to this suit. The verdict was for the defendants and the plaintiffs excepted.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, and APPLETON, J. J., was drawn up by

WELLS, J. — A payment of a part of a debt is not a satisfaction of the whole, even if it be so agreed, but where there is some other consideration than such partial payment, and it is received in full satisfaction of the debt, the debt will be thereby discharged. *Lee* v. *Oppenheimer*, 32 Maine, 253. The consideration given in the present case by the defendant Sprague to the plaintiffs, was a horse, and it would have been a sufficient satisfaction of the debt, if it had been received for that purpose, but the plaintiffs did not intend to discharge the whole debt, but only to relieve Sprague from any further liability. The receipt purports to be in full of his half of the account, and by its express terms, it was not to discharge Murphy. If the receipt should be considered a release of Sprague, it would discharge the whole debt, for a release of one joint debtor or one joint and several debtor is a release of all. To give it that effect would be a construction directly in opposition to the plain intention of the parties. If it had been an absolute release to Sprague under seal, although upon a partial payment, it would have been a discharge of both debtors. *Walker* v. *McCulloch,* 4 Greenl. 421. Because the debt being the debt of each, the release of one debtor is a release of all, who are holden for it. The effect of a release is based upon a presumed payment, the seal being evidence of a complete and ample consideration. But the receipt in this case was not a technical release, it was not under seal, and if it had been, it could not fairly be understood to mean, that the whole debt should be discharged by a present release of Sprague. Its language does not imply an intention to cancel the whole debt, although the consideration might be adequate to that purpose and also to release Sprague, without its being

under seal. Such effect might have been given to it, if it had been so intended. But it must be construed according to the purpose of the parties, and its meaning appears to be, that the whole debt was not to be extinguished, but only one of the debtors discharged. Now an immediate discharge of one of the debtors in a joint debt would enable the other to be discharged also. And to prevent this result and in order to carry into effect the purpose of the parties, the receipt must be considered an agreement to discharge Sprague, like a covenant to discharge or not to sue, and as having the same legal effect, in this action.

By giving to the receipt the effect of a covenant, the object of the parties will be accomplished, for such a covenant would not be a release to Murphy. *Bank of Catskill* v. *Messenger*, 9 Cowen, 37; *Shaw* v. *Pratt*, 22 Pick. 305; *Lacy* v. *Kynaston*, 2 Salk. 575.

Nor can it prevent Sprague from being liable in this action. A covenant not to sue a sole debtor may be pleaded as a general release in bar, to avoid circuity of action. But if he be one of two or more debtors, such covenant cannot be pleaded in bar, and if he should be sued contrary to the terms of it, he must pursue his remedy by an action upon the covenant. *Shed* v. *Pierce & al.* 17 Mass. 623; *Harrison* v. *Close & al.* 2 Johns. 451; *Dean* v. *Newhall*, 8 T. R. 168; *Kirby* v. *Taylor*, 6 Johns. Chan. 250; 2 Saund. 48, (note 1.); *Rowly* v. *Stoddard*, 7 Johns. 207. If such covenant could be pleaded in bar by one debtor when he is joined with others, it would operate contrary to the intention of the parties, and would be a protection to those with whom it was not made. For in an action *ex contractu*, there must be a recovery against all of the defendants or none. And if judgment should be rendered in this action for Sprague, it must also be in favor of Murphy. 1 Chit. Plead. 32. And if Sprague's name should be stricken from the writ, under an amendment granted by virtue of the statute, chap. 115, sect. 11, Murphy could claim the same right to plead the non-joinder of Sprague as if the action had been commenced against

him alone. The omission of one joint promisor may be pleaded in abatement. *Ruggles* v. *Patten*, 8 Mass. 482. And when the name of one is stricken from the writ, the other ought not to be precluded from an opportunity of objecting to the continuance of the action against him alone. If the obligation had been joint and several, as then the creditors might have sued Murphy alone, with whom no agreement had been made, and there could have been no necessity for an action against both, Sprague's name might be stricken from the writ, in accordance with the statute, and the action maintained against Murphy, as was done in the case of *Goodnow* v. *Smith*, 18 Pick. 414.

But there does not appear to be any way effectually to hold Murphy upon the cause of action in this case, which is joint, without uniting both debtors in the suit, and without considering the terms of the receipt as an agreement, operating like a covenant, with Sprague. This course corresponds more perfectly with the intention of the parties than to regard it as a present release of Sprague. If the execution should be enforced against him, he will have his remedy upon the agreement, to which a greater force ought not to be given than would be to an actual covenant to discharge him.

The exceptions are sustained, nonsuit set aside and a new trial granted.

Fuller and *Harvey*, for the plaintiffs.

Tyler, for the defendants.

Kinnear *versus* Lowell.

A mortgage of land is not, under all circumstances, discharged by a payment of the debt which it was intended to secure.

A mortgage is not discharged by a payment, coerced from the mortgager, when in fact he had conveyed the right of redemption to one, who was bound to pay the debt.

In such case, the mortgager is entitled to repayment, and to be regarded *in equity* as the assignee of the mortgage to secure its enforcement.

If, in such case, the mortgager, after making the payment, shall obtain a release of the estate from the mortgagee, he will in law be regarded as the assignee.

An estoppel is commensurate only with the covenant out of which it springs.

On Report from *Nisi Prius*, Tenney, J. presiding.

Writ of entry.

The demandant mortgaged the premises to Gove & Co., to secure his note to them of $209. He then conveyed the same to the tenant by warranty deed, subject to the mortgage. He was afterwards sued upon the note, and compelled to pay it on execution, and the mortgagees thereupon "released and conveyed" to him all their rights under the mortgage. He now brings this suit as their assignee.

The deposition of one Pike was introduced by the demandant, though objected to. It tended to prove, that the tenant verbally recognized a contract with the demandant to pay the note to Gove & Co.

Walker and *OBrien*, for the demandant.

The tenant was bound to pay the mortgage debt.

The payment of it by the demandant, under compulsory process, did not discharge the mortgage. By that transaction, he became subrogated to the rights of the mortgagees. *Bullard* v. *Hinkley*, 5 Maine, 272; *Carle* v. *Butman*, 7 Maine, 102; *Gibson* v. *Crehore*, 3 Pick. 475; *Barker* v. *Parker*, 4 Pick. 505; *Hogdon* v. *Smith*, 12 Metc. 511.

If it is for the interest of the party to uphold the mortgage, an intent to do so will be presumed. *Hatch* v. *Kimball*, 14 Maine, 9; *Hatch* v. *Kimball*, 16 Maine, 146; *Pool* v. *Hathaway*, 22 Maine, 85; *Campbell* v. *Vaughan*, 24 Maine, 332.

Even where the mortgagee had entered on the record a discharge of the mortgage, equity will uphold it when it is for the interest of the mortgager. *Popkin* v. *Bumstead*, 8 Mass. 491.

The demandant is not estopped by his deed to the tenant, for it was made subject to the mortgage.

Lowell, *pro se.*

1. The plaintiff conveyed to the defendant by warranty deed, all his right, title and interest in the premises. He no longer had any privity of title. He was not entitled to redeem. *Elder* v. *True*, 32 Maine, 104; *True* v. *Haley*, 24 Maine, 297.

2. The plaintiff was estopped by the covenants in his deed to the tenant from purchasing this mortgage, or from acquiring any other outstanding title. The law is well settled, that where one conveys to another, by deed of general warranty, land to which he has not then a perfect title, any title subsequently acquired by the grantor, will enure, by estoppel, to the grantee. *Fairbanks* v. *Williamson*, 7 Greenl. 96; *White* v. *Erskine*, 1 Fairf. 306; *Lawry* v. *Williams*, 13 Maine, 281; *Baxter* v. *Bradbury*, 20 Maine, 260; *Durham* v. *Alden & al.* 20 Maine, 228; *Gardner* v. *Gerrish*, 23 Maine, 46; *Pike* v. *Galvin*, 29 Maine, 183; *Somes* v. *Skinner*, 3 Pick. 52; *White* v. *Patten*, 24 Pick. 324. Nor are the cases of *Hatch* v. *Kimball*, 14 Maine, 9, and *Same* v. *Same*, 16 Maine, 146, at all in conflict with this doctrine.

3. A real action upon a mortgage cannot be sustained after the debt secured by it has been paid. *Williams* v. *Thurlow*, 31 Maine, 392; *Chadbourne* v. *Rackliff*, 30 Maine, 354.

This debt had been paid before the assignment of the mortgage by Gove & als. to Kinnear, and the mortgagees then had no interest in the premises, and therefore could assign none. *Barry* v. *Bennett*, 7 Metc. 354.

4. An assignment of a satisfied mortgage conveys no interest in the estate. *Chadbourne & ux. & als.* v. *Rackliff*, 30 Maine, 354; *Holman* v. *Bailey*, 3 Metc. 55.

5. The writing on the back of the mortgage operates as a discharge, and not as an assignment. The debt had then been paid.

6. Equity is with the tenant. He was under no obligation to redeem the mortgage. *Elder* v. *True*, 32 Maine, 104.

He had made no "promise, contract or agreement in writing" to answer for Kinnear's debt to Gove & als. R. S. chap. 136, § 1.

Nor had he, by any instrument in writing, engaged to discharge the mortgage. If he had done so by an instrument of as high a nature as the deed, then the covenants of warranty in the plaintiff's deed would not include the mortgage. *Brown* v. *Staples*, 28 Maine, 497; *Given* v. *Marr*, 27 Maine, 212.

7. Pike's deposition should be excluded. It seeks to vary, explain or control by parol evidence, the plaintiff's deed to the tenant. If it proves a verbal agreement, such agreement is void. R. S. chap. 136, § 1.

Chase replied for the plaintiff.

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — When a mortgager pays his debt to the mortgagee, the usual result is, that the estate is relieved from the incumbrance. This is so, because the debt has been paid by the person, whose duty it was to make the payment. But he may not continue, with respect to others than his creditor, to be the person who is to make the payment. In such case a compulsive payment made by him, cannot be regarded as made with the intention to relieve him, whose duty it was to have made the payment. It may more appropriately be regarded as made with an intention to save and secure all his legal and equitable rights.

When so paid by the mortgager, when he is not the owner of the equity of redemption, he is deeply interested to have the mortgage upheld, to enable him to recover the amount due upon it from the estate, or from him who should have made the payment.

In this case the mortgager appears to have conveyed his equity to the tenant, on October 1, 1847, "subject to a mortgage given by said Kinnear to Gove, Stone & Co., April 1, 1847, for two hundred and nine dollars." The conveyance having been made subject to that mortgage, the amount due upon it must have constituted a part of the price to be paid for the estate; and it became the duty of the purchaser to pay

that debt, if he would relieve the estate from the incumbrance.

A suit appears to have been subsequently commenced upon the note secured by the mortgage, in which a judgment was rendered against the demandant, who paid the debt upon an execution issued thereon, probably in the month of June, 1849, and obtained from the mortgagees, on September 14, 1849, a release of all their right, title and interest in the estate.

This case is distinguishable from the cases of *Chadbourne* v. *Rackliff*, 30 Maine, 354, and *Williams* v. *Thurlow*, 31 Maine, 392, cited by the tenant. In the first named case there was nothing due by virtue of the mortgage, and the person claiming to be the assignee of it, had paid nothing upon it. In the other case, the person claiming to be the assignee of the mortgage "united in himself the person who should make the payment, and who should receive it." Testimony to prove, that another than the debtor had agreed to pay the debt secured by the mortgage, appears to have been received.

When the demandant obtained the release from his creditors, as well as when he made the payment, he was not the owner of the equity of redemption, and it does not necessarily follow, that the mortgage must be considered as extinguished by a payment of the debt secured by it.

In the case of *Marsh* v. *Pike*, 10 Paige, 495, Marsh appears to have conveyed in mortgage, a lot of land to Pike, and to have conveyed it afterwards to McLean, subject to that mortgage. McLean conveyed it to Towle, subject to the same mortgage. Testimony appears to have been received to prove, that McLean and Towle each agreed to pay the debt secured by the mortgage. The opinion of the Chancellor states, "the effect of these several conveyances and agreements is in equity to place the complainant in the situation of a surety for the payment of the bond and mortgage, and to make the defendants, Towle and McLean, the principal debtors as to him." "The complainant, therefore, if he paid the bond and mortgage to Pike would have been entitled to be substituted in Pike's place, not only as to the remedy against

the land, but also as to the equitable claim against McLean and Towle, who had agreed to pay off the mortgage."

These doctrines were asserted in a suit in equity, but when a party is so situated, that he can in equity have a mortgage enforced against the estate after the debt secured by it has been paid to the creditor, the law has so far adopted the rules in equity, that it will uphold the mortgage by regarding the person, who has obtained a release of the estate, as an assignee of the mortgage. And it may do this, although he may be the mortgager, when he is not the owner of the equity of redemption. *Barker* v. *Parker*, 4 Pick. 505 ; *Willard* v. *Harvey*, 5 N. H. 252.

The demandant having been compelled to pay the debt secured by the mortgage, becomes entitled to a reclamation of it, and to be regarded as the assignee of the mortgage for its enforcement against the estate.

It is insisted in defence, that he is estopped to do this by the covenants of general warranty, contained in his conveyance of the estate to the tenant. He would be estopped by them to assert any title, to which those covenants would be applicable. But the mortgage title was excepted from their operation, and the estoppel is coëxtensive only with the covenants.

An answer to the other objections will be found in the observations already presented. *Tenant defaulted.*

COUNTY OF HANCOCK.

HIGGINS *versus* WASGATT.

Written instruments are to be construed with reference to the nature of the transactions between the parties, and so as to give effect, if practicable, to their intentions.

A deed, "*demising and granting*" land to A. B. his *heirs and assigns*, with habendum for his natural life, will be held to convey a life estate only, if, from other parts of the deed, it appears that such was the intent of the parties.

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

WRIT OF ENTRY. Plea, general issue.

The demandant is a widow, and claims under a deed, inartificially drawn, by which her son, Henry Barnes, on the 26th July, 1841, "demised, granted and farm-let the land to her and her husband, *their heirs, executors, administrators and assigns*, to have and to hold the same for and *during their natural lives.*" By the same instrument, Barnes covenanted that he would keep the farm in good repair, while it should remain in *his* possession; and the parties, for themselves and their *respective heirs*, executors and administrators, agreed to fulfill a certain contract made between them, and Barnes stipulated that the demandant should have a home during her life with him.

The tenant claimed under a deed made to him by Barnes in 1845, which was recorded prior to the registry of the deed to the demandant and husband.

The demandant called two witnesses, whose testimony tended to show that the tenant, when receiving his conveyance from Barnes, had knowledge of the previous deed to the demandant and husband.

The case was withdrawn from the jury. If the demandant is entitled to recover, the rents and profits are to be assessed by an individual agreed upon.

Herbert, for the demandant.

The *habendum* and the *premises* of the instrument are inconsistent and repugnant.

"The general rule is that, where there is an apparent inconsistency between the *habendum* and the *premises*, the deed shall be construed to give effect to the whole if possible; "but, if this cannot be done, the greatest regard shall be paid to the *premises*, and the *habendum* shall be considered repugnant and void; as if lands are given *in the premises* to one and his heirs, *habendum* to him for life, the *habendum* is void, because it is repugnant to what is already expressed in the *premises*." Wood's Inst. 229; Croke Jac. 563; 7 Petersd. Abridg. 676.

The premises "*grant, demise and to farm-let* to the demandant and her husband and *their heirs*," *&c.*

The office of the *premises* is, among other things, "*to set forth the certainty of the grantor, grantee and the thing granted.*" 2 Black. Com. 298.

"The office of the *habendum* is properly to determine what estate or interest is granted by the deed; this may be, and sometimes is, performed by the *premises*, in which case *the habendum* may lessen, explain, enlarge or qualify the premises, but not totally contradict or be repugnant to the estate granted in the premises." 2 Black. Com. 298.

And the very case at bar is there put as an example. Had the grant been in the *premises* to A and his heirs, *habendum* to him for life, the habendum would be utterly void; for an estate of inheritance is vested in him before the *habendum* comes; and shall not afterwards be taken away or devested by it." *Baldwin's case*, Ibid *ut Sup.*; *Edwards' case*, cited in 2 Black. Com. 298; Inst. 299, a.; Plowd. 153.

The case supposed in Blackstone, the very strongest example of repugnance put in the books, is the very case at bar, and is fully sustained by *Baldwin's case*, there cited, which, so far as the words used are concerned, is like this instrument; though the technical necessity of livery and seizin operated in that case to defeat the grant in fee, and let in the limitation for life. But our statute permits all deeds to take effect from delivery without other ceremony, which leaves this instrument to take effect as a deed in fee. 4 Cruise's Dig. page 291, chap. 20, § 76, 77, 78.

The case of *Carter* v. *Mudgewick*, 3 Lev. 339, was an indenture similar in the premises and habendum to that in the case at bar. The Court there say, although the habendum of a future freehold is void, "yet the grant in the premises being expressly to him and his heirs, the indenture shall inure upon the premises and shall pass the estate to the vendee directly by the premises. In *Goodtitle* v. *Gibbs*, 5 B. & C. and 12 C. L. Rep. 359, the conveyance was by release "to I. W. and to his heirs and assigns, to hold the same to I. W. his heirs and assigns from and after the death of M. H." the releasor.

This case was stoutly argued and the case of *Carter* v. *Mudgewick* was stated by counsel to be a solitary decision; but ABBOTT, C. J., in delivering the opinion of the Court, says, "if an estate and interest be mentioned in the *premises*, the *intention of the parties is shown* and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the *premises*, the *habendum* will be rejected and the deed stand good upon the premises. * * * * The case of *Carter* v. *Mudgewick* is not a solitary case, the case of *Jarman* v. *Orchard* is to the same effect. Skin. 528; Salk. 346; Show. P. C. 199."

And this would seem also to be good law in this country. 2 Hilliard's Real Prop. 355, § 155; 4 Dane's Ab. chap. 109, art. 5, § 3.

In *Bond* v. *Susquehannah, &c.* 6 Har. & J. 132, BUCHANAN, J., in the opinion of the Court, recognizes this doctrine. And *Hoffner* v. *Irwin*, 4 Dev. & B. 433, is also cited.

Chancellor Kent, 4 Com. 468, uses the following language, "the habendum cannot perform the office of devesting an estate already vested by the deed, for it is void if it be repugnant to the estate granted," and *Goodtitle* v. *Gibbs* is cited in the margin as the authority, and this rule of construction seems not to be questioned in American Courts.

Robinson, for the tenant.

The instrument, under which the demandant claims, was manifestly intended by the parties as a lease, with certain special provisions. The habendum is for the natural lives of the

lessees. Possibly this created a freehold. The mention of heirs and assigns does not establish the kind of estate. The limitation of the habendum is decisive. The intent of the parties is obvious. It was, that no title greater than a life estate should pass. The intent is to be carried into effect.

Herbert, in reply.

The intention of the parties to a deed, as in all other contracts, is to govern, a deed being but an executed contract of sale, but the intention is to be gathered from the instrument; parol evidence cannot vary it, and thus change the title of real estate. The law has prescribed certain rules for interpreting the intention of the parties. These rules are uniform and have the judicial sanction of centuries. They have been affirmed, whenever questioned, by the wisest and best of Judges. This Court will hesitate long before they break down these fixed and settled principles of construction and interpretation, and make them yield to supposed intention. Besides, one or the other clause in the deed must yield. Will the Court reject the premises to give effect to the habendum, destroy the essential to sustain the unessential, unless compelled to it by authority?

The opinion of the Court, SHEPLEY, C. J., WELLS, RICE, HATHAWAY and APPLETON, J. J., was drawn up by

RICE, J. — This is a writ of entry. Two questions only were presented at the argument for the consideration of the Court; *First*, what estate, if any, has the plaintiff in the demanded premises? *Second*, had the tenant received actual notice of the existence of the deed from Barnes to Higgins and wife, before he took his deed from Barnes, March 6th, 1845?

The deed from Barnes to Higgins and wife is inartificially drawn. But every written instrument must be construed with reference to the nature of the transaction between the parties, and in such way if practicable, as to give effect to their intentions. Taking the whole instrument into consideration, there can be no doubt that it was the intention of the parties that

Higgins and his wife should take a life estate in the premises. In that estate they were siezed not by moieties, but as an entirety to be held by them and the survivor of them. *Shaw & al.* v. *Hussey & al.* 5 Mass. 522.

The second proposition presents a question of fact, purely. From the uncontradicted testimony of the witnesses, Knowles and Richardson, there can be no doubt of the fact, that the defendant was fully apprised of the existence of the deed from Barnes to Higgins and wife at the time of his purchase, and that in estimating the value of the estate purchased, especial reference was had to the incumbrance created by that instrument. In his own language he was to "step into Barnes' shoes," and perform his covenants. Such being the fact, no reason is perceived, either in law or equity, why the demandant should not recover.

According to the agreement of the parties, judgment is to be rendered for the demandant, and Richard Tinker, Esq. is appointed to assess the value of the rents and profits with power to examine witnesses upon oath.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PENOBSCOT.

1850 and 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 CORINTH *versus* INHABITANTS OF LINCOLN.

Declarations, made by a third person, when in the performance of an act, and illustrative of its purpose, are admissible in evidence as a part of the act.

In order to the admission of declarations in evidence as a part of an act, the act must have a tendency to establish the allegations which the party undertakes to sustain.

Evidence that a person, after performing various jobs of labor in the line of his business, in the same and in neighboring towns, occasionally returned to the house of a particular family, where he stayed while out of employment, has no tendency to prove that he had acquired a *residence* in that family.

His declarations, therefore, made when in the acts of such returnings, that he was going to that house as his home, are inadmissible.

Where the only evidence to establish the *residence* of a pauper, showed that his home was in a particular family, it is not erroneous in the Judge, to instruct the jury that, in order to justify them in finding a *residence*, it must be proved that he was a member of that family.

No one can become a member of another person's family, so as thereby to gain a *residence* within the meaning of the pauper laws, unless *voluntarily*, and *by consent of the family.*

If, while a person is a member of another's family, pauper supplies are furnished to the family, it will be considered that supplies are furnished to him, even though of full age, and not subject to the control of any of the family.

Where the only evidence of supplies being furnished to one who had called for relief, was that such articles were *sent* by the overseers of the poor, it is for the jury to decide whether they were received.

On Exceptions from *Nisi Prius*, Shepley, C. J. presiding.

Assumpsit for supplies furnished to Clarissa Bodge, as a pauper, in 1846. In 1829, she derived from her father a settlement in Lincoln. Whether she afterwards acquired a new settlement in Corinth, was the question raised in the case. In 1839, being then more than twenty-one years of age, she went from Fayette, (where she had been residing,) to the dwellinghouse of her father, who then lived in Corinth, and there made his house her stopping place.

The defendants were allowed to prove that, when upon the journey, she declared it was her purpose to *reside* permanently in her father's family.

After thus going to Corinth, she labored for wages at different places in that and in neighboring towns, occasionally returning to her father's house, where she sometimes left her trunk and such other articles as she did not have occasion to carry with her.

The defendants having proved her to be now insane and incapable of giving testimony, offered evidence of her declarations, made when going from her places of labor to her father's, to prove that she considered her home to be at his house. This evidence, being objected to, was excluded.

To dislodge the effect of such residence, (if she acquired one in Corinth,) the plaintiffs proved that, by their overseers of the poor, they supplied needful relief to the family of her

father; and that, at her parent's request, they sent to her a pair of shoes at the expense of the town; the overseers not remembering by whom they were sent. There was no other proof in relation to the shoes.

The Judge instructed the jury *that*, in order to the gaining of a settlement in Corinth by five years residence, Clarissa must have, voluntarily and by the consent of her parents, made herself a member of her father's family; and *that* the same kind of residence, which would be necessary to fix her settlement in Corinth, would make her subject to be affected by the supplies furnished to her father.

The defendants' attorney requested instruction to the jury;

1. That supplies furnished to the father could not affect the settlement of Clarissa, though living at the time in his family, if she was then of age and not subject to his control.

2. That, from the evidence, the jury were not warranted in finding that the pauper received the pair of shoes.

In giving the first requested instruction, the Judge added to it the words, "*or voluntarily a member of his family.*"

He refused to give the second requested instruction, but submitted to the jury the question, whether the evidence satisfied them that Clarissa received the shoes.

The verdict was for the plaintiffs, and the defendants excepted.

A. W. Paine, for the defendants.

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

TENNEY, J. — The declarations of a party to a transaction, made at the time of the acts done, and expressive of their character, motive or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts. They are a part of the *res gestæ*. 1 Greenl. Ev. § 108; *Gorham* v. *Canton*, 5 Greenl. 266; *Baring* v. *Calais*, 2 Fairf. 463. But declarations cannot with propriety be received as evidence, unless the act which the declarations accompany, has itself a material bearing upon the issue presented; for the act is

the principal fact, and the declarations are received, as tending to exhibit the purpose of the agent, which prompted it, and was productive of the act done.

The defendants did not deny the settlement of the pauper in their town, derived from her father, who resided there at the time of the Act of incorporation. The ground taken in defence was, that the pauper moved into the town of Corinth, after she became twenty-one years of age, and lived there for the space of five years together. This proposition of the defendants they were required to sustain by proof, or fail in the defence. It was necessary, that it should appear, that she resided there during that period, with the intention of making that place her home. When she was in the act of coming into the town of Corinth, from another town, where she had been residing, the design of making it her home, or as a place, where she proposed to remain temporarily, for a certain specific purpose only, might be known in some measure by the declaration of her object, accompanying the act. The act itself might be precisely the same in one case as in the other. After she was found in the town of Corinth, working in different places therein, or in neighboring towns, the acts of passing from one house to another, in the prosecution of her ordinary business, were not evidence to show that she had come into that town from some other; that act had already transpired, and her subsequent declarations could not add force or give character to a transaction, which was before complete. They were not a part of the *res gestæ*; were not acts, in the least indicative of a design at that time to change her residence from one town to another, or as going into the town of Corinth as the place of her home. Such declarations could have no greater effect, than those made, when she might be passing to and from church or public meetings, or in going from one part to the other of the house or appendages, where she was at the time boarding. The act itself not being one expressive in the least, of an intention of living in one town rather than another, but only indicating to what place in the town she might be going, either as her per-

manent place of abode or otherwise, for that particular time, the declarations accompanying such acts could not on any principle be held admissible.

The defendants insist, that the instruction to the jury "that in order for them to find, that Clarissa, [the pauper,] had gained a settlement in Corinth by five years residence, they must be satisfied, that she had voluntarily, and by mutual consent of her parents and herself made herself a member of her father's family," was erroneous. The legal correctness of instructions must be determined in some measure by the propositions of fact attempted to be supported by the evidence at the trial. From the case before us, it appears that the defendants did not undertake to prove that the pauper moved into the town of Corinth with the design of making the town as such her home for an indefinite period of time. If such had been their attempt, and proof had been introduced, for that purpose, it might not have been material that the place of her residence should have been one, where she had a legal right to remain, by being the owner of the house, or by a mutual understanding between the owner thereof and her, that she should occupy it. But the case finds, that the plaintiffs introduced evidence to prove, and the defendants to disprove, that in June, 1839, she being then of age, the pauper moved into Corinth with the intention thenceforward to make her home at her father's house in that town. Her object, as proposed to be proved, was to find a home in the family of her father; the fact that his house was in the town of Corinth, had no influence upon her mind, in forming the design to live with him. She is not represented as having a wish to make any other place in that town her residence; or to remain there for any other purpose than to be an inmate in his own family. Consequently in order to constitute a settlement in the town by a residence of five years together, it must appear that she had her home at her father's house. What was necessary to make his house her home? Home, when restricted to the house of a person's residence, must be the place where he has the design and the right for the time

being, to abide, connected with actual residence. This necessarily involves the idea of a voluntary intention to occupy the place on the part of the inmate and a voluntary consent, to that occupation, on the part of the one who has the control. Notwithstanding such might have been her wish and intention, accompanied by the personal presence of the pauper, at her father's house, unless she resided there by his permission, in some manner manifest, it could not in any sense be regarded as her home.

Exceptions are taken to the instructions, "that the same kind of residence, which would be necessary to fix the pauper's settlement in Corinth, would make her subject to be affected by supplies furnished to her father." If the pauper's residence was in her father's family, and in common with the other members of it, in the sense which has been considered necessary to constitute it her home, the destitution of her father, which made it proper that he should be relieved by the town, would apply to her, and the supplies must be treated as furnished to both. If the supplies were furnished on the application of the father, and she being in his family by her own wish and his consent, partook of them, they were indirectly furnished for her relief. Supplies obtained on the request of her father, of which she partook, when she was compelled to be in his family against her wishes, and when she could have lived elsewhere, if left unrestrained, could not make her a pauper; neither would she be considered as having relief from the town, if she took, against the consent of her father, the supplies which were furnished on his application and exclusively for his relief.

The instructions, which were first requested, and given with the qualification of the Judge, were substantially a repetition of the general instruction, which had been previously given, and without the qualification would have been incorrect.

The second instruction requested was properly withheld, it being upon a subject, which was wholly for the consideration of the jury. In the opinion of a majority of the Court, the

Exceptions must be overruled.

LADD *versus* DILLINGHAM *&* *al.*

In a written contract for the sale of all the stock of goods in an apothecary's store, the spirituous liquors within the store and belonging to the vender are, *ex vi terminorum*, included.

If the vender had no license to sell such liquor, the contract cannot be enforced by him against the vendee.

Upon invoicing the property on such a sale, the making of a separate schedule of the liquors, by direction of both parties, if designed as an evasion of the statute, "restricting the sale of intoxicating drinks," cannot make the contract effectual as to the other goods.

Exceptions cannot be sustained for the wrongful admission of testimony explaining a written contract, if the explanation shows nothing different from the legal import of the contract itself.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

COVENANT BROKEN.

The parties were apothecaries. Their contract was under seal, in the penal sum of $100. The plaintiff was to sell and the defendants were to buy "all of the stock of goods, wares, medicines, furniture and fixtures and all that appertain thereto, now in" a certain described store. The price was to be paid chiefly in notes, at specified pay-days. An inventory was to be made by which to ascertain the amount of the sale.

The plaintiff had, in the store, a quantity of spirituous liquors, the sale of which was prohibited, except by persons having special license. He offered no proof that he had such a license.

In preparing the inventory, it was agreed by the parties, that a separate schedule should be made of the liquors, which was accordingly done. Still the liquors were inserted in the general inventory, but no price of them was named, and their value was not included in the footing.

While the taking of the inventory was in progress, the defendants stated, that if the trade amounted to more than five thousand dollars, they should not take the goods, but would pay the stipulated penalty.

The amount at the sale price, without including the liquors, was found to be $5792,16, and for that sum the plaintiff de-

manded pay, in the mode fixed by the contract. He, at the same time, exhibited the schedule of the liquors, and told the defendants they might elect whether to take them or not, but that if taken, separate notes must be given for them. The defendants refused to take any of the goods or liquors. This action was therefore brought upon the contract.

A witness for the defendants testified to certain declarations made by the plaintiff prior to signing the contract, tending to show that he designed to include the liquors in the sale. To the introduction of this evidence, the plaintiff objected. The witness testified, that the plaintiff repeated the same declarations after the contract was signed, and while the taking of the inventory was in progress.

The plaintiff inquired of a witness "what was said as to the liquors, before or at the signing of the contract." This inquiry, being objected to, was ruled to be inadmissible.

Other testimony was introduced by each party upon the question, whether the liquor was regarded by both parties as embraced in the written contract.

The Judge instructed the jury, that if there were prohibited liquors in the store with the other goods, the language of the contract applied to and embraced them, and was therefore in violation of law, and that no action could be maintained upon it; that, however, if the parties did not *intend*, that the contract should embrace them, and did not treat them as coming within its meaning, but made another and distinct contract for them, under which the account was taken, the contract might be upheld; but that, if an account of the liquors was taken under the written contract, the fact that they were eventually placed upon a different invoice from that containing the other goods, could not make the contract legal. The verdict was for the defendants, and the plaintiff excepted.

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

A. Sanborn, for the defendants.

TENNEY J. — The testimony of witnesses introduced by

the plaintiff, as well as by the defendants, shows that there was in the store referred to in the contract, and constituting a part of the stock of goods, which was the subject thereof, certain spirituous liquors of American manufacture; and that an account of the same was taken promiscuously with the other goods, when the parties were present, though they were afterwards transferred and entered upon a separate invoice by the direction of both.

The case shows no denial to have been made by the plaintiff, that the liquors were a part of the goods belonging to him and in the store.

The plaintiff did not rely upon any license to make sale of spirituous liquors; and one ground of defence was, that the written contract was invalid, because it was partly for the sale of articles which could not be legally sold. The plaintiff contended, that the spirituous liquors were the subject of another and a verbal contract, and that the consideration was to be paid in promissory notes, separate and distinct from those to be given for the remaining portion of the goods.

It appears by the case, that a witness called by the defendants, stated that he heard a conversation between the parties in relation to the penalty in the contract. The plaintiff objected to all conversation before the contract was signed. The witness testified that the plaintiff said there would be liquors to the value of $400 or $500. The defendant, Dillingham, told the plaintiff he had better take the liquors out, he might take advantage of the law; the plaintiff said he would risk that. The witness then stated, that this was before and after the contract.

Assuming that the objection extended to this testimony, has the plaintiff been injured by its introduction? It is only so far as the conversation took place before the execution of the contract, that we are called upon to consider, whether it was proper or otherwise, no objection having been interposed, to the conversation which occurred afterwards.

On the question, whether the sale of the liquors was under the written contract, the conversation detailed by the witness,

which took place after the agreement to sell all the goods was executed, was not incompetent, and might have had an important influence upon the minds of the jury. If the parties were attempting at the time they took an account of the goods to evade the statute of 1846, c. 205, "to restrict the sale of intoxicating drinks," when they really designed that the transfer should be by virtue of the written contract; such an attempt could not avail them; the law was effectual against the forms intended to conceal the substance. The defendants were entitled to the conversation of the parties, as it occurred while they were making schedules of the goods, and it could not have been excluded, for the reason that a similar conversation took place before the contract was signed. On request, the Judge could have instructed the jury, that the conversation before the contract was made, would not influence their minds, if it was incompetent. This request was not made, and it does not appear, by the statement of the witness, that the conversation first heard by him was responsive to the defendants' inquiry.

If the conversation of the parties, when together, before the written contract was complete, had any tendency to give it a meaning less favorable to the plaintiff, than that to be derived from the contract itself, it was clearly incompetent, when introduced in such a manner as to expose him to be so affected. But if the evidence had no such tendency, he has no cause of complaint, as the verdict against him could not have been the effect of such evidence. The contract was, that the plaintiff should sell "all the stock of goods, wares, medicines, furniture, fixtures now in the store lately occupied by Joseph E. Ladd, and all that appertain thereto." By the terms of this agreement, all the spirituous liquors in that store was embraced. And it could acquire no strength by the conversation of the parties stated by the witness, objected to. The fact, that the plaintiff and the defendants treated the liquors in that conversation as belonging to the stock, could have no tendency whatever to give to the written instrument an interpretation against the plaintiff, which would not be

required by its plain, and unambiguous language. And in this view the evidence was not material.

The exclusion of evidence offered by the plaintiff, of statements made at, and before the contract was signed, as to the liquors, is relied upon, as a ground for sustaining the exceptions. The exceptions do not exhibit the facts attempted to be proved. Nothing, which could qualify the meaning of the contract according to the construction to be put upon its language, in favoring the plaintiff, was admissible. We cannot regard the evidence as admissible on any conjectural ground of its import.

The instruction to the jury treated the contract as invalid if it was designed by the parties to make a sale, in any respect illegal by the laws of the State. Although the instrument, by its terms, was for a sale of the liquors with other goods in the store, yet if the parties did not regard them as coming within the contract afterwards, the jury were authorized to hold the contract valid and binding. This was clearly favorable to the plaintiff. And the instruction, that if the account of the liquors was taken under the written contract, and the parties regarded them as falling within its meaning, and the action for a breach of the covenant therein, could not be maintained, was not erroneous. Upon satisfactory evidence of the truth of the affirmative of this issue, the plain meaning of the written agreement was carried out.

In the opinion of a majority of the Court, the exceptions should be overruled.

State *versus* Roberts & *al.*

To defraud a person of his money, goods or estate; *or* to cheat and defraud him of his money, goods or estate; *or* wrongfully and wickedly to obtain his money and other property designedly and with intent to defraud; is not necessarily a crime subjecting the perpetrator to punishment.

An indictment, therefore, charging a conspiracy to commit either of those acts, without *particularizing* the object to be accomplished or the means to be used, is unsustainable.

In an indictment for such a conspiracy, a charge that it was to be accomplished by "false pretences," is not sufficiently descriptive of the means to be used.

ON EXCEPTIONS from the *District Court*, HATHAWAY, J.

INDICTMENT for a conspiracy.

After verdict against the defendant Roberts, he moved in arrest of judgment for insufficiency of the indictment. The motion was overruled, and exceptions were taken.

TENNEY, J. — This indictment consists of three counts. The first charges a conspiracy of the defendants, with the intent one James Hawes wrongfully and wickedly to injure and defraud of his money, goods and chattels and estate. The second is for a conspiracy the said James Hawes to injure, cheat and defraud of his moneys, goods and chattels. The third alleges a conspiracy of the defendants, wrongfully and wickedly to obtain from James Hawes his money, goods and other property, designedly and by false pretences, and with intent to defraud.

The indictment contains no count or charge against the defendants under the 4th § of c. 161 of the Revised Statutes, inasmuch as there is no allegation that the fraud or cheating was a "gross fraud or cheat."

It is not necessarily in law, a crime, which subjects the perpetrator to punishment, to defraud one of his money, goods, chattels or estate, nor to cheat and defraud one of the same; nor wrongfully and wickedly obtain his money and other property, designedly and with intent to defraud. *Commonwealth* v. *Eastman & als.* 1 Cush. 189; *State* v. *Hewett & al.* 31 Maine, 396. The two first counts are silent as to the means by which the defendants designed to effect their purposes in the conspiracy charged. Consequently, there is in them no allegation of any object, which is in itself criminal, nor of any means, of a criminal character, designed to be used in promotion of the object intended.

The third count goes farther than the others. Is that a sufficient basis for a judgment? It is a conspiracy for two or more persons, with the fraudulent and malicious intent, wrong-

fully and wickedly to commit any crime, punishable by imprisonment in the state prison. R. S. c. 161, § 11. And if a person designedly and by any false pretences, shall obtain from another any money, goods or any property, he shall be punished by imprisonment in the state prison, or by a fine and imprisonment in the county gaol. § 1.

The purpose, which was the object of the conspiracy, as alleged in the third count, not being criminal in itself, if there is any offence charged, it must consist in the means designed to be employed. These must be specifically stated. *State* v. *Ripley & als.* 31 Maine, 386. In this count the means are described only as being "false pretences." By this the accused could not be sufficiently informed of the acts, against which they were called to answer. The description of the means are too general, and not in accordance with the established rules of criminal pleading.

Exceptions sustained. Judgment arrested.

Knowles, for the defendants.

Waterhouse, County Att'y, for the State.

Burleigh *versus* Lumbert.

Though a mill-dam have occasioned land to be flowed more than twenty years, yet, if the damage thereby occasioned commenced *within* that period, a claim to continue the flowing, without compensation, cannot be maintained upon prescription.

Complaint for flowing land.

Tenney, J. — It is stated in the complaint, which was filed December 19, 1846, that the mills, and the dam, which was the cause of the damages alleged to have been sustained thereby, were erected in the year 1826. The defence attempted to be maintained is a prescriptive right in the respondent to flow the land in question.

The evidence shows the erection of the mills and the dam in the year 1826, and a flowing thereby about the first of Dec. of that year. It is also proved, that in the year 1827

or 1828, the dam having settled in the centre, some timber was put upon it to restore the level, and it was then raised above the original height and flowed more than it had previously done; and that the owner of the mill was called on for damages in consequence, after it was thus raised, by an owner of land flowed, who had not demanded any before. It was shown that hay was made from the grass, which had grown on the meadow, now owned by the complainant, before the flowing in 1826; that it was low meadow then, partly covered with grass and partly with bushes; that it was in the same situation at the time of the trial, in which it was at that time, excepting the effect of the flowing, and that the growth had since been killed thereby.

As the law was before the Revised Statutes, unless damages were sustained by the owner of land flowed, he could not prevent such flowing, or maintain any suit or process for the purpose of recovering damages therefor; and no prescriptive right to flow without the payment of damages, could be acquired against him. *Nelson* v. *Butterfield & al.* 21 Maine, 220. The burden to show the prescriptive right to flow is upon the party asserting it.

In this case, it is not shown, that the injury to the land alleged by the complainant to have been flowed, was earlier than the year 1827 or 1828, (which was less than twenty years before the filing of the complaint,) when the dam was increased in height; and hence no process for the recovery of damages could have been maintained before that event. This is not inconsistent with the allegation in the complaint, that, "by reason of said dam being made across said stream, the water in said stream flowed, and overflowed," &c. It may be true, that the flowing was the result of the erection of the dam, but that there was no flowing which caused damage to the complainant, till long afterwards, is clear.

Respondent to be defaulted and the case to stand for further proceedings.

J. Godfrey, for the complainant.

Rowe and *Bartlett*, for the respondent.

INHABITANTS OF BANGOR *versus* WARREN.

A deed of land for a valuable consideration, intended to be absolute, made and received with a fraudulent intent to hinder or delay creditors, is not, on that account, void as to *subsequent* creditors, *unless* some secret trust was reserved for the benefit of the grantor.

A negotiable note, taken for a prior debt, is a payment.

The right of re-entry for a breach of condition in a conveyance of land, pertains only to the grantor and his legal representatives. It is not included among the rights mentioned in R. S. c. 94, § 1, and cannot be taken on execution.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

Philip Coombs, Philip H. Coombs and others owned a tract of land in Bangor. They conveyed it, in 1835, *for the expressed consideration of one dollar*, to the city, upon a condition that *it should be inclosed as a common, and be kept unintersected by roads, for the proper use of the public forever.* The deed was recorded in February, 1836.

The defendant having obtained several judgments against P. & P. H. Coombs, seasonably levied his executions upon the land in 1841 and 1842, his attachments thereof having been made in 1837. This is a writ of entry against him for the land, brought in September, 1846.

The tenant, in order to show that the conveyance by P. Coombs and P. H. Coombs, to the city, was fraudulent and void, as to the tenant, their creditor, offered evidence that they were insolvent when it was made, stating *that* to be the only evidence, of any description, which he should offer as to the fraud. The evidence was excluded. He then offered to prove that the bill of exchange upon which one of his judgments was recovered, was given in renewal for paper which originated in 1835. The evidence was excluded.

He then offered to prove that his levies were delayed in order that some prior attaching creditors, on demands existing prior to the conveyance, should first levy, and that they did in fact levy on a large portion of the debtor's estate. The evidence was excluded.

He then offered to prove that the city, prior to his levies,

had forfeited the land by a non-compliance with the conditions of the deed. For this purpose, he offered a lease made by the city in 1839, by which they demised the land to Sayward & Wingate for seven years, within which period the lessees were to decorate the same with transplanted trees, according to a prescribed plan; and, at the end of the term, to leave the land in a smoothed condition and laid down to grass. He also offered oral evidence that, under the lease, Sayward & Wingate fenced up the land, and excluded all ingress and egress to and from the same. The lease and the oral evidence were excluded.

The demandants, in order to dislodge the imputation of fraud in the deed, and to show that the grantors received an adequate consideration for the land, introduced, (under objection,) — 1st; a contract executed by Roberts and others, in which they stipulated to purchase sixty-seven small lots of the grantors, lying on the several exterior lines of the common, at the price of $300 for each lot; upon a condition that the "common should be granted to the city to be forever used as a public common," and 2d, copies of many deeds, made to Roberts and others of lots around the common at the above mentioned prices.

The Judge ordered a verdict, *pro forma,* for the demandants, and the tenant excepted.

Cutting, for the tenant.

1. No title passed from the Messrs. Coombs to the city; because the consideration expressed in their deed being merely nominal, the law construes the transaction to be nothing more than a gift.

And the tenant "offered to show that at the time of the conveyance the Coombses were actually insolvent." It was therefore, a fraud on creditors; the grantors not being in a situation to make gifts.

The Statute of 13 Eliz. c. 5, declares all gifts, conveyances and alienations, of real or personal estate, whereby creditors may be delayed or defrauded, void as against creditors.

Perhaps it may be contended that this statute only protects prior creditors, and not subsequent ones, and authorities may be cited, which seem to sustain that position.

No doubt a *solvent* person may make a voluntary conveyance or gift; but the question still returns, can an *insolvent* person do the same thing?

And upon what principle should the *prior* creditor be protected and not the *subsequent* creditor? *Walker* v. *Burrows,* 1 Atk. 94; *Reade* v. *Livingston,* 3 Johns. Ch. 481; *Doe* v. *Routledge,* 5 Cowp. 711; *Parker* v. *Proctor,* 9 Mass. 390; *Bennett* v. *Bedford Bank,* 11 Mass. 421.

The deed from the Coombses to the city was not recorded until 1836. The tenant offered to prove that the bill of exchange, on which one of his judgments was founded, was given in renewal for paper, which originated in 1835. A renewal is not payment, and therefore the tenant is to be viewed as a *prior* creditor.

2d. The conveyance was made upon conditions, subsequently to be performed by the grantees. The language of the deed is, "and also in consideration, and *upon condition,* that the parcel or tract of land herein intended to be conveyed, shall be inclosed as a common and be kept by said city unintersected by roads, for the proper use of the public forever. To have and to hold, &c., to the proper use of the public as a common forever. Shall well and truly hold as aforesaid, for the purposes as aforesaid, forever."

Now, I contend that the city have forfeited all interest, if they ever had any, by reason of a non-performance of those conditions.

In March, 1835, the deed was delivered; the first Act of the city touching the premises, was in May, 1839, more than four years subsequent to the conveyance.

What then? Did they do any thing in submission to the conditions? Directly the reverse.

They leased the premises to Sayward & Wingate for the term of seven years, who fenced up this common (falsely so

called,) and excluded all persons, even the grantors themselves from its enjoyment.

Was such conduct, the having and holding *to the proper use of the public as a common forever?* *Hayden* v. *Stoughton*, 5 Pick. 528; *Gray* v. *Blanchard*, 8 Pick. 284.

Assuming then that the grant was upon a condition subsequent, and that the condition had been broken, the Coombses' "right of entry" was attachable and subject to a levy. R. S. c. 94, § 1; R. S. c. 114, § 30.

The defendant took an actual possession by virtue of his levies in 1842, and therefore no formal entry, in order to revest the estate in himself, could be necessary. *Kennebec Bank* v. *Drummond*, 5 Mass. 321.

3. The deed is void, because the city were not legally authorized to receive it, coupled with a condition, that the lot "should be *inclosed* as a common."

How inclosed? with a wooden or metalic fence? Suppose the kind of fence had been mentioned at a cost of $10,000, could money for that purpose have been raised by a legal tax? What law of the State gives a city or town such authority?

The deeds to Roberts and thirteen others, and also the contract signed by Roberts and thirty-eight others, were inadmissible. They contradict the deed to the city, as to its consideration.

They were transactions between other parties, — were immaterial to the issue; did not authorize an insolvent person to give away so large a territory, even for the purpose of trying an experiment, thereby jeopardizing his creditors.

Wakefield, city solicitor, for the demandants.

Tenney, J. — The city of Bangor claims the premises by virtue of a deed from Philip Coombs, Philip H. Coombs and others, dated March 26, 1835, accepted by a vote of the board of aldermen, and of the common council, on April 11, 1835, and recorded Feb. 24, 1836, upon the condition that the premises be inclosed as a common and be kept by the

city, unintersected by roads, for the proper use of the public forever.

The tenant derives his title from the levy of certain executions against Philip Coombs and Philip H. Coombs, issued upon judgments rendered in actions against them on certain drafts, all bearing date subsequently to the execution and delivery, and the registration of the deed to the city. And he offered to show, that, at the time of the conveyance of Philip H. Coombs and Philip Coombs to the city, they were actually insolvent, as proof of constructive and legal fraud; and it was at the same time stated by the tenant's counsel, that they should offer no other evidence of fraud of any description. And they offered to show further, that the bill of exchange for the recovery of which one of the actions was brought that resulted in a judgment, for the satisfaction of which, a levy was made, was the renewal of paper, which originated sometime in the year 1835. The evidence so offered, on being objected to, was excluded.

Assuming that the deed of the tenant's debtors was a voluntary conveyance, and wholly without consideration, can the tenant avail himself of this fact, to avoid the deed, on proof that these persons, who were grantors therein were insolvent at the time when they executed the deed? The doctrine of the law is too well settled upon this point to need further discussion. This Court gave full consideration to the question in the case of *Howe* v. *Ward*, 4 Greenl. 195, and in *Clark* v. *French*, 23 Maine, 221, and the principles announced in each have been uniformly adhered to in this State.

But it is insisted, that in one of the judgments the tenant is to be treated as an attaching creditor before the constructive notice to him in the record of the deed to the city, inasmuch as the foundation of that judgment was a draft for paper originating anterior to that time. This draft on which the action was commenced was negotiable, and where such have been taken for a preëxisting debt, it has been held in this State and in Massachusetts, that the prior debt was thereby paid.

The tenant offered a lease of the premises made by authority of the city to Sayward and Wingate, dated May 16, 1839, and the consequent occupation by the lessees under it, by fencing up and excluding all ingress and egress to or from the premises, as evidence of the non-performance of the condition in the deed, prior to the tenant's levies, and therefore, that the premises were thereby forfeited. This evidence was not admitted.

The condition is manifestly subsequent in its character, and this is admitted by the tenant's counsel. And "it is a rule of the common law, that none may take advantage of a condition, but parties and privies in right and representation as heirs, executors, &c., of natural persons, and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat, nor as grantees of reversions, nor privies in estate, as he to whom a remainder is limited, shall take the benefit of entry or reëntry by force of a condition." 1 Shep. Touch. 149. Chancellor Kent remarks, that "conditions can only be reserved for the grantor and his heirs. A stranger cannot take advantage of the breach of them. There must be an actual entry, for the breach of the condition." 4 Com. § 56; Stearns on Real Actions, 24.

But the counsel for the tenant contends, that as a creditor may take in execution for his debts, among other things, "all rights of entry into land" of his debtor, R. S. c. 94, § 1, the levy upon the premises was effectual to pass the right of entry on the ground of a forfeiture for the breach of the condition in the deed, to the tenant, as a creditor, and his subsequent actual possession has made perfect to him the title in the premises.

The right of entry referred to, in the statute relied upon, is undoubtedly the first and most simple remedy for one, who has been *ousted* or *dispossessed* of a freehold. It is for the purpose of revesting an estate, of which the claimant or his ancestor or predecessor has been unlawfully deprived, and is different in some respects from the right or title of entry for a forfeiture on breach of a condition. Jackson on Real Actions,

1 and 2. Such an entry is defined to be "an extra judicial and summary remedy against certain species of injury by *ouster*, used by the legal owner, when another person, who has no right, has previously taken possession of the lands or tenements." 2 Jacob's Law Dic. 380. It is unlike the entry where one entitled, wishes to take advantage of a breach of a condition in the deed; in which case, the entry is essential to the title of the claimant, and the time, when it is to be made, will depend much upon the instrument or contract by which it is reserved. Ib.; Stearns on Real Actions, 25. The last species of entry is usually denominated an entry or reëntry for a forfeiture on breach of a condition.

The statute gives the right to the creditor to levy his execution upon "all rights of entry" in the land of the debtor in the manner mentioned in this chapter. And it is provided in the 18th § of c. 94, "when an execution is levied on land into which the debtor has or is supposed to have the right of entry, and of which any other person is then seized, the officer shall deliver to the creditor a momentary seizin and possession of the land, so far as to enable the creditor to maintain an action therefor in his own name, and on his own seizin." It is evident from this section, that the entry before referred to is that entry to which a party who has been disseized, or one who succeeds to his place, has a right, in order to regain that possession which has been usurped by one, who had no right to the land.

The statute contains no provision, by which a creditor can, by a levy of his execution upon land conveyed by his debtor in a deed containing a condition subsequent, acquire the rights of the grantor, and claim the estate for a breach of the condition. And it cannot be admitted, that so important a change as that contended for in behalf of the tenant, in the common law, would follow from the provision, that "all rights of entry into lands" of the debtor may be levied upon by his creditor. On the construction contended for, the right would exist without any remedy expressly provided, by which it could be enforced and made available.

The evidence offered to show, that the tenant's levies were delayed for the purpose of allowing prior attaching creditors to levy on demands existing previous to the conveyance to the city, and that such creditors did levy upon large portions of the lands of Philip Coombs and Philip H. Coombs, could have no legitimate effect upon the case. We are to look only to the premises on which the tenant made his levy, and determine whether he was a creditor, prior or subsequent to the record of the deed thereof to the city; and the rights of neither party can be affected by such delays and the levies made by other creditors.

It is contended, that the deed to the city is void, because the city was not legally authorized to receive it, coupled with a condition, that the premises should be enclosed as a common. It is denied that the city can make an appropriation to enclose a common. This is a point, which was not raised at the trial, and cannot now with propriety be considered. The city charter and by-laws are not referred to in the case, and we cannot decide, that the city have not the authority to enclose a parcel of land for a city common. But in this question the tenant has no lawful interest, because such a deed is good, until avoided by the grantor himself or by some one privy in estate. *Inhabitants of Worcester* v. *Eaton,* 13 Mass. 371.

The deeds from Coombs to Orin Favor and thirteen others, were admitted in evidence for the city, against the objection of the tenant, and also the contract executed by Amos M. Roberts and others. The decision of the case against the tenant has been put upon other grounds, than that which would render this evidence material. These documents could have had no effect whatever upon the verdict, as it was directed to be rendered, and the tenant was not injured thereby. *Exceptions overruled.*

Judgment on the verdict.

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

CASE

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. JOSEPH HOWARD, } JUSTICES.

LONGLEY *versus* HILTON.

In relation to partition fences, the power of the fence viewers extends only to the assignment of the respective portions of the dividing line and to the fixing of the time, within which to build the fence.

Further orders or adjudications by them, being unauthorized by the statute, are of no effect.

Thus, an order, (however *equitable* under the circumstances,) that *one* of the adjoining owners should build a fence upon a portion of the line assigned to the *other*, and exonerating the latter from building upon such portion, creates no obligation upon the former, nor relieves the latter from the duty, imposed by the statute, to build the fence upon that portion of the line.

Such an order, though incorporated into the assignment of the divisional line, is merely void, and therefore cannot vitiate the assignment itself. SHEPLEY, C. J., *dissentiente*.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

REPLEVIN, for a steer. The defendant alleges that the steer was doing damage in his close, and avows the taking. The plaintiff replies that the steer escaped from his land into that of the defendant, by reason of an insufficiency in that part of the partition fence, which the defendant was bound to maintain. The defendant rejoins, denying any obligation to maintain any part of the fence. Issue was taken upon the rejoinder.

The plaintiff introduced the fence viewers' assignment of the divisional line.

It required each party "to build and keep in repair" $102\frac{5}{25}$ rods on certain designated parts of the line. It happened, upon the part assigned to Hilton, that Longley had already erected $7\frac{8}{25}$ rods of stone wall. And the fence viewers, in their assignment, required that Hilton, to compensate for that erection, should build $7\frac{8}{25}$ rods of stone wall upon that part of the line assigned to Longley, and exempted Longley from building upon that distance.

The defendant requested instruction to the jury, that the assignment did not prove a legal division, because of the direction as to the stone wall. That request was not complied with, but instruction was given that the assignment proved a legal division to have been made.

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

Stewart, for the defendant.

Abbott, for the plaintiff.

The opinion of a majority of the Court, TENNEY and HOWARD, J. J., (SHEPLEY, C. J. dissenting,) was drawn up by

TENNEY, J. — The only question involved in the exceptions is whether the assignment made by the fence viewers, and introduced as evidence at the trial was sufficient to prove a legal division of the partition fence between the parties.

Fence viewers derive all their power from the statute. Any adjudication in a matter, not within their jurisdiction, or any

order for the performance of acts by the parties not embraced in the provisions of the statute is void.

By statute, c. 29, § 5, where the owners or occupants of adjoining lands disagree respecting their rights in partition fences, and their obligations to maintain the same, after proceedings therein prescribed, the fence viewers "may in writing under their hands assign to each party his share thereof, and limit the time within which, each party shall build or repair his part of the fence not exceeding six days," as provided in a previous section of the same chapter. And such assignment "being recorded in the town clerk's office shall be binding upon the parties, and all, who may afterwards occupy the lands; and they shall be obliged always thereafter, to maintain their part of said fence." From the language used in these provisions, it is obvious that the "share," which the fence viewers should assign to each party has reference to the dividing line between the respective owners and occupants.

In the division of the line and the order for the erection or repair of the fence thereon, the provision, in the section referred to, contains the whole power of the fence viewers. After assignment of the several parts of the line, they have no authority given them by which they can impose upon one party the burden of making or repairing fence upon the line assigned to the other, nor can they excuse him in any respect from the full performance of his duty in making the fence upon the part of the line falling to him. The statute has pointed out what each is bound to do after the assignment of the several portions of the line; and the fence viewers in this respect have only the further power to limit the time for the completion of the fence. Any direction to the owners or occupants beyond that to build or repair the fence within the time specified by law, incorporated into the assignment, would be entirely foreign to their duty as officers, and the parties would not be bound thereby.

If the assignment contains every thing contemplated by the statute, expressed so clearly that the parties cannot mistake the part of the line, upon which each is to build or repair, and

maintain the fence, and the time is fixed when the fence is to be built or repaired, is either, or are both the adjoining occupants or owners relieved from the performance of the duty required by the statute, by reason of a further requirement in the assignment wholly unauthorized? If in addition to the assignment to each party, of a certain well defined part of the line, and a direction within what time the fence shall be built thereon, he is directed to build or repair the fence with certain specific materials or in a particular mode, it is not believed, that for such cause, he would be discharged of his obligations to do that, which the statute demands. If the fence should be required in the assignment, signed by the fence viewers, to be composed of stone, or brick or boards, would the owner or occupant of the land incur no risk, if he should for that cause, wholly omit to build or repair it? He is bound to know the requirements of the statute and the extent of his duties under it. When the assignment indicates to him clearly all that the statute demands, that he should do, after an apportionment of the line, other requirements of the fence viewers therein, distinct from those, which are binding on him, will not be a protection for the omission of his legal duties, and his neglect to perform them will be at his peril.

In the case before us, the fence viewers assigned to each party the portion of the fence, which they were to build and keep in repair. They also fixed the time within which the fence should be built or repaired. The same length of line was assigned to one and to the other. In all this there is no ground to question the validity of the assignment. There was an attempt to compensate the plaintiff for fence made of stone by him, on a part of the line assigned to the defendant in a manner, not authorized, and the attempt imposed no obligations upon the defendant, and conferred no benefit upon the plaintiff. This direction of the fence viewers was simply void. The defendant was not freed from the performance of the duty required of him, both by the statute and the assignment, to construct the fence upon his part of the line; nor was the plaintiff relieved from the like obligation. The as-

signment was sufficient to prove a legal division of the partition fence between the parties. *Exceptions overruled.*

SHEPLEY, C. J., dissenting. —

The question presented is, whether the proceedings of fence viewers, called by virtue of the provisions of the statute, c. 29, § 5, can be sustained.

It appears from the assignment made by them to each of these parties, of his share of the fence to be built between their adjoining lands, that those lands adjoined for a distance of 204 rods and 10 links, where the fence was to be built. The fence viewers were required by the second section of the statute to make an assignment in equal shares of the fence to be built. They did so, assigning to Hilton 60 rods and 5 links on the westerly end of the line, extending from a road adjoining the westerly end of their lands, easterly to a cedar stake, and another piece on the easterly end of the line a distance of 42 rods and extending from a maple tree designated, to the east end of the line.

They assigned to Longley as his share that portion of the line between the two parts of it assigned to Hilton and extending from the cedar stake to the maple tree, a distance of 102 rods and 5 links.

They directed each party to build and keep in repair a fence on that portion of the line assigned to him, with an exception to be hereafter noticed. They were authorized to require the parties to build or repair the fence, but were not authorized to require them to continue to "keep in repair the fence," as they did in this case. This being, however, an attempt to impose an obligation already imposed by law, will not affect the validity of their proceedings.

Doubts have been expressed, whether fence viewers are authorized by the statute to require the parties to build or repair the fences, and whether that obligation is not imposed by the law alone. The provisions of the third section are, "and if they shall determine that the fence is insufficient, they shall signify the same in writing to the delinquent occupant

of the land and direct him to repair or rebuild the same within such time as they shall judge reasonable not exceeding six days." If the construction of this clause be, that they are merely to fix the time, when the work should be done, they would have no power to determine, whether an existing fence was such as is required by the first section. It is manifest that such a power was intended to be conferred. If it be urged, that this object will be accomplished by their certifying in writing, that the fence is insufficient, it will be observed, that the statute is equally plain, that they shall direct him to build or repair, as it is, that they should certify it to be insufficient. The record in this case does not show, that they signified in writing, that the fence was insufficient; that fact can only be considered as decided by them by giving effect to their requiring the parties to build or repair. To accomplish the purpose designed the construction must conform to the literal interpretation, that they must at least signify the insufficiency in writing, or "direct him to repair or rebuild the same," as well as to fix the time within which it shall be done.

After having assigned to Hilton his first portion of the line of fence, they say, "he shall also build 7 rods and 8 links of good and sufficient stone wall, eastwardly from said cedar stake to another cedar stake on the south side of the fence spotted and marked with red chalk, to compensate said Longley for the same length of wall already built by him and included in the above mentioned sixty rods." The cedar stake first named in this clause is the one standing at the easterly end of the first portion of the line of fence assigned to Hilton, and he is required to build upon that portion of it assigned to Longley a stone wall a distance of seven rods and eight links; and to do it as a compensation for so much wall formerly built by Longley on that portion of the line assigned to Hilton. This they were not authorized to do. If they had ascertained, that Longley had built the larger portion of the existing fence, they would have been authorized by a writing signed by them to award to him the value

of the excess to be paid to him in money by Hilton within six months after demand. This requirement to build that piece of wall is void; and it is insisted, that it may be rejected without affecting the legality of the other proceedings. If, however, it be rejected, there will be no obligation imposed upon either party to build that portion of the fence; for in the assignment to Longley he is required to build the portion assigned to him "except he shall not build the 7 rods and 8 links assigned to the said Hilton." If the clause named were rejected, and each party should build the portion of fence required of him by the remaining proceedings, there would remain a space in the line of 7 rods and 8 links, upon which there would exist no fence. It would be necessary to reject the exception also to have the whole line of fence built. This would essentially change the character of the proceedings and make them convey a meaning and speak a language contrary to the intention and language of the fence viewers.

The clause providing that the fences shall be built or repaired within six days, cannot, be construed to require the 7 rods and 8 links to be built by the plaintiff within six days, without making the fence viewers speak a language directly opposed to that which they used.

It becomes necessary therefore not only to reject as inoperative a part of the language used, but to supply a defect occasioned by the rejection of it.

The fence viewers appear to have found, that the plaintiff had already built 7 rods and 8 links of wall, for which he was entitled to compensation, and to have proceeded to make it in a manner unauthorized. If their proceedings are regarded as legal, he may be deprived of the compensation, to which he was justly entitled. For the statute does not appear to have been framed to authorize such compensation to be made by other fence viewers and as an independent and separate proceeding.

Their whole proceedings should therefore be regarded as illegal.

CASE

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.

Hudson and Emily his Wife, *appellants*, *versus* Martin.

The first three years, within which a guardian is bound to settle a guardianship account, do not commence until assets shall have come into his hands.

In settling, in the Probate Court, a guardianship account with a minor, no previous notice by the guardian is requisite, except in cases of married females and in cases where new guardians may have been appointed.

Of the compensation for personal services and of the rate of commissions, to which a guardian is entitled.

Appeal from a decree of the *Judge of Probate*.

Emily F. Martin was the daughter of the appellee. While a minor she became possessed of property in her own right, and her father was appointed as her guardian, *July* 1, 1845. No assets came to his hands until *February*, 1846. By R. S. c. 110, § 28, a guardian forfeits compensation for his per-

sonal services, if he neglects to settle his guardianship account in the probate office, at least once in three years. It was in *August,* 1848, when the appellant exhibited his first account for settlement, no notice thereof having been given. The Judge of Probate decreed that the account be "*received and recorded.*"

In March, 1850, Emily intermarried with Henry Hudson, and in July, 1850, while yet under age, joined with her husband in a petition, that the appellee should be cited to settle a final account of his guardianship. Upon the citation, issued on that petition, the final account was presented for settlement.

The first account, among other items, contained charges for attending seven times at the Probate Court; also for commissions on $2070, at 5 per cent. The second account charged for attending at four different times at the Probate Court, and credited an allowance upon the first account of $72,13. These items of charge, together with some others of greater magnitude, mentioned in the opinion of the Court, were objected to, but the whole were allowed. For that reason, this appeal was taken.

Blake, for the appellants.

TENNEY, J. — It is admitted, that the appellee was appointed July 1, 1845, the guardian of Emily F. Martin, who has since intermarried with Henry Hudson, and that no assets came to his hands, till Feb. 1846, when he filed in the probate office his inventory. No complaint appears to have been made, that he did not come to the possession of the property of the ward at an earlier day. It could not have been intended by the Legislature, that the three years within which a guardian is required by statute c. 110, § 27, to render and settle his account with the Judge of Probate, should commence before any property should come to his hands.

Another ground of appeal is, that an improper allowance has been made to the guardian for expenses incurred in the

education of the ward, who was his daughter; also unreasonable sums for services, and disbursements as charged in the account. Under this head, the appellants claim the right to have the accounts from their commencement to the final decree of the Judge of Probate examined and passed upon by this Court. This right is denied, as not being applicable to the first account, upon the ground, that the first account has been rendered to the Judge of Probate, and settled by him, and cannot therefore be reëxamined, unless upon a suggestion, that fraud has been committed or some mistake has been discovered therein.

It has been assumed in cases before the appellate Court of Probate in Massachusetts, and that of this State, that when a guardian's account has been the subject of a decree of allowance in the Probate Court, and no appeal taken, that account cannot afterwards be reöpened, unless for the causes before referred to. But in some of them such questions were not raised by the facts presented. *Boynton & al.* v. *Dyer*, 18 Pick. 1; *Starrett* v. *Jameson*, 29 Maine, 504. In both, the question was, whether the guardian should account for interest on moneys in his hands, when the principal without interest had been credited in a former account, and a decree upon the account passed. It was held that the claim of interest had never been before the Court and was not embraced in the decree.

In the settlement of a guardian's account in probate, during the minority of the ward, notice is not required to be given, and there is no one, unless a new guardian is appointed, whose duty it is to appear before the Probate Court and object to the account, and take an appeal from any decree of the Judge. And in R. S. c. 110, § 15, the guardian is required to give bonds, that at the expiration of his trust, he will deliver over all moneys and property, which on a final settlement of his *accounts* shall appear to be remaining in his hands. It is contended, from the plural form used in reference to accounts in this provision, the final settlement ap-

plies to all the accounts previously presented, when the ward can be heard.

But this question does not seem to be involved in the case before us. In looking into the copies of the probate proceedings, there has been no decree, allowing the guardian's account, excepting the one from which the appeal was taken.

The first account, as appears by the record, was presented, sworn to, vouchers examined, without any notice, and decreed to be *received* and recorded.

In the second account rendered, the guardian has opened his first account by giving a credit to his ward, "by allowance on first account in 1848, $72,13," and the record shows that the guardian made oath, that the charges and articles were true, and due notice thereof having been given, pursuant to the order of Court. Objections were made by Henry Hudson, but on due consideration were overruled. After examination of vouchers, it was decreed, that the same be allowed and recorded, and the balance paid to the ward.

It must have been understood by the guardian and the Judge of Probate, that the accounts from their commencement were open, and made the subject of the decree. And an appeal being taken, they are now before this Court.

From June 16, 1846, to July 31, 1848, inclusive, the guardian charged one hundred dollars, for expenses incurred in the education of the ward, and between the last date and the time when the last account was rendered, the sum of one hundred and four dollars and nineteen cents for expenses incurred for the same object. All this was when the ward was between fifteen and nineteen years of age.

By statute, c. 88, § 1, if any minor who has a father living, has property, which is sufficient for his maintenance and education, in a manner more expensive, than the father can afford, regard being had to the situation of the father's family, and to all the circumstances of the case, the expenses of the maintenance and education of such child may be defrayed out of his own property in whole or in part. The evidence introduced satisfies us, that the expenses for the ed-

ucation of the ward was not greater than the guardian could afford, and these expenses should have been defrayed from his own means exclusively; and they are therefore disallowed.

It is proper that the guardian should have compensation for attending Probate Court when he took letters of guardianship, when he returned his inventory, and for presenting his first account of guardianship, which was received and recorded without notice. All this was done when these services were rendered for two wards jointly, and half of the charges to be allowed on the first account only should be against the appellants. He attended Probate Court, when he presented his second account, and when the same was settled. These two charges are proper and should be allowed. No evidence is presented, to satisfy us of the necessity of attending Probate Court at other times, and the charges therefor are disallowed, in both accounts.

It appears that the guardian has made specific charges for all his services. The charge therefore of commissions should be reduced to the sum of 2½ per cent. upon the moneys in his hands, and that amount be allowed, and the residue of this charge disallowed.

The sum of $72,13 has been credited to the ward in the second account. The sum therefore disallowed in the first account should be made less by this amount.

The decree of the Judge of Probate is reversed so far as it embraces in the allowance, the charges which are now disallowed, and affirmed as to the residue of the account.

CASE

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.

Stiles *versus* Sherman.

Where one, holding lands subject to an outstanding mortgage, represents to his grantee, in negotiating for the sale of it, that a specified sum, and no more, is due upon the mortgage, and deducts that sum from the agreed price of the land, the grantee is entitled, in a suit against him upon the note given for the purchase money, to have a deduction of the excess which may be due upon the mortgage over and above that specified sum.

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

Assumpsit upon a promissory note of $300.

The plaintiff, by a quit-claim deed, conveyed to the defendant a farm which was incumbered by an outstanding mortgage, made by an earlier proprietor. The price agreed

to be given for the farm was not very clearly shown; but it was proved that the plaintiff, when making the negotiation, represented to the defendant, that the amount due upon the old mortgage was $150, and no more, and that he deducted that sum from the agreed price, and received for the balance a conveyance to him by the defendant of two other lots of land, and also the note now in suit.

The case was withdrawn from the jury, and submitted to the Court to assess the damage, first deducting for any such failure of consideration as might constitute a defence in whole or in part.

Thacher, for the plaintiff.

J. A. & S. H. Lowell, for the defendant.

TENNEY, J. — It appears that the note in controversy, was given as the difference in the value of the lands, exchanged and conveyed by the parties to this suit. And it is contended that there has been a total or a partial failure of consideration thereof.

The deed of the plaintiff to the defendant not containing covenants of warranty against the mortgage upon the premises, created no obligation in the plaintiff to the defendant to remove that incumbrance, and there was no contract of any description to do so.

There is no evidence of any fraudulent design in the plaintiff, in stating a less sum due upon the mortgage of the Marion farm, than the actual amount of the incumbrance.

It does not appear, that the note or the mortgage was present. It is not to be presumed that they were in the hands of the plaintiff, as they were outstanding against the estate. He may have honestly believed that the incumbrance was no greater than the sum stated by him. But as this statement appears to have been made to the other party, when he was negotiating for the purchase, that incumbrance was an essential element in the contract, which resulted in a conveyance of the equity of redemption only. The price agreed to be paid for the plaintiff's interest in that land, was the value of

the entire title as estimated by the parties after deducting the supposed amount of the incumbrance. The note being for a specific sum, the amount of the note secured by the mortgage was regarded as equally certain. The excess of the incumbrance over its estimation was the sum of $72,91, and that part of the consideration has failed by a mutual mistake of the parties. *Defendant defaulted.*

CASE

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, } ASSOCIATE JUSTICES.
HON. JOSEPH HOWARD. }

EMERSON *versus* JOY.

A nonsuit cannot be ordered, except by consent, after testimony has been introduced in defence.

ON EXCEPTIONS from the *District Court.*

DEBT on judgment for $40,54. Plea, *nul tiel record,* with brief statement of payment. The plaintiff introduced the record of the judgment. The defendant read a receipt from the plaintiff, for $10, in full of the judgment and execution, and introduced a witness who testified to the execution of the receipt, and to conversation between the parties, tending to show the reasons which induced the plaintiff to discharge the

judgment for so small a sum. The suit was commenced prior to the statute of 1851, c. 213, which prohibits the maintenance of actions upon claims, which have been settled, though settled for less than the amount due. The Judge ruled that the action was defeated by that statute, and ordered a nonsuit. To that order the plaintiff excepted.

N. D. Appleton, in support of the exceptions.

I. S. Kimball, contra.

SHEPLEY, C. J. — The nonsuit appears to have been ordered upon testimony introduced by the defendant. The receipt signed by the plaintiff, and the testimony of the witness introduced by the defendant, might have been, if believed, fully sufficient to authorize a verdict for the defendant. The Court could not, however, deprive the plaintiff of a right to have those facts considered by a jury. A nonsuit cannot be ordered without consent, after testimony has been introduced in defence. *Exceptions sustained, and nonsuit taken off.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1852.

COUNTY OF LINCOLN.

Stockbridge *versus* Crooker.

It is not a *rule of law* that a more skillful and learned person is entitled to a greater compensation for the performance of a professional service, than one competent, but less skillful or learned, who should perform the service as well.

In awarding compensation for a professional service, the jury may properly take *into consideration* the degree of skill exhibited, and of responsibility incurred, in the performance of it; but are not *imperatively bound* to award a sum "*commensurate*" with such skill and responsibility.

On Exceptions from the *District Court*, Rice, J.

Assumpsit for services by the plaintiff, as a surgeon.

The plaintiff, with the aid of another person, and in concurrence with the views of consulting surgeons, had successfully performed a critical operation upon the skull of the defendant's child, which had been injured by a falling weight.

The exceptions were filed by the defendant.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The jury were instructed "that the plaintiff was entitled to recover for the service a sum commensurate with the labor performed, the skill exhibited, and the responsibility incurred by him in the matter."

These were proper subjects for consideration by the jury, while they were determining, what would be a reasonable compensation for the professional services performed.

The law allows a reasonable compensation, and permits the jury to take into consideration all the facts. The same rule of law decides the compensation to be made for services, whether performed by a day-laborer, or by a mechanic, or by a surgeon. It does not enter into distinctions so nice as to determine, as matter of law, that a mechanic, who performs his services faithfully and with competent skill is not entitled to receive as much compensation therefor as another would be, who had acquired much greater skill and had performed like services no better. Or that a surgeon, who had performed an operation skillfully and faithfully, would not be entitled to receive the same compensation, as one more learned and skillful, who could perform the same operation no better.

While the law does not act upon such distinctions, it permits jurors to take into consideration the exhausting studies, the time consumed, and the expenses incurred, to acquire great professional knowledge and distinction, or great mechanical or other skill.

If the law made the compensation for services performed commensurate with the skill exhibited and the responsibility incurred, it would be necessary to admit testimony in each case to prove how much skill had been exhibited, and how great responsibility had been incurred.

It would often be difficult, if not impossible, to receive such testimony in such a manner, that a jury could safely act upon it.

The rule stated would tend greatly to impair uniformity of compensation for professional and mechanical services of the same description, and to introduce a different rule of compensation for like services, when performed by different individuals. *Exceptions sustained, verdict set aside, and a new trial granted.*

Gilbert, for the defendant.

Tallman, for the plaintiff.

Kennedy *versus* Wright.

The R. S. c. 158, § 17, imposes a penalty of not more than thirty dollars, recoverable by action of debt, for falsely and corruptly certifying as a witness, to more travel and attendance than there had really been.

Such a certificate is presumed to be true, till disproved.

When shown to be false, it is presumed to have been made corruptly.

Such presumption may be repelled by proof.

In an action of debt to recover penalties, for the making of false and corrupt certificates of that descriptiou, the amount recoverable is to be assessed by the jury.

To justify one in certifying his travel and attendance, as a witness, he must have been in actual attendance at the court house. And though not bound to be constantly within the house, he must, at his peril, be within call when needed.

On Exceptions from the *District Court*, Rice, J.

Debt, founded upon R. S. c. 158, § 17, to recover penalties incurred by the defendant, for falsely and corruptly certifying, upon two occasions, that he traveled a greater number of miles, and attended a greater number of days, as a witness, than he had in fact done.

There was evidence tending to prove the *falsity* of the certificate. A witness testified to a declaration made by the defendant, which was proved to be untrue. He was then inquired of whether the defendant did not, immediately after, correct the error, and say, "it was a mistake of recollection." The exceptions show that "the Court did not allow the ques-

tion to be answered, it appearing that the communication inquired about, was made at a subsequent time."

The defendant requested instruction to the jury that, "if the defendant, in obedience to the summons, came into the vicinity of the court house, where he could be within call, whenever the case should come on, his certifying attendance as a witness would not subject him to the penalty, although he might not actually have come into the court house.

The Judge refused the request, and instructed the jury "that the defendant must have come to the court house, and been in actual attendance, as a witness, to authorize him to certify as such; though he would not be required to stay in court all the time, but if within call that would be sufficient."

The jury were further instructed, "*that* the certificates were to be presumed to be *true* until the contrary should be proved; *that,* if proved to be *false,* the law raised a presumption that they were made *corruptly;* — *that* this presumption might be repelled by proof; — and *that,* if they found the defendant guilty, it was their duty to assess the penalty."

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

Ruggles and *Gould,* for the defendant.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The first error alleged is, that a witness was not permitted to answer, whether the defendant did not immediately correct an error said to have been committed in a conversation with the witness.

The form of the question does not prove, that the correction was made immediately or during the same conversation. The reason stated in the bill of exceptions for the exclusion of the answer is a satisfactory one. "It appearing the communication inquired about was made at a subsequent time." It might have been made after he had ascertained, that it was expedient, that a different time should be named.

The second error alleged is, that the Judge refused to in-

struct the jury, "that if defendant in obedience to the summons came into the village of Wiscasset in the vicinity of the court house, where he could be within call, whenever the case should come on, his certifying as a witness would not subject him to the penalty, although he might not actually come into the court house"; and did instruct them, "that he must come to the court house and be in actual attendance as a witness, to authorize him to certify as such, though he would not be required to stay in Court all the time, but if within call, that would be sufficient."

The form of a subpœna for witnesses prescribed by the statute, c. 63 of the Acts of the year 1821, now in force, requires them to make their "appearance before the justices" of the Court.

The R. S. c. 115, § 71, authorizes clerks of the Courts to issue "summonses for witnesses to attend before such Courts."

No provision of law is found affording any countenance to the position, that a witness may neglect to comply with the requisition of the precept, and come into the village or city, in which the Court is holden, and claim to be in attendance before the Court. A construction which would sanction such a course, would deprive litigating parties of important legal rights, and operate unfavorably upon the administration of justice. It would require parties to be present at trials or to have agents present to look after their witnesses and procure their attendance before the Court when needed.

Females, persons residing at a distance from the place of trial, and those too aged, infirm, or ill, to attend Court, who have caused their witnesses to be summoned and paid, have a right to have them attend and be in readiness to perform their duties, without incurring the risk and expense of employing others to look after them, and see that they are present at the trial. If witnesses summoned and paid do not appear upon a call of the officer in attendance upon the Court, when they are needed," the business of the Court cannot be performed in due course; and it would be the duty of the Court

upon proper proof to issue a capias to bring them into Court, and render them liable to be dealt with for contumacy.

A witness to be entitled to his fees must obey the precept, and, if not actually present in Court during its session, he must at his own risk keep himself sufficiently informed of the state of the business to be able to be actually present, when his services are required.

It is insisted, that the defendant would not have incurred the penalty, if he had been in the village and had acted under a misapprehension of his duty in neglecting to appear before the Court.

The instructions do not decide otherwise. The jurors were to decide, whether the certificates were made corruptly as well as falsely, and this matter might properly be considered by them. The case does not show, that it was not urged upon their attention under proper instructions.

If other instructions were desired respecting such misapprehension of his duty, a request for them might have been presented.

The fact being found, that the certificates were false, the law authorized the presumption, that they had been corruptly made. This presumption might have been rebutted by proof facts to satisfy the jury, that they were not so made.

The third error alleged is, that the jury were instructed to assess the amount to be recovered for penalties. The case of *Chesley* v. *Brown*, 2 Fairf. 143, is referred to as deciding, that the amount to be recovered should have been fixed by the Court.

Although the instructions in that case were approved, the Court does not appear to have decided, that they would have been erroneous, if the jury had been instructed to assess the amount to be recovered.

The opinion appears to present three considerations as inducing the Court to approve of the instructions. These were, that but one penalty was claimed, that the smallest sum allowed by law had been assessed by the Court, so that the defendant could not have been aggrieved by its action,

and "that the authorities sanctioned either course of proceeding in such cases."

The last reason named is sufficient to authorize the course pursued in this case; and it appears to have been the more appropriate one, for two penalties being claimed the jurors could not have found simply, that he was guilty or that he did owe. *Exceptions overruled.*

COUNTY OF KENNEBEC.

Ballard *versus* Child.

A covenant, in a deed of conveyance, which is broken at the moment of its execution, does not run with the land, and at the common law no action upon it can be maintained by an assignee.

The R. S. c. 115, §§ 16 and 17, giving to assignees the right of action upon such covenants, extends only to cases in which an eviction had occurred.

Where no seizin passes by the conveyance, and no possession is taken, there can be no eviction.

On Report from *Nisi Prius*, Wells, J. presiding.

Covenant Broken.

The defendant conveyed by deed of warranty in common form, to Thomas Sawyer his heirs and assigns a dwelling-house, "together with the privilege of getting water from the well" on an adjoining lot.

The plaintiff is the assignee of Sawyer.

Prior to the conveyance to Sawyer, the well had been filled up, and a permanent brick store had been erected over its place.

This is an action upon the covenant of seizin contained in the defendant's deed to Sawyer. The plaintiff moves for leave to insert a count upon the covenant for quiet enjoyment.

The ground of the suit is, that, by the destruction of the

well, the defendant's covenants were broken. The plaintiff did not file in the Court any release of the covenants contained in the deed of Sawyer to himself. The case was submitted to the decision of the Court.

Lancaster & Baker, for the plaintiff.

Vose, for the defendant.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD, RICE and APPLETON, J. J. was drawn up by

RICE J. — This is an action of covenant broken. The plaintiff asks leave to amend his declaration by declaring for a breach of the covenant of warranty as well as seizin. The subject matter of this action was before this Court in the case of *Ballard* v. *Butler*, 30 Maine, 94. In that case, which is now referred to, the Court found, that the easement described in the plaintiff's writ was "annihilated and destroyed" in 1831, before the premises, to which it is alleged to have been appurtenant, were conveyed to the defendant.

The defendant therefore, at the time of his conveyance to Sawyer, had neither seizin nor title, the thing granted having no existence in fact. His covenants were therefore instantly broken, and a right of action thereon accrued to his grantee upon those covenants. This right did not run with the land, but remained where it fell, with the grantee. It became a mere chose in action, not transferable. *Slater* v. *Rawson*, 1 Metc. 450.

The plaintiff contends, that by the provisions of the R. S. c. 115, § 16 and 17, all the rights of the defendant's grantee under the covenants passed by assignment to the plaintiff, and that he is thereby authorized and empowered to maintain this action in his own name, in the same manner as the original covenantee might have done.

This authority is found, if at all, in the 16th section of said chapter, which provides, "in all cases where real estate has been, or may be absolutely conveyed to any person, his heirs and assigns, with a covenant, that the grantor was seized in fee of the same, and that it was free of all incumbran-

ces at the time of such conveyance, the said estate then being under mortgage or other incumbrance, or the grantor not being then seized of the same, the assignee of such grantee, his executors or administrators, after having been evicted of said estate, by the elder and better title of the mortgagee, his heirs or assigns may maintain an action of covenant broken against the first grantor," &c.

This statute is a modification of the rules of the common law, by which assignees may, in certain specified cases, maintain actions in their own names, for breaches of covenant, where formerly such actions could only be maintained in the name of the original covenantee. But like other changes in established rules of law, it cannot be extended beyond its express terms.

The statute only authorizes the assignee, *after having been evicted of said estate by the elder and better title of the mortgagee,* to maintain the action of covenant broken. Here there has been no seizin, no possession, consequently there can have been no eviction. The contingency contemplated by the statute has not occurred, its provisions therefore do not apply to the case at bar, which must be determined according to the rules of the common law, which have already been considered.

There were several other matters discussed at the argument, which do not become material in the determination of the case.

The amendment desired would be unavailing if granted.

According to the agreement of the parties a nonsuit is to be entered.

Little *& al. versus* Hobbs *& al.*

The inconvenience to a debtor of procuring security for a part of the debt is a sufficient consideration to support a promise by the creditor, that he would, therefor, relinquish the residue of the debt.

If no time be stipulated within which to furnish such security, it is to be done in a reasonable time.

In a promise by a creditor to his debtor that he would relinquish a part of the debt, upon payment of the residue at a specified time, satisfactory security being furnished, there is a condition precedent to be performed by the debtor.

Such a condition is not fulfilled by a tender, though seasonable, of the security, *as a payment.*

In such a case, a neglect by the debtor to *pay* the agreed part at the pay-day absolves the creditor from his promise to relinquish the residue.

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

ASSUMPSIT.

The defendants owed the plaintiffs about $3500, for which this suit was brought. In April, 1850, the plaintiffs stipulated in writing that they would discharge the debt upon payment to them of fifty per cent. of its amount, in four quarter-yearly payments, "satisfactory security to be given, the first of said payments to be made May 1, 1850."

On the first day of July, 1850, the defendants tendered to the plaintiffs, *as payment* of said fifty per cent., good notes for the amounts, and payable respectively at the pay-days stipulated. The defendants relied upon these facts as a defence.

The case was submitted to the decision of the Court.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD, RICE and APPLETON, J. J., was drawn up by

RICE, J. — The defendants contend that the contract of April, 1850, and the execution and tender of the notes, July 1st, 1850, constitute a good defence to this action.

It has been held by this Court to be settled law, that the payment, in money, of a part, does not operate to extinguish the whole debt, although it be received as payment in full. There must be some consideration for the part not paid. *White* v. *Jordan*, 27 Maine, 370. It is immaterial how small the consideration may be to make the contract binding, but if without any it is void. *Bailey* v. *Day*, 26 Maine, 88. The contract of April, 1850, not only stipulates for the payment of fifty per cent. of the debt, but also that "satisfactory security" should be given. To procure security would subject

the defendants to an inconvenience to which they were not liable by the terms of the original contract between the parties. *That* would constitute a valuable consideration for the agreement to relinquish that portion of the debt which was agreed to be canceled without payment. The contract was not therefore void for want of consideration, as the law stood prior to the Act of 1851, c. 113.

The contract of April, 1850, is executory and contains conditions precedent, to be performed by the defendants, before they were entitled to a discharge of the whole debt. These precedent conditions are, the payment of fifty per cent. of the plaintiffs' claim, at the times stipulated, and the furnishing satisfactory security for said payments.

There is no time indicated in the contract within which the security was to be furnished. The law therefore determines that it must be furnished within a reasonable time. Whether that was done in this case, is not material, as the decision does not turn upon that point.

The other condition was the payment of fifty per cent. of the plaintiff's claim at the times stipulated. The contract contains no provision as to the mode in which these payments were to be made. The plaintiffs were therefore entitled to receive the payments, as they severally became due, in the legal currency of the country. The tender of notes could, at most, be considered a tender of the security which the defendants were required to furnish. It was not payment unless so received by the plaintiffs. Those notes being tendered only as payment, the plaintiffs were under no obligation to receive them as such, and was not a performance of the conditions precedent to be performed by the defendants. A default is therefore to be entered.

May, for the plaintiffs.

Morrell, for the defendants.

KENNEBEC & PORTLAND RAIL ROAD COMPANY *versus* JARVIS.

The right of holding shares is a sufficient consideration for a promise to the corporation to take such shares and pay for them.

When the amount of stock, which a corporation may hold, is *not fixed in its charter;* and the corporation has voted what the amount should be, it is not requisite, (in order to a valid assessment upon the shares of a member,) that the whole of that amount should have been subscribed for, although his subscription was made after the vote was passed.

Upon a subscription, promising a corporation to take and pay for shares in its stock, assumpsit may be maintained, although the corporation has not exercised its chartered authority to sell the shares for the delinquency of payment.

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

ASSUMPSIT, to recover assessments upon two shares in the stock of the company. The defendant, with many others, had signed the following paper, and set the word "two" against his name. — "We, the subscribers hereto, agree and promise to take the No. of shares set to our names respectively in the Kennebec and Portland Rail Road Company, which shares are to be each of the value of $100, and to be paid for at that rate, at such times, to such persons and in such installments, as shall be hereafter required by a vote of said company. — Gardiner, Jan. 5, 1847."

The Act of incorporation was passed in 1836, and the company was organized in 1846. One of the by-laws authorized the Directors, from time to time, to make such reasonable assessments on all the shares, as they might deem necessary, and to direct the same to be paid to the *Treasurer*, at such time and place as *they* might think proper.

The same by-law also authorized the shares of any delinquent subscriber to be sold for payment of his subscription, holding him liable for the balance, if the sale should not produce the price of the shares. "On Jan. 21, 1847, it was voted by the directors that the capital stock shall be called in in 20 assessments of $5 each."

On the same day the directors ordered that the first assessment of $5 be payable May 1, 1847. The other assessments were made payable at many successive pay-days.

The defence was placed upon the following grounds: —

1. That there was no consideration for the promise.

2. That the promise was made upon a condition that the whole number of shares, constituting the capital stock, should be subscribed for.

As applicable to this branch of the defence, it is to be observed that the charter, § 4, enacted that the capital stock "may" consist of $1,200,000, and shall be divided into shares of $200 each. An amendatory Act of July, 1846, required the capital to be divided into shares of $100.

The 13th by-law was, that "the capital stock shall consist of 12,000 shares of $100 each, and the number thereof may be increased, from time to time, as the directors shall determine, and the Legislature authorize; *provided* they do not exceed 20,000."

The shares subscribed for were never so many as 12,000, wherefore the defendant contended, that the assessments, being made upon less than the whole number of required shares, were unauthorized and void. He also suggested that, because the whole stock had not been subscribed, the charter was vacated. Upon this second point in defence, he cited *Salem Mill Dam Co.* v. *Ropes*, 6 Pick. 23; *Central Turnpike Co.* v. *Valentine*, 10 Pick. 142.

3. That the payment had not been required as provided for in the contract, (of which the charter and by-laws are to be considered a part,) inasmuch as the assessments were not made payable at the time and place and to the person, provided for in the by-laws.

It is here to be noticed, that the by-law authorized the directors to make assessments, and to direct them to be paid to the treasurer, at such time and place, as they shall deem proper.

The assessment in question was made, by the directors, not by virtue of a specific vote of the stockholders, under the provision of the by-law, and *they* ordered the time for its payment, and that it should be paid at the Bank.

4. That the defendant, if liable to the suit, is liable only for the balance remaining due after a sale of his shares. *Portland, S. & P. R. Road* v. *Graham*, 11 Metc. 1; 2 Johns. 109.

5. That no certificate of stock had been issued to the defendants.

The case was submitted to the Court, with power to draw such inferences as a jury might.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The defendant subscribed his name to a paper, by which he promised to take two shares in the company, of one hundred dollars each, to be paid for at such times, to such persons, and in such installments, as should be required by the company. It has already been decided, that a promise to pay for shares in a corporation is binding upon the promiser.

Several objections to the maintenance of this suit have been presented by an argument for the defendant.

The first is, that there was no consideration for the promise.

When a subscription is made to the stock of a corporation by its authority, or when it accepts such a subscription, it becomes liable to be called upon to perform on its part, whatever its charter and by-laws require for the benefit of the holder of its stock. The testimony is sufficient to authorize the Court to infer, that the subscriptions made to its stock by the defendant and others were accepted.

The right acquired by the defendant to become the owner of two shares and to be entitled to the privileges of a stockholder was a sufficient consideration for his promise to pay for them.

2. The substance of the second is, that the promise was made upon condition, that the whole capital should be raised by a subscription for all the shares; and that there has been no performance of it on the part of the corporation.

The case of the *Salem Mill Dam Co.* v. *Ropes*, 6 Pick. 23, is relied upon as a decisive authority for this position.

The charter and contract presented in that case, will be found upon examination, to differ essentially from the charter and contract exhibited by this case.

In that case, the capital stock was considered to be certainly and absolutely determined by the charter, by an enactment prescribing the number and the amount of shares, so that it could not be enlarged or diminished by the corporation.

In this case the capital is not determined by the charter. The fourth section provides, that the capital stock, "may consist of one million two hundred thousand dollars, and shall be divided into shares of two hundred dollars."

The number of shares is not determined; and the language used respecting the amount of the capital, confers the privilege to have such an amount of capital. It does not require that it should have it.

The contract subscribed, as presented in that case, not only had reference to a certain number of shares as composing the capital stock, a definite proportion of which was to be taken by the subscriber, but the language of the contract obliged him "to take the number of shares of the capital stock," "and to pay all such legal assessments on each of said shares."

The contract in this case could not have had reference to any certain number of shares or certain amount of capital as fixed by the charter, and there is no language used in the contract prescribing the number of the shares or the amount of the capital. The promise is not to pay all "legal assessments." It is to pay for the shares as he should be required by a vote of the company, without any reference to assessments or payments to be made on other shares.

The decision in the case cited, appears to have been made upon the ground, that the promise was to take a proportion of the capital stock as fixed by the charter. That it was therefore a conditional promise, to be performed only in case the corporation should have such a capital.

In this case the defendant cannot for such a cause be relieved. There being no certain number of shares or amount

of capital fixed by the charter, the promise could not have been conditional, that the corporation should have a fixed amount of capital or a certain number of shares.

Before the defendant made the promise, the by laws of the corporation had been adopted.

The thirteenth provided, that "the capital stock of the company shall consist of twelve thousand shares of $100 each; and the number thereof may be increased from time to time as the directors shall determine and the Legislature authorize, provided they do not exceed 20,000 shares."

The by-laws might be altered at any annual meeting, or at a special meeting called for that purpose. The subscribers for stock must have known, when their subscriptions were made, that the amount of capital then provided for, was subject to enlargement or diminution by a vote of the corporation. The contract of a subscriber to the stock cannot, therefore, be considered as made upon condition, that the corporation should have a certain number of shares or a fixed capital. Such a construction would deprive the corporation of the power to alter that by-law without a violation of its contracts with the stockholders. This could not have been the intention of the parties. The agreement provided for payment of the amount of the shares without any reference to a fixed capital, or to any number of shares, or to any assessment to be made on other shares.

This objection cannot therefore prevail.

3. The third in substance is, that payment for the shares has not been required in the manner provided for by the contract, charter and by-laws.

The contract provided, that payment should be made "as shall hereafter be required by a vote of the company."

The assessments were not made by a vote of the company, but by the president and directors, who were authorized by the sixteenth by-law to make them.

Whatever is done by the agents of a corporation, duly authorized by its by-laws, must be considered as done by the corporation. The sixteenth by-law provides, that the presi-

dent and directors may make assessments "and may direct the same to be paid to the treasurer at such time and place as they shall deem proper.

No place of payment was designated by a vote of the directors. The by-law *authorized*, but did not *require* them to appoint a place for payment.

The contract provided for payment to such person as should be required by the company.

The designation of the treasurer of the corporation by the ninth by-law as the person to collect and receive all assessments was a sufficient designation of the person, to whom payment was to be made.

The place of payment would be determined in the absence of any other appointment, by the same by-law providing, that the treasurer should have an office at such place as the directors should determine accessible to all persons having business with the corporation.

The notices required were given, and certain banks were designated by the treasurer as places of payment for the convenience of the subscribers to the stock.

These were agents by his own appointment, and by their appointment no contract between the corporation and the proprietors of its stock appears to have been violated.

4. The fourth is, if the defendant be liable to pay, he can be liable only for a balance remaining due after a sale of his shares.

The contract does not provide for a sale of the shares. The sixteenth by-law authorizes the directors to order a sale of them, in case of neglect or refusal to pay assessments. It does not require them to make such an order.

The case of the *Portland, Saco & Portsmouth R. R. Co.* v. *Graham*, 11 Metc. 1, does not determine, that an action cannot be maintained to recover the amount agreed to be paid by the terms of a subscription, without proof that the shares have been sold. That case decided, that an action could not be maintained for that purpose, after a sale and transfer of the shares to another person.

The promise in this case not having been made upon any condition expressed, or to be inferred from any provision contained in the charter or by-laws, that payment should be made only after a sale of the shares, is obligatory upon the defendant, who must be holden for the payment according to the terms of his contract.

5. The fifth is, that the defendant was by the by-laws entitled to certificates for his shares, which have not been issued.

The issuing of such certificates is not made a prerequisite to a recovery. It does not appear to have been intended, that the payment of assessments and the issuing of certificates should be simultaneous or dependent acts; for the form of a certificate provides, that the shares shall be subject to all assessments.

There is no proof that the defendant made a demand of certificates, and that they were refused.

Defendant defaulted.

Evans, for the plaintiffs.

Morrell, for the defendant.

KENNEBEC & PORTLAND RAIL ROAD COMPANY *versus* PALMER.

Of the liability of a person, upon a subscription made jointly by himself and others, agreeing to take shares in the stock of a corporation.

Of the consideration, necessary to sustain a suit by a corporation upon such a subscription.

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

ASSUMPSIT, to recover assessments upon four shares, of $100 each, in the capital stock of the company.

The defendant, with others, on July 16, 1845, subscribed a paper, agreeing to associate together, under the provisions of the company's charter, and promising to take the number of shares, (in the corporation,) set against their respective names, to be each of the value of $200, and to be paid for at that

rate, viz., $2, at the time of subscribing and $198 at such times, to such persons, and in such installments, as shall hereafter be required, by a vote of the company, when the same shall be duly organized under the Act of incorporation. Against the defendant's name, he had set the word "two." The company was organized, October 28, 1846.

The defendant set up, in defence, —

1st. That there was no contract between the parties.

2d. That the contract, if any, was without consideration.

Applicable to these points, testimony was offered showing that the defendant attended at one or more of the annual meetings of the stockholders, and voted in the choice of directors; also that, on being applied to by an agent of the company, after the assessments were made, he promised to pay them; and also that he at the same time paid a part of their amount.

3d. That the defendant's subscription was not for four shares of $100 each, but for two shares of $200 each.

Other grounds, taken in defence, were also taken in the preceding case by the same plaintiffs against Jarvis, and it was agreed that the facts, presented in that case, should be considered as established in this case, both cases being argued simultaneously, and submitted to the Court upon the same principles.

Evans, for the plaintiffs.

Allen, for the defendant, urged the following grounds of defence.

1. The defendant's subscription, signed by the defendant and others, being prior to the organization of the company, could not be a promise to the *plaintiffs*. It was merely an engagement *inter sese*. It is not unlike the case *New Bedford Turnpike Co.* v. *John Q. Adams*, 8 Mass. 138.

2. The suit is for assessments on four shares of $100 each. For such shares the defendant never subscribed. His subscription was for shares of $200 each.

3. The subscription was upon the implied condition, that

all the stock should be subscribed for. 2 Comstock, 230; 31 Maine, 573.

4. No action can lie upon the subscription, till the shares should have been sold for payment of the stock.

5. The promise was without consideration. The plaintiffs have paid nothing for the defendants.

The opinion of the Court, SHEPLEY, C. J., TENNEY, HOWARD and APPLETON, J. J., was drawn up by

SHEPLEY, C. J. — The contract was signed by the defendant on July 16, 1845. The corporation was not organized under its charter until October 28, 1846. The charter and additional Acts of incorporation are referred to in the contract, which declares, "the subscribers agree to associate together under the provisions of those Acts, and agree and promise to take the number of shares set against our names respectively in the Portland and Kennebec Rail Road Company."

1. The first objection is, that there was not and is not any existing contract between these parties.

The contract was undoubtedly intended to have been made between the parties, for it provides, that payment shall be made "as shall hereafter be required by a vote of said company, when the same shall be organized under said Act of incorporation," and the defendant was to receive his shares from it.

2. It is alleged to have been made without consideration. The agreement to associate together under the Act to accomplish the purposes designed, would seem to be a sufficient consideration. The consideration need not proceed from the party with whom the contract is made. The consideration of one promise is, that others will make like promises.

If this be not regarded as sufficient, the testimony shows, that the company was subsequently organized; that it proceeded to accomplish the purpose for which the charter was granted; that the defendant paid in part for the shares; and, that he promised to pay the remainder.

The prior proceedings and acts of the parties are in such cases, regarded as a legal basis for a subsequent promise, and

the partial execution of the purpose designed by the charter as forming a sufficient consideration for it. *Farmington Academy* v. *Allen*, 14 Mass. 172. *Amherst Academy* v. *Cowls*, 6 Pick. 427. The renewal of the promise was made to an existing corporation.

3. It is insisted, that the plaintiffs cannot recover, because the defendant contracted to take two shares of $200 each and not four shares of $100 each.

The original charter provided, that the capital stock should be divided into shares of $200 each. An additional Act, approved on July 16, 1846, provided, that it should be divided into shares of $100 each. This was accepted by the corporation, of which the defendant was a member. Long after this, the defendant paid in part for the four shares assigned to him by virtue of his subscription. He must therefore be considered as having assented to that change in the division of the stock, and to the assignment of four shares of $100 each instead of two shares of $200 each.

The change required no greater sum to be paid; and it neither increased nor diminished his proportion of the capital.

The other objections made to a maintenance of the action have been considered and decided in a case between the same plaintiffs and Edward Jarvis. *Ante*, page 360.

Defendant defaulted.

Evans, for the plaintiffs.

Allen and *Morrell*, for the defendant.

KENNEBEC AND PORTLAND RAIL ROAD CO. *versus* WATERS.

In a suit by a corporation against a subscriber to its capital stock, to recover assessments made upon the shares subscribed for, it is not competent for the defendant to show, by parol evidence, that his subscription was upon a condition, not expressed in the writing.

J. H. Williams, for the plaintiffs.

Lancaster and *Baker*, for the defendant.

WILLIAMS, *Judge of Probate, versus* CUSHING, *Executrix.*

One, having been appointed by a will, as executor and also as trustee, and having given bond as executor, will be deemed to have declined the appointment as trustee, unless he give bond in that capacity also.

It is a *general rule* that suits upon probate bonds are not maintainable, unless authorized by the Judge of Probate, or unless the amount due from the obligor has been ascertained by a judgment of Court. This rule, however, does not apply to suits brought by residuary legatees, whether the legacies be for their own benefit, or in trust for the use of others.

Where a *testamentary trustee* of the residuum of the testator's estate has declined to act in that capacity, another person may be appointed in his room by the Judge of Probate.

The person so appointed will have the rights of a residuary trustee, in relation to suits upon Probate bonds.

If there be a residuary trustee, it is to *him* that the executor is to pay the residuary fund.

If the executor, instead of paying such fund to the trustee, have paid it, *as executor,* to some person having no just claim to it, there is no jurisdiction in the Judge of Probate to allow for such payment in settling the executor's administration account.

A decree by the Judge of Probate, making such allowance, being merely void, will not preclude the trustee from receiving the amount of the fund in a suit upon the executor's bond.

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

DEBT on Probate bond given by the defendant's testator.

Prior to 1843, Abraham Arnold, an insane person, of full age, had been supported for several years at the expense of the town of Augusta. In 1843, his father, John Arnold, died, having appointed Loring Cushing to be the executor of his will. The testator after making certain legacies, gave the residue of his estate to Mr. Cushing, *in trust*, to be applied, at his discretion, for the support of said Abraham, and of a daughter named Abigail. The will appropriated $100, to be paid to Abigail upon the occurrence of her marriage; and also directed that, if Abraham should die *in the life-time of the* testator, all charges for his support should be paid out of the testator's estate.

Abigail is yet living, and has never been married. Up to the time of his father's death, the amount which the town had expended for the support of Abraham was $375,89.

Mr. Cushing gave bond, and took the oath as executor, and administered the estate, but gave no bond as trustee.

The funds in his hands, as executor, after paying all undisputed charges, amounted to $475,89. That sum he placed in the town treasury, viz: $375,89, to reimburse the town for said expenditure, and $100 to be paid to Abigail upon the occurrence of her marriage. These sums he charged in his administration account. They were allowed by the Probate Court, and thereby the administration account was balanced and settled.

After these proceedings, Mr. Cushing died, and the Judge of Probate appointed David Oakes to be *trustee* of said John Arnold's estate.

Mr. Oakes considers Mr. Cushing to have placed the $475,89 in the town treasury without authority, and in his own wrong; and it is by his procurement that this suit was commenced upon the executor-bond, given by Mr. Cushing, to recover that sum with its interest against the executrix of Mr. Cushing's will. The Judge of Probate gave no authority for bringing the suit; neither has the amount, (if any,) due to the trustee, been ascertained by any judgment of court.

The case was submitted to the Court for a decision according to legal rights.

Emmons, for the plaintiff.

North and *Mills*, for the defendant.

1. The prerequisites of R. S. c. 113, have not been complied with. The permission of the Judge of Probate to institute the suit has not been shown. § 7, 8, 16.

Neither has the amount to be recovered been ascertained by a judgment at law. § 5, 6, 7, 10, 11, 12.

2. The executor's account has been fully allowed and settled in the Probate Court.

This Court as a Court of common law, cannot so revise the proceedings of the Judge of Probate, as to reverse an allowance already made to an accountant in the Probate Court. 2 Greenl. 257; 31 Maine, 254; 7 Greenl. 312; 7 Mass. 83; 11 Mass. 512.

3. The fund was appropriated according to the intent of the testator, as deducible from all the provisions of the will.

APPLETON, J. — Loring Cushing was appointed by the last will and testament of John Arnold his executor and trustee for certain purposes fully set forth therein. He took upon himself the trust of executor, gave the requisite bonds, administered upon the estate and then deceased. The defendant was appointed his executrix. As he never gave bonds as trustee, he is to be regarded as having declined to act in that capacity. *Groton* v. *Ruggles*, 17 Maine, 137. The trust being thus vacant, David Oakes was appointed trustee, and by virtue of his appointment commenced this suit to enforce the payment of the amount to which as such he is entitled.

The suit is brought without any special authority from the Judge of Probate, as a matter of right under the provisions of R. S. c. 113, § 5, 6, 7. The amount due the trustee, Oakes, has never been ascertained by judgment of Court. By § 10, 11 and 14 of the same chapter the amount due the creditor or legatee must first be determined by judgment of Court, and a demand for payment thereof must be made upon the administrator or executor, previous to the maintenance of a suit on the official bond of such administrator or executor, by one attempting to enforce his rights without the express authority of the Judge of Probate. *Coffin* v. *Jones*, 5 Pick. 62; *Groton* v. *Tallman*, 27 Maine, 68. To this there is but one exception. From the language of these sections, it is evident that a residuary legatee may maintain a suit, without having fixed the amount due him by judgment. *Smith* v. *Lambert*, 30 Maine, 137. More than a year has elapsed since the executor took upon himself the trust, and it is not denied, that all debts due from the estate of Arnold have long since been paid. Unless then David Oakes is to be considered the residuary legatee or the successor of the residuary legatee and entitled to all his rights, the action cannot be maintained.

After making certain legacies not material to the determi-

nation of the rights of these parties, the testator devises "all the residue" of his property to Loring Cushing, executor of his last will and testament, upon and for the trusts, interests and purposes hereinafter mentioned. The duties of executor and trustee are separate and distinct. They may be conferred upon and performed by one and the same or different individuals, as the testator shall deem expedient. The performance of these trusts is enforced by bonds corresponding to the official duties respectively imposed. The appointee may accept or decline either or both, when both are conferred on the same person. Whether the executor and trustee is or is not the same, is immaterial. Legally they are to be viewed as equally distinct, whether these trusts are held by one or more. The trusts are clearly set forth in the will, and the executor is appointed *residuary legatee* in trust. But whether the residuary legatee hold the estate in his own right or in trust cannot affect his right of action under § 11. The legal estate in either case is equally vested in him, and his rights to the estate bequeathed depend in no way upon what may be its future disposition. So too when a trust is created and a trustee appointed, though the individual named should decline, the trust is not thereby defeated. It will still be upheld, and the intentions of the intestate will be carried into effect through the agency of some one appointed for that purpose, whose rights and duties will be the same as if he had been originally designated for the trust. All this is necessary to prevent the failure of the manifest purposes of the deceased. The trustee under the will was residuary legatee, and the plaintiff Oakes succeeds to his rights. This action is rightly brought.

John Arnold left two children, Abraham and Abigail, both of whom survived him. Abraham has since his death deceased. During the life of his father and since his decease, he was supported in the Insane Hospital by the town of Augusta. The amount thus paid has since been refunded to the town by the executor of Arnold, who in the settlement of his account was allowed the same by the Judge of Pro-

bate. It thus becomes necessary to determine whether those payments were rightfully made, and if not whether the decree of the Judge of Probate allowing them is conclusive and a bar to the recovery of the amount thus paid.

The will, after making Loring Cushing the executor trustee, proceeds to make him, *as trustee and in that capacity*, residuary legatee, and to designate the uses and purposes for which the trust was created. Upon this portion of the will, the question arises whether the trust is charged with the maintenance of Abraham before the death of his father. The two first clauses relate to the future support of these children in certain contingencies and to the disposition of the residue of the estate if any should remain after their decease or that of either of them. The language of the will in reference to the rights of these parties is as follows: "I also order that, if the said Abraham should decease before my death, that every and all charges for his support up to the time of his decease shall be paid out of the property which I may leave, provided the same property shall be sufficient to defray and discharge the same expenses and also to give my daughter Abigail one hundred dollars as above stated," &c. The trustee has no right to appropriate the funds for any other or different purposes than those set forth in the will. The executor as such was to pay the funds to the trustee when appointed, till which time they were held by him in his official capacity. The language referred to looks only to the single contingency of the death of Abraham before his father and in that event provides for his past support. The contingency which would justify these payments never occurred. Abraham was the preferred object of his father's bounty. It was known to the father that he was supported by the town of Augusta. In case of the decease of Abraham before his death, he was willing that the funds destined principally for his benefit should be appropriated for his past support. If he survived, the estate was to be for the future support of his children. The other provisions of the will are entirely prospective. The amount of $475,89 was wrongfully paid

by the executor into the treasury of Augusta, it being for the expenditures for the son before the death of the father and one hundred dollars for Abigail under the provisions of the will in case of her marriage.

As this sum has been allowed the executor by the Judge of Probate in the settlement of his account, it is insisted that this allowance is forever binding and conclusive upon all parties interested. The decree of the Judge of Probate upon all matters within his jurisdiction is final unless vacated by appeal. As to matters without his jurisdiction it is null and void. It is no part of his duty to settle the legal construction of a will, to determine in case of different claimants to whom payment should be made, or when the amount is contested, what the sum shall be. All these questions belong to another tribunal. The executor might await the legal decision of controverted rights, or he might on his own responsibility decide for himself. He chose the latter and must abide the result. These funds then are to be deemed as still legally in his hands, the payment to the town of Augusta having been made without authority. *Smith* v. *Lambert*, 30 Maine, 137; *Cowden* v. *Perry*, 11 Pick. 503. The amount received remains in his hands till he renders an account, in which the payments shall appear to have been made to the trustee, who should give a new bond whether such trustee be the executor or some one else. *Conkey* v. *Dickinson*, 12 Met. 51. This not having been done, the executor would remain chargeable.

SHEPLEY, C. J., TENNEY, HOWARD and RICE, J. J. concurred.

Defendant defaulted.

BLANCHARD *versus* HOXIE.

A general demurrer to a declaration containing several counts, is unsustainable, if any of the counts are good.

In a declaration upon the covenants of seizin and of right to sell, contained in a deed of land, the breaches are sufficiently alleged by negativing the words of the covenants.

In a declaration upon the covenants of freedom from incumbrances, and for quiet enjoyment, the breaches must be specifically set forth.

In a count for covenant broken, alleging several breaches, there may be a recovery for such breaches as are well assigned, although the assignment of some other breaches may be fatally defective.

A declaration negativing the words of the covenant of seizin, is not defeasible on general demurrer, although it proceed to allege that the defendant's seizin did not extend to a described part of the land.

In such a case, the measure of damage is the consideration paid for that part of the land, with its interest.

ON DEMURRER.

COVENANT BROKEN.

APPLETON, J. — The plaintiff has declared on the covenants of a deed of warranty given him by the defendant, and in his declaration has set forth in one count all the covenants, and assigned a breach of each by negativing its words. To this the defendant has filed a general demurrer.

In suits on the covenants against incumbrances of warranty, and for quiet enjoyment, the breach of each of these covenants must be specifically set forth. It is not enough to negative the general words of these covenants. *Marston* v. *Hobbs*, 2 Mass. 437; *Wait* v. *Maxwell*, 4 Pick. 87. The breach of these covenants therefore is not well assigned. The law is otherwise in reference to the covenants of seizin and a right to sell. It is sufficient in these last covenants merely to negative their language.

In this case, the breach alleged of the covenants of seizin and good right to sell is, that "The defendant was not seized of the said granted premises, and that he had not good right to sell and convey the same." By all the authorities this is a good assignment of a breach of these covenants. The declar-

ation then proceeds as follows: "but that at the time of said conveyance, ten acres of said tract on the east side of the same were claimed, demanded, and owned by one David Robinson and Stephen Ward, and that a further portion of said tract was claimed, demanded, and owned by said David Robinson, being about three-fourths of an acre on the west side of tract," &c. This is not inconsistent with, nor a denial of the previous allegation, that the defendant was not seized, and had not good right to sell and convey to the extent, at any rate, of so much of the premises granted as are thus described. The effect of this language may be by implication to restrict the breach to the limits thus specified, but that cannot affect the plaintiff's right to recover for this portion of the land granted him. Though the defendant may have been seized of a portion of the land, he would still be liable in damages for the value of so much as he might have conveyed without right. The defendant cannot complain because the generality of the breach of these covenants is confined within more narrow bounds. The count clearly and in fitting language sets forth a breach of the covenants of seizin, and good right to convey. Is, then, the plaintiff to fail because, having undertaken to assign other breaches, he has not well assigned them? The demurrer being general, the objection of duplicity cannot prevail, for that can only be taken advantage of on special demurrer. 1 Chit. Pl., 228; *Otis* v. *Blake*, 6 Mass. 336; *Tubbs* v. *Caswell*, 8 Wend. 129. Neither is the plaintiff to suffer because a breach of the other covenants has been defectively assigned in this count. "If one of two breaches or a part of a breach be improperly assigned, leaving a sufficient breach to support the count, the defendant cannot demur to the whole." 1 Chit. Pl. 337; Stephen on Pl. 4th Am. Ed., 2d app.

"It is a settled rule that, if the same count contains two demands or complaints for one of which the action lies and not for the other, all the damages shall be referred to the goc cause of action. *Doe* v. *Dyeball*, 8 B. & Cres. 70. " too in covenant, if some breaches are good and the

not, it is no ground of demurrer to the whole declaration, but the plaintiff shall have judgment for the breaches well assigned," per BAILEY, J., in *Amory* v. *Broderich*, 2 Chit. R. 329. The case of *Wait* v. *Maxwell*, 4 Pick. 87, is in point and conclusively so. There the declaration alleged a breach of all the covenants by negativing the general language of each. This was an ill assignment as to the covenants of warranty and against incumbrances, and the court held that the defendant was not bound to notice those in his plea for that cause, and that the declaration was good for a breach of the covenant of seizin and right to sell.

The cases cited by the counsel for the defendant and principally relied upon in his argument, do not necessarily conflict with these principles. In *Hacker* v. *Storer*, 8 Greenl. 230, the suit was by one claiming title from the defendant through various mesne conveyances. In each count a breach of all the covenants was alleged. Upon the trial it appeared that in fact the defendant was not seized at the time of his conveyance. The covenant of seizin being broken at the instant of the conveyance became a mere chose in action and was not assignable so as to enable the assignee to recover in his own name. When the covenant of seizin is broken, as nothing passes by the deed, the covenant of warranty which runs with the land, would not vest in the assignee, for there was no land conveyed to which it could attach. In *Fairbrother* v. *Griffin*, 1 Fairf. 91, the breach assigned was of a non-existing covenant, so that no cause of action was set forth in the declaration. Besides, the suit was on a covenant running with the land and was not broken till after the plaintiff had parted with his title, so that the right of action, if any, vested in his grantee. In *Swift* v. *Patrick*, 2 Fairf. 181, it was decided that when some of the counts were good and some bad, upon general demurrer, the plaintiff was entitled to judgment upon those which were good. As in that case, one count was free from all exception, it became of less importance carefully to scrutinize the other. In none of these cases was the question, now before us, discussed, considered or

determined. Indeed the very authorities which establish the position that in case of demurrer to a declaration containing some counts, which are good and some which are bad, equally sustain the position that the plaintiff's right to recover on a breach well assigned is not to be defeated by reason of some breach ill assigned in the same count. *Powduh* v. *Lyon*, 11 East, 566. The declaration is adjudged good. The plaintiff is entitled to recover on the covenant of seizin the consideration paid for the ten and three-fourth acres of which the defendant was not seized with interest to the time when judgment shall be rendered.

SHEPLEY, C. J., TENNEY, HOWARD and RICE, J. J. concurred. *Declaration adjudged good and judgment for plaintiff.*

Lancaster and *Baker*, for the defendant.

Fuller and *Edwards*, for the plaintiffs.

DUNN *versus* MARSTON *&* *al.*

Upon a note, payable in such articles as the creditor shall select from those, which the debtor is manufacturing at a specified place, a *legal* inference arises that the payment is to be made *at that place.*

Upon a note, payable on demand, in specific articles, the demand may be made, at any reasonable hour, at the place of payment, though neither the debtor or any person in his behalf should be present.

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

ASSUMPSIT upon a note for fifty dollars, payable on demand in pine boards, and fifty dollars payable in pine shingles, of such quality as the plaintiff might select from those which the defendants were manufacturing at Taylor's mills.

The testimony showed *that* the defendants were farmers; *that* they had a retail grocery store a few miles distant from their farms; *that* they manufactured lumber at Taylor's mills, which were a few miles distant from their store and from their farms; *that* they had in their lumber yard, twenty five

rods from the mills, a large quantity of pine boards and pine shingles, of their manufacture; *that* the plaintiff's agent went, with the note, into the yard at a reasonable hour, and demanded payment; and *that,* at the making of the demand, neither of the defendants or any person in their behalf was at the mills or in the yard.

The defendants requested the Judge to instruct the jury *that* no place of payment was named in the note, and *that,* as no demand was made upon either of the defendants, or their agent, or at their store or place of business, there was no sufficient demand to support the action.

This request was refused, and the jury were instructed that, if there was a demand of payment during business hours, at Taylor's mills, and if the defendants neglected to set out sufficient lumber, in payment of the note according to its tenor, such demand was sufficient to support the action.

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

Appleton, J. — This was an action of assumpsit on a note of the following tenor: —

"For value received of R. B. Dunn we promise to pay him or bearer one hundred dollars, fifty dollars to be paid in merchantable pine boards and fifty to be paid in pine shingles of such quality as he may select from those which we manufacture at Taylor's mills so called in Mt. Vernon, at a fair cash price on demand. "Marston & Tilton,
"by C. A. Marston."

The plaintiff by this contract has obviously the right to determine at what time he will demand its performance. The defendants on their part are bound to have at all times on hand at the place of delivery, wherever that may be, enough lumber of the kinds mentioned to enable them to comply with its stipulations. *Bailey* v. *Simonds*, 6 N. H. 159. When the demand is made at a reasonable hour and at the proper place, it will be equally available whether the

defendants are present or absent. *Mason* v. *Briggs*, 16 Mass. 453. *Higgins* v. *Emmons*, 5 Conn. 79.

The defendants contracted to pay the plaintiff a certain sum, part in boards and part in pine shingles of such quality as he might select from those they were manufacturing at Taylor's mills. The lumber from which payment was to be made is specially described. It was to be manufactured by the defendants or by those in their employ at a given place; and lumber manufactured elsewhere or by other persons, so far as relates to the shingles at any rate, would not answer the requirements of the contract, which had clearly defined by whom and where they were to be manufactured. The plaintiff might at any time make his demand and if the defendants complied with it, he might select enough to pay that portion of his note payable in shingles. The right of selection applies to all on hand at the time of demand whereever that may be made. That right the defendants could not limit nor restrain. To allow them to do that, would be to the extent of such allowance, an interference with the plaintiff's rights, which in this respect are unlimited. As the right of selection exists as to all the shingles manufactured at the time of demand, it must be exercised at the place where they are manufactured, otherwise the defendants would be compelled to remove the whole mass to the place of selection, wherever it should be determined to be, which would be absurd. When the selection is duly made the title to the lumber selected would vest in the creditor so selecting. The selection must therefore be made at the place of manufacture, and the delivery had at the place of selection.

If the right of selection should be deemed to apply to the boards in which part of the payment was to be made, then the same reasoning would be applicable. If no right of selection existed as to them still no different results would follow, for it cannot be deemed to have been the intention of the parties to this contract that there should be separate and distinct places of delivery for each article by which the note was to be paid. The subject-matter of the contract, the ob-

ject the parties had in making it and their presumed intentions are all to be regarded in connection with the instrument itself in determining what shall be its legal construction. *Howard* v. *Miner*, 20 Maine, 330. The place of delivery therefore is at Taylor's mills, "for if the place intended by the parties can be inferred, the creditor has no right to appoint a different one." 2 Kent's Com. 507. Besides, if the plaintiff had the right to appoint a special place of delivery for the boards it might be waived, and if when he made the demand he designated no such place, the place of delivery would be the place where they were at the time of the demand, or such reasonable place as the debtor might appoint.

But a question of no less importance arises as to where was the proper place of *demand*, for if there has been no demand at the proper place the defendants cannot be deemed as in default. From the evidence it appears that the defendants were farmers, having a store at the village in the town in which they resided, at some distance from their farms, and that at the same time they were engaged in the manufacture of lumber at a place called Taylor's mills, at some distance from the place where they transacted their mercantile business as well as from their farms. It has been settled that a note payable in farm produce should be demanded at the farm of the debtor and that one payable in merchandise or manufactures should be demanded at the store of the merchant or the shop of the manufacturer. *Lobdell* v. *Hopkins*, 5 Cow. 516; Chipman on Contracts, 28, 29, 30, 49. In *Rice* v. *Churchill*, 2 Denio, 145, the note declared on was "payable in lumber, at cash price, when called for." The defendant in that case was engaged in farming as well as in the manufacture of lumber. In delivering the opinion of the Court, BEARDSLEY, J., says, "A personal demand was not necessary in this case. The lumber was payable at the defendant's mill-yard, and the creditor must go to that place to receive it. He was not, however, bound to go there more than once, nor to remain until the defendant was found at the same place. One who enters into such an engagement

as this, must at all reasonable hours be at the place of payment, and prepared to perform his contract. If the debtor is not there a demand may be made of any one in charge for him; and if no such person can be found, a public demand at that place at a reasonable time will suffice." It may be that a demand might have been elsewhere which would have been enough unless the defendants had met the demand with an offer to make payment at the place of delivery. If this was proffered on such demand the holder of the note would be bound to repair there to receive his pay. *Scott* v. *Crane*, 1 Conn. 225.

The instruction given being in conformity with these principles was correct. The instructions requested proceed upon the assumption that no legal demand could be made at Taylor's mills and were properly refused. The sufficiency of the evidence to satisfy the jury is not before the Court. The legal correctness of the rulings of the Judge are alone to be considered on exceptions.

SHEPLEY, C. J., TENNEY and HOWARD, J. J. concurred.

Exception overruled. Judgment on the verdict.

Morrell, for the defendants.

Kempton, for the plaintiff.

STATE *versus* BONNEY.

An indictment for forgery, or counterfeiting, or for having counterfeit bills in possession, should set forth the forged or counterfeit instruments by fac simile or copy, whenever practicable.

In such cases, the indictment must, in itself, *purport* to set forth the *tenor* of the instruments. It is not sufficient to set them forth according to their *purport and effect*.

ON EXCEPTIONS from the District Court, RICE, J.

INDICTMENT for having in possession a counterfeit bank bill, knowing the same to be counterfeit, and intending to pass it, whereby to defraud the bank.

The indictment does not purport to set forth the bill according to its *tenor*, or in its words and figures, but according to its *purport and effect.*

The Judge refused to give instructions to the jury as the defendant had requested, and to that refusal the defendant excepted. He then gave to the jury certain instructions to which also the defendant excepted.

The verdict was against the defendant, and he thereupon moved an arrest of judgment, for the reason, that "the indictment does not profess to set out the bank bill alleged to be counterfeit, in the words and figures thereof, or according to its tenor, but only according to its purport and effect."

Paine and *Baker*, for the defendant.

Vose, *County Att'y*, for the State.

HOWARD, J. — In indictments for forgery, the instruments alleged to be forged should be set forth in words and figures, whenever it is practicable. But, if in possession of the prisoner, or if they be lost, or destroyed, or not attainable by the government, and it be so stated in the indictment, this may constitute a sufficient reason for not setting out exact copies. 2 East, P. C. 975, c. 19, § 53, 54; 1 Chit. Cr. Law, 234; 2 Russell on Crimes, 359; *Commonwealth* v. *Houghton*, 8 Mass. 107; *People* v. *Kingsley*, 2 Cowen, 522. The same principles are applicable to indictments upon statutes, for having in possession counterfeit bank bills, notes, public securities, &c. with intent to pass them, with a design to defraud. R. S. c. 157, § 5, 6, 7, &c.

The instrument should be set forth in the indictment according to its *tenor*, and not according to its *purport and effect.* By the former mode an exact copy is intended, but by the latter, the import or substance only is indicated. *Queen* v. *Drake*, 3 Salk. 225; *Rex* v. *Beare*, 1 Ld. Raym. 414; *Wright* v. *Clements*, 3 B. & Ald. 503; 3 Chitty's Criminal Law, 801, 802, (*1041;) *Commonwealth* v. *Wright*, 1 Cush. 46.

It has been the general practice in this State and in Massa-

chusetts, for many years before, and since the separation of these States, to adopt the forms of indictments used and furnished by the late Solicitor General, Davis. His precedents are generally improvements upon the English forms, less cumbrous and more convenient, but all of them are not wholly unobjectionable. His forms of indictments for forgery, and such as are designed and required to contain an exact copy of an instrument in writing, are generally drawn so as to purport to contain only the import of the document; and he states it to be most proper, and equally valid, and more advisable, to allege the purport and effect, rather than the tenor of the instrument. Davis's Precedents, Nos. 152, 170, and notes. Indictments thus drawn, are essentially defective, in not purporting to contain a transcript or fac simile of the instrument, and in not informing the Court or the prisoner, of the actual charge intended to be made, and are bad at common law; for by that law every indictment should contain the particular matter, wherein the offence was committed. 2 H. H. 182; 2 Leach, 808.

It will be found, that in the earlier practice of Mr. Davis, as Solicitor General, indictments of the description referred to, were not drawn in conformity with the rules and precedents subsequently adopted by him. *Commonwealth* v. *Stow*, 1 Mass. 54; *Same* v. *Bailey*, 1 Mass. 62; *Same* v. *Stevens*, 1 Mass. 204. The change in this respect cannot, in our opinion, be supported upon principle or authority. We do not feel called upon to sanction loose forms and an erroneous practice, now that an objection is taken, and the matter distinctly presented for consideration.

It does not become material to consider the exceptions.

SHEPLEY, C. J., TENNEY and APPLETON, J. J. concurred.

Motion sustained and judgment arrested.

SOPHRONIA PARKER *versus* MARSTON.

Declarations by the vender of property, made in disparagement of his title, and while he was in possession of the property, are admissible in evidence to disprove such title.

In order to make such declarations admissible, it is not necessary that, at the time of making them, the property should be exhibited, or that any act should be done in relation to it.

ON EXCEPTIONS from *Nisi Prius*, WELLS, J. presiding.

TROVER for an unindorsed promissory note, made payable to Betsey Parker.

The plaintiff's testimony tended to prove the ownership of the note to be in her, by a gift from the payee. The defendant introduced testimony tending to show *that* the note was given by the payee to one Mary Anne Parker, as a "*donatio causa mortis*;" *that* Mary Anne took it into possession at the time of the gift; and *that* it was seen in her hands several times within the next subsequent four years.

He also proved that, after that period, Mary Anne sold the note to one Thomas Parker, of whom it was purchased by the defendant.

Several witnesses for the plaintiff testified, that, on several occasions within those four years, Mary Anne declared that the note had been given not to her but to the plaintiff. It did not, however, appear that, upon either of those occasions, the note was present, or that any act was done in relation to it. To the admission of those declarations, the defendant seasonably objected, and now files exceptions.

Mary Anne was not used as a witness by either party, though still living. The defendant also moved for a new trial, on the ground of newly discovered evidence.

APPLETON, J. — It was claimed in the defence that one Betsey Parker in her last sickness, and in contemplation of death, gave the note, for the conversion of which this action was brought, to her sister, Mary Anne Parker, by whom the same was sold to one Thomas Parker, from whom the defendant derived title by purchase. There was evidence on the

part of the defendant tending to prove that Mary Anne Parker took possession of the note at the time of the alleged gift, and that it was in her hands at various times before the sale and delivery of the same to Thomas Parker. Her declarations in disparagement of her title between those times were received. It is contended that such declarations are hearsay, and consequently were inadmissible. The real and efficient testimony, in cases of this class, is that of the individual whose declarations are offered. It is undoubtedly true that this kind of proof partakes of the characteristic infirmities of hearsay evidence. It is not uttered under the securities which the administration of an oath and the opportunities of cross-examination afford for trustworthiness. But the want of those securities affect only the degree of credit to which it may be entitled. Its admissibility has been too clearly settled by repeated decisions to be any longer questioned. *Hatch* v. *Dennis*, 1 Fairf. 244; *Holt* v. *Walker*, 26 Maine, 107. The note in this case was not indorsed by the payee, and the defendant may justly be deemed as taking it under circumstances of suspicion. 1 Greenl. Ev. § 190.

By the statute of 1852, c. 246, all motions for a new trial, and petitions for review are to be heard by one Judge at *Nisi Prius*, before whom the party aggrieved can present his evidence and have a hearing.

SHEPLEY, C. J., TENNEY, HOWARD, and RICE, J. J. concurred. *Exceptions overruled.*

Noyes, for the defendant.

Paine, for the plaintiff.

COUNTY OF WALDO.

SWEENY *versus* MILLER.

The establishment of a divisional line between adjoining lands, resulting from the acceptance of an award made under a rule of Court, by which the referee was authorized to establish the line, is not in contravention of the Statute of Frauds or of any other principle of law, although, previous to the docket entry of the submission, no agreement had been made *in writing* to refer the matter.

To enforce the rights, resulting from such an acceptance and judgment thereon, the law will furnish adequate remedies.

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

TRESPASS QUARE. The question was one of boundary. The action was referred by rule of Court to Rufus B. Allyn, Esq., who was to decide the action on legal principles, and to establish the line between the parties. There was no written agreement to refer. The referee awarded, that the plaintiff recover in the suit, and that the line between the parties, on or by the premises described in the declaration, *be fixed* and established as follows, [describing the course and boundaries of a straight line ;] "the plaintiff 's land to be contiguous to the west side of said straight line, and the defendant's land to be contiguous to the east side of the same line."

The defendant moved that the award be recommitted or rejected. Among the reasons for the motion it was urged, that the referee "had no authority to make a new line, but was only authorized to run and fix where the true line was, upon legal principles"; and that he, nevertheless, wrongfully established a new and "arbitrary" line. The other reason suggested was, that suitable opportunity for the defendant's counsel to offer an argument was not allowed by the referee. Evidence was introduced to the Court by the defendant to show a mistake in the awarded line. The award was accepted, and the defendant filed exceptions.

Palmer, for the defendants.

1. The acceptance of the award cannot bind the parties. A judgment thereupon would not vest the lands, according to the award, without mutual releases. Such releases were not required by the award, and cannot be decreed by a Court of Equity, for there was no previous *written agreement* for the submission, to which such a Court could resort for power. In no case wherein exceptions have been taken to the acceptance of an award, and wherein the title to real estate was passed, have the Courts held that they had power to give it effect, unless by virtue of a *written agreement* signed by the parties. 6 Pick. 147; 17 Pick. 470; 22 Pick. 144; 6 Metc. 131; 13 Metc. 383; 18 Maine, 255; 12 Metc. 31.

2. The award attempts to transfer to one party land which belongs to the other. There being no written agreement to refer, such an attempt is in violation of the statute of frauds.

Dickerson, for the plaintiff.

SHEPLEY, C. J. — The record and the rule of reference states, that the referee "is to decide this action on legal principles and establish the line between the parties." The law as well as the facts was thereby submitted to his decision. He was under no obligation to state the facts proved before him and to submit a question of law for the consideration of the Court.

The parties by the reference admit, that the line between their lands was disputed and uncertain; that its exact position had not been ascertained. The design appears to have been to have that uncertainty removed and to have the position of the line clearly ascertained and established. The fourth clause of the award declares "that the line between said parties on or by the premises described in the plaintiff's writ, be fixed and established as follows," describing it. There is no indication in the award, that the testimony introduced was disregarded, or that land not in dispute was taken from one party and assigned to the other. The statement, that the land of each party is to be contiguous to that line, is of no importance, it being but a statement of the legal effect of

the establishment of the line between their lands. The testimony introduced before the referee is not presented by the exceptions, and the Court can form no judgment, that an incorrect decision was made by him upon the facts; that the line established was not authorized by the testimony; or that the law was not correctly applied.

The testimony respecting what the referee did and said can have no other effect than to prove, that he so conducted, that his award ought not to be accepted. This it fails to do.

There does not appear to be any just cause to fear, that the award will not be conclusive upon the rights of the parties submitted.

TENNEY, WELLS and HOWARD, J. J. concurred.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1852.

COUNTY OF PENOBSCOT.

NASON *versus* DINSMORE *&* *al.*

A contract, made on the Lord's day, and before sunset of that day, is illegal and void.

A contract, proved to have been made on the Lord's day, is not thereby rendered invalid, unless it be also proved, that it was made before sunset.

Upon a contract, dated on the Lord's day, no presumption arises that it was made before sunset, but rather that it was made upon that part of the day, in which it was lawful to do it.

Such a date, therefore, in the absence of other evidence, will not support a defence.

ON EXCEPTIONS from the *District Court*, HATHAWAY, J.

DEBT on bond. The bond was dated April 8, 1849, which was the *Lord's day*, and for that reason the defendants contended that it was void.

The Judge ruled that the date of itself, without further evidence, would not support the defence. To that ruling the defendants excepted.

Dinsmore, for the defendants.

A. Sanborn, for the plaintiff.

WELLS, J. — It has been decided in the case of *Towle* v. *Larrabee*, 26 Maine, 464, that a contract made before sunset on the Lord's day is void.

By statute, c. 160, § 26, any person, who shall do any work, labor or business, works of necessity or charity excepted, on the Lord's day, is punishable by fine. But it is provided by the twenty-eighth section of the same chapter, that "for the purposes of the provisions of the two preceding sections, the Lord's day shall be construed to include the time between the midnight preceding, and the sunsetting of the same day."

The bond in suit purports to be dated on Sunday, but it might have been made after sunset on that day, when the making of it was not unlawful. If the defendants would avoid their bond, they must show it was made in violation of law, and it is to be considered valid until it appears to be otherwise. There is nothing in the bond itself, which necessarily shows it to be illegal. It does not appear by any thing exhibited in the case that it is void. The defendants allege an infirmity in the bond, which does not appear on its face, and the burden of proof is on them to show its existence. The presumption is, that the parties acted in conformity to law, and not in opposition to it, and the bond must therefore be regarded as valid.

SHEPLEY, C. J., RICE and APPLETON, J. J. concurred.

Exceptions overruled.

BARKER *versus* FOGG *& al.*

In a suit between individuals, the public records of a city, of the location or alteration of its streets, may be used as evidence.

Such records furnish evidence of the facts, of which they speak, equal to ordinary testimony given under the obligation of an oath.

Thus, where it became material for a party to show *at what time* a public street was *actually* widened; *Held*, competent to introduce the records of the city to prove at what time the widening was *authorized.*

In such a case, in the absence of opposing evidence, it is allowable for the jury to infer, that the *actual* widening was not made until *after* the same was duly *authorized.*

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

TRESPASS QUARE.

The verdict was for plaintiff, and the defendants excepted.

Rowe & Bartlett, for the plaintiff.

Appleton and *Moody*, for the defendants.

WELLS, J. — It became material to a full understanding of the evidence introduced at the trial, to ascertain the time when the street, on which a corner stone had been placed as a boundary, was widened. The defendants offered the records of the city of Bangor in relation to the alteration of the street in evidence, to show when it took place, but they were not received.

The city has power to lay out and alter streets ; such acts are of a public nature, the whole community are interested in them, and those who perform and record them are the agents and servants of the public. Such public officers discharge their respective duties under the sanction of their official oaths. The records are the evidence of the facts of which they speak, and they are required to perpetuate the knowledge of them ; they are equal to ordinary testimony given under the obligation of an oath, and in relation to remote events, they are more satisfactory than the recollection of witnesses. As they are of a public nature, they are open to all, and they may be introduced in evidence whenever the interest of any one requires an exhibition of the facts which they contain. It is on account of their public character and bearing, that any one may resort to them as a justification for the appropriate use of the land over which streets and highways are located, and the same reason would authorize their introduction to establish the truth amid conflicting testimony, in the ordinary investigation of facts. 1 Greenl. Ev. § 483; 1 Stark. Ev. 230; *Merriam* v. *Mitchell*, 13 Maine,

456; *Sumner* v. *Sebec,* 3 Greenl. 223; *Owing* v. *Speed & al.* 5 Wheat. 420.

It is true the records would only show a legal authority for the alteration, and not when in fact the street was made wider. It might have been done by the owners of the land, before any action was had by the city in relation to it, yet the inference might be fairly drawn, in the absence of any opposing proof, that it was made wider after such action. The plaintiff would be at liberty to repel such inference by showing when the street was actually widened.

SHEPLEY, C. J., RICE and HATHAWAY, J. J. concurred.

Exceptions sustained and new trial granted.

FARRAR *& al. versus* COOPER, *Executor.*

A conveyance of "the use of land forever," is equivalent to a conveyance of the land.

In a deed, granting part of a mill and of a mill site, within specified boundaries, an authorization to the grantee, in concurrence with the other part owners, to remove the mill and maintain it at any other spot within the boundaries, does not limit the grant to that of an easement only.

When land is conveyed, to be afterwards located within specified limits, the first rightful location upon the earth, determines forever its bounds.

A right, acquired by use, to maintain a dam, unimpeded by any dam below it on the same stream, may be lost by non user.

A non user of such a right for twenty years furnishes presumptive evidence of an extinction of the right by abandonment.

Such presumption, however, may be rebutted by proof.

Though, from the time of ceasing to use a mill privilege, twenty years may not have elapsed, prior to its being overflowed and destroyed by a dam below, still an abandonment of the privilege may be presumed, *if* its proprietor, *witnessing* the erection of the dam and of expensive works upon it, and *knowing* that it must destroy his privilege above, makes no effort or remonstrance to prevent it or claim of remuneration for it, *within the residue of the twenty years.*

A servitude is presumed to be extinguished, when the proprietor of the estate, charged with it, is permitted, for a sufficient length of time, to manage it in such manner as to preclude the exercise of the rights, arising out of that servitude.

The acceptance, within twenty years, of a deed granting a mill site, and reciting the existence of another mill site above it, does not estop the grantee from asserting the abandonment, by non user, of the upper site, unless the deed shows that the upper site had a right of priority in the use of the water.

TRESPASS ON THE CASE.

The parties agreed the facts, and thereupon submitted the case to the Court, with power to draw inferences as a jury might.

Of the facts thus agreed, the following particulars only are necessary for understanding the opinion of the Court.

In 1811, Samuel Greeley deeded to Joseph and James Carr the following real estate;—the north-easterly half of a double saw-mill on Stillwater stream with the privilege of forever having and keeping a saw-mill on the same plat of ground on which that half of the mill stands, "or removed further up, further down, or further into the stream," as they and the proprietor of the other half should agree, provided no encroachment is made on the mills and privileges on the north-easterly end of the dam; also an undivided half of the dam and of the right to flow water thereby; also an undivided moiety forever of the privilege of a mill yard, one hundred feet square, adjoining said mill, appendant and appurtenant to, and best to accommodate said double saw-mill. In the deed, however, Greeley reserved and excepted the grist-mill, then connected with the double saw-mill, and also the right of keeping a single grist-mill there forever.

The land and privilege thus conveyed, was carved, by Greeley, out of a tract, owned by him and extending to a greater distance up and down the stream.

In 1817, the double mill and the dam, on which it stood, were swept away by the freshet, *and there have been no erections on the site of them since.*

In 1828, the part which Joseph Carr took under that deed, and also one half of the south-westerly half of the double mill site, with its half of the dam and other privileges, became vested in Jonathan Farrar. In June, 1833, Farrar conveyed his interest to R. M. N. Smyth, describing it as "one undivided half of a mill privilege, being the privilege for

one saw in the south-westerly part of the mill seat, called the Greeley mill, and the right and privilege of keeping and supporting one saw in any saw-mill to be erected on the premises," and half of the dam, mill yard, &c.

This estate, however, became afterwards, in 1843, revested in the heirs of Farrar, by a foreclosure of the mortgage, given by Smyth for the purchase money.

In July, 1833, Smyth, having purchased other portions of the Greeley tract, and of adjoining lands, conveyed to J. N. Cooper and A. Cooper, one undivided fourth part of a described territory, larger in extent, but embracing within its lines, the land which he had mortgaged to Farrar, "meaning to convey one undivided fourth part of all the mills, *seats*, rights, *privileges* and estates included within the lines aforesaid."

Other persons became owners of certain portions of the land referred to. Those persons and the Messrs. Cooper, in 1833 or 1834, jointly erected a dam, with valuable mills, upon said land, a few rods below the former site of the Greeley dam and mill, and across the same stream, by which dam that site was overflowed, and its privilege entirely destroyed.

Jonathan Farrar died prior to 1840, and the plaintiffs, being his heirs at law, commenced this suit, in 1847, to recover for the damage sustained by the destruction of said privilege.

James N. Cooper, against whom the suit was brought, has since deceased, and the defendant comes in as his executor.

Among the points presented by the defendant, it was insisted that the plaintiffs' rights had been lost by non user and abandonment.

Cutting, for the plaintiffs.

The defendant is estopped to set up an abandonment. Every deed up to 1833, under which his testator claimed, recognizes the existence of a mill site and of mill privileges, and conveys the premises, as such. Even Smyth's deed to Coopers in 1833 conveys "one undivided fourth part of all the mills, *seats*, rights, *privileges* and estates included within

the lines aforesaid." And it is not pretended that, within those lines, there were any mills or privileges, except the Greeley mill and the privileges pertaining to it.

But, if not estopped, the case shows no such abandonment.

Nothing short of a *non user* for twenty years shall be construed into an abandonment, *even prima facie. French* v. *Braintree Manufacturing Co.* 23 Pick. 219. *Arnold* v. *Stevens*, 24 Pick. 106.

In this case, the Greeley mill was in existence and in use till 1817. The acts now complained of were in 1833 or 1834, less than twenty years from the destruction of the Greeley mill and dam. The title in the plaintiffs did not become absolute until the mortgage of Smyth to Jonathan Farrar was fully foreclosed in 1843.

This suit, therefore, was commenced by the plaintiffs in four years from the acquisition of their title.

Rowe & Bartlett, for the defendant.

SHEPLEY, C. J. — This action on the case has been commenced to recover damages alleged to have been occasioned to a mill site by its having been overflowed by the erection of a dam, below it, on the same stream. The case is submitted upon an agreed statement of the facts.

It becomes important to ascertain in the first place, the character and extent of the estate, conveyed by Samuel Greeley to Joseph and James Carr.

A conveyance of a mill, or of a mill privilege, or of the privilege of a mill, will operate to convey the land occupied for the purpose, unless there be in the conveyance language indicating a different intention. *Blake* v. *Clark*, 6 Greenl. 436; *Moore* v. *Fletcher*, 16 Maine, 63; *Crosby* v. *Bradbury*, 20 Maine, 61.

By the deed from Greeley to the Carrs, one moiety of a double saw-mill is conveyed " with the privilege of forever having and keeping a saw-mill on the same plat of ground, whereon the same conveyed moiety now stands." If the words following in the deed were omitted, there could be

no doubt, that a moiety of the land, upon which the mill stood, would be conveyed; for a conveyance of the "use of land forever" is equivalent to a conveyance of the land.

The right, however, is conveyed of keeping a mill on the *same plat* of ground forever, "or removed further up, further down, or further into said stream, as the owner of the other moiety and the owner of the above moiety hereby conveyed, shall agree." It has been contended, that these words had the effect to restrict the conveyance to an easement or servitude in the land. The words afford no indication, that the land, upon which the mill then was or was to be erected, was not intended to be granted, for wherever the mill should be placed, the right to have a mill remain there forever was granted. The language might extend the bounds of the privilege conveyed, or render those bounds so uncertain, that the conveyance would be inoperative, but they would not change the character of the estate conveyed. There is another clause in the deed, conveying "also one undivided moiety forever of the privileges of a mill yard, one hundred feet square, adjoining said mill, *appendant* and *appurtenant* to, and best to accommodate said double saw mill." This language would convey a lot of land of those dimensions; and although such a lot does not appear to have been designated upon the earth at that time, it does appear to have been subsequently; and when the bounds were first established by the parties according to the terms of the grant, they became the unalterable bounds of the land conveyed for a mill yard, upon the well known rule, that when a grant of a certain quantity of land is made, to be thereafter located within certain limits, the first rightful location of it upon the earth, within those limits, determines forever its extent and bounds.

The bounds of the mill yard having been thus designated, as adjoining the mill, a construction of the deed, which would permit the mill to be removed so far up or down the stream as would remove it without the bounds of the mill yard, would be inadmissible. In addition to this consideration, there is not found in the deed any express authority to re-

move the dam then existing; and the grantor excepted and reserved the grist-mill, then connected with the saw-mill, and also "the right of keeping a single grist-mill there forever."

Opposed to these considerations, it is insisted, that as there was but one mill site on the whole lot then owned by Greeley, his grant of the mill and privilege would authorize his grantee to use that privilege, by erecting a dam and mills upon it, where they would be most convenient and useful. Greeley, before his conveyance, might indeed have erected a dam and mills, where the dam was subsequently erected, several rods lower upon the same stream, without affording just cause of complaint by the riparian proprietors above or below his mill site. But when he had conveyed a site, and so bounded and limited it, that it would not include the whole of the site owned by him, his grantee could not claim a right to occupy the site without the bounds of his own grant.

A construction which would permit this, from the use of the words "or removed further up or down or further into the stream," would prevent a conveyance of a mill site and mill yard having any definable bounds and thus annihilate the conveyance.

Those, who erected the existing dam and mills, would not therefore, by being part owners of the Greeley mill site, be authorized to erect a dam below that site, which would overflow and destroy it.

The next question presented is, whether the owners of the Greeley mill site have lost their right to the prior use of the water for the purpose of moving mill wheels, by their neglect to use it for that purpose.

Their right to have a dam remain there, uninjured by any one subsequently erected below it, could only be acquired by a prior occupation of the site and use of the water. A right acquired by use may be lost by non user. Such appears to have been the rule of the civil law, which was declared to be the common law by Bracton, and it has been repeatedly

recognized as such by judicial decisions. A non user of twenty years is regarded as presumptive evidence of an abandonment and extinction of the right. This presumption may be rebutted by proof of facts inconsistent with such a conclusion. The rule is not applicable to rights or incorporeal hereditaments, secured by a deed of conveyance.

By the agreed statement, it appears that "the Greeley mill and dam were swept away by a freshet in 1817, and there have been no erections on their site since." This language would be sufficient to show that these parties did not consider the existing dam and mills as standing on the Greeley mill site. This suit was commenced on April 2, 1847, but was not presented for the consideration of the Court prior to the last law term. It does not appear, that any of the owners of that mill site, during those thirty years, made any attempt to occupy it or any complaint, that the riparian proprietors below it were making erections or using the water of the stream to the prejudice or injury of their rights.

The counsel for the plaintiffs insists, that the presumption arising from these facts is rebutted, or that the defendant's testator was estopped to set it up against them. The presumption, it is said, should not be regarded as existing, because the owners below erected, during the years 1833 and 1834, a dam which caused the water to flow back upon the Greeley mill site, thereby preventing an occupation of it subsequently. One tenant in common of a mill site, which has long remained unoccupied, sees that his co-tenants and others, owning land upon the stream below, are expending large sums of money in the improvement of their estate, in such a manner, that the effect must be to destroy his right to a prior use of the water above, without taking any measures to prevent it or to secure his rights, and without remonstrance, complaint or suit. Surely this conduct is rather suited to strengthen than to rebut the presumption of an abandonment.

A servitude is presumed to be extinguished, when the owner of the estate charged with it is permitted, without complaint or molestation, and for sufficient length of time, so

to manage his estate as to wholly prevent the exercise of the rights arising out of that servitude. By the application of this principle to the present case, it would seem, that a presumption of an abandonment might arise or be strengthened by such a use of the water below, as would effectually prevent its prior use at the Greeley mill site.

The conveyance from Robert M. N. Smyth to the Messrs. Cooper, made on July 16, 1833, describes a tract of land including the Greeley mill site, and it states, that the meaning is "to convey one undivided fourth part of all the mills, seats, rights, privileges, and estates included within the lines aforesaid." The conveyance made by Jonathan Farrar to Smyth, on June 20, 1833, describes the Greeley mill site as "an undivided half of a mill privilege," "being the privilege for one saw in the south-westerly part of the mill seat called the Greeley mill and the right and privilege of keeping and supporting one saw in any saw-mill to be erected on the premises."

By these and similar descriptions it is insisted, that the testator was estopped to deny, that the owners of that site had the rights appertaining to prior occupancy. The principle, upon which an estoppel rests, is, that one is not permitted to deny, what he has by a deed admitted to be true. If the testator could not be permitted to deny the existence of that mill site with the privileges and appurtenances therein described as connected with it, still among them the right of prior occupation is not enumerated or stated, as appurtenant to the site. These conveyances are all silent respecting such a right; and the testator by denying it would not be obliged to contradict any thing stated in them. By noticing the difference between a mill site entitled to a right of prior occupancy, and one, to which no such right is appurtenant, it will be perceived, that the conveyances make no statement, that the mill site conveyed is one, to which such a right is appurtenant, and that to deny it to have such a right does not contradict any fact admitted by the deeds.

The conclusion therefore must be, that the right of prior

occupancy and use of the water for the Greeley mill site had been abandoned and lost by lapse of time and non user before this suit was commenced.

Wells, Rice and Appleton, J. J. concurred.

Hathaway, J. also concurred in the result, though dissenting from the reasonings of the opinion.

Plaintiffs nonsuit.

Pierce *versus* Knapp.

The three years "before the commencement of the *action*," during which a proprietor of land, flowed by a mill-dam, has a lien upon the mills, mean three years before the institution of the *original complaint*.

A judgment, recovered upon such a complaint, is a charge upon the estate. The obligation to pay the damage runs with the land, and an action to recover the amount may be maintained against an assignee of the estate.

On Facts agreed.

Writ of Entry, dated in August, 1851, to recover possession of a mill and its appurtenances.

In 1836, this defendant recovered a judgment against Plummer & al., who then owned and occupied the mill, upon a complaint for flowing his land by means of the dam upon which the mill stood. The yearly damage was assessed at $67.

In 1845, one Clark became owner of the mill, by conveyances from Plummer & al.

In that year, the defendant instituted a suit against Clark for the unpaid annual damage, and in October, 1849, recovered judgment in that action against Clark for $990. Upon the execution issued on that judgment, the mill with its appurtenances was sold at auction to the plaintiff for $700.

The plaintiff's title was under Clark by a mortgage deed, made in July, 1845, and a release of the right of redeeming, made in 1851. Upon these facts, the case was submitted for the decision of the Court.

Kelley, for the plaintiff.

A construction is to be given to R. S. c. 126, § 19, 20, 21, 22. The plaintiff claims, that the lien reaches back to the judgment in 1836, though the statute on which it rests, had not then been passed. We contend that the statute was prospective merely ; otherwise, it took away vested rights, without notice or equivalent. The only fair inference is, that the lien is limited to three years. *Knapp* v. *Clark,* 30 Maine, 244.

The defendant, in his judgment against Clark, included several years damage, to which his lien did not extend. By this course, the lien was wholly waived. 12 Pick. 388 ; 22 Pick. 540.

McDonald and *M. & L. Appleton,* for the defendant.

Wells, J. — It is contended by the plaintiff, that the lien of the defendant "on the mill and mill-dam," &c. is limited by statute to the annual damages, which have been recovered, and which are due for three years only prior to the commencement of the action to recover them.

The nineteenth section of the statute, c. 126, provides, that "the person, entitled to receive such annual compensation, shall have a lien therefor, from the time of the institution of the original complaint, on the mill and mill-dam, with the appurtenances and the land under and adjoining the same, and used therewith," *provided* that it shall not extend to any sum due more than three years before the commencement of the action.

The word action in this section appears to have been used in the same sense as complaint, and the phrase "three years before the commencement of the action" must be understood as referring to that period of time before the institution of the complaint. It is a repetition of the provision in the fifth section, which is as follows, "but no compensation shall be awarded for any damages sustained more than three years before the institution of the complaint," and of a similar provision in the thirty-fifth section.

This construction of the nineteenth section is met with the objection, that the lien would not be limited in a case where it could not attach, for if the damages could not be recovered for more than three years before the commencement of the complaint, no lien could exist for damages beyond that period.

But the construction given to the statute of 1795, c. 74, and that of 1821, c. 45, has been, that the judgment against the mill owner was a charge upon the estate, and an assignee of it was bound to pay the damages in arrear. *Com.* v. *Ellis*, 11 Mass. 465; *Lowell* v. *Shaw*, 15 Maine, 242. And in *Knapp* v. *Clark*, 30 Maine, 244, the same principle was adopted, and Clark was held liable for the annual damages due for a period of about nine years before he acquired his title. And by statute, c. 126, § 20, "the party, entitled to such annual compensation, may maintain an action of debt, &c., against the person, who shall own or occupy the said mill, when the action is brought; and shall therein recover the whole sum due and unpaid with costs."

It is therefore manifestly the intention of the Legislature that the damages, which have been established, shall run with the land, and any assignee of the mill owner shall be held to pay them. What reason then could exist for making the lien for a less period than the personal liability? It could hardly be supposed, that it was intended to make the assignee liable and exonerate the estate, when the very ground of his liability consisted in the ownership of the estate. When one is liable to a charge because he owns an estate, it is because the estate is encumbered with such charge. This consideration would appear to justify the construction given to the nineteenth section.

If the latter clause of the nineteenth section had referred to an annual compensation already established, it might be supposed that appropriate language would have been employed to express that idea, as was done in the twentieth section, but the language is, "any sum due," &c. which may

have been intended to relate to a claim, capable of being made certain and recovered by legal proceedings.

The plaintiff acquired his title after the Revised Statutes went into operation, and if they have introduced any new provision, they act prospectively in relation to him.

SHEPLEY, C. J., RICE and HATHAWAY, J. J. concurred.

Plaintiff nonsuit.

FIELD *versus* TOWLE.

For labor done upon the highway, under the surveyors' express promise to pay for it, an action may be maintained against him, although the laborer may not have satisfied the jury, that the defendant *intended* to render himself *personally* liable.

A highway surveyor has no authority to employ laborers upon the highway, upon the credit of the town, except by the written consent of the selectmen, when the money appropriated for the repairs within his limits, prove to be insufficient.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

ASSUMPSIT for labor done upon the highway, of which the defendant was the surveyor. The testimony tended to show that the defendant employed the plaintiff to do the work, saying he would pay him for it. The defendant requested instruction to the jury that the plaintiff could not recover, unless from the terms of the contract and the relations of the parties, they were satisfied the defendant *intended* to render himself *personally* liable. This request was refused, and the jury were instructed *that,* if the defendant requested the plaintiff to do the labor, and promised to pay him for it, if he would do it, and if the plaintiff, for that consideration, agreed to do it and did do it, *on the faith of the defendant's promise,* then the plaintiff was entitled to recover; also *that* the defendant had no authority, as highway surveyor, to employ the plaintiff upon the credit of the town, so as to give him a right of action against the town. The verdict was against the defendant and he took exceptions.

A. Sanborn, for the defendant.

Peters, for the plaintiff.

WELLS, J. — The question presented to the jury was, whether a contract had been made between the parties, by which the defendant had bound himself personally to pay for the labor performed by the plaintiff.

The first requested instruction was properly refused, for the rights of the parties could not be determined by the unexpressed intentions of the defendant.

The question to whom the credit was in fact given was properly presented to the jury. They were informed, that if there had been an express contract, and the plaintiff relied upon the defendant's promise to pay him for his services, he would be entitled to recover.

It is provided by c. 25, § 68 of the R. S., that if a town does not direct the way and manner in which obstructions caused by snow shall be removed, the surveyor may use his own discretion as to the mode of effecting that object. His discretion is to be applied to the manner of making the highways passable. The seventy-fourth section of the statute prescribes his duty when the sum appropriated for the repair of ways in his limits is insufficient; he may then employ inhabitants of the town, "with the consent of the selectmen obtained in writing" in repairing such ways, and the persons thus employed will be entitled to a reasonable compensation from the town. No other provision appears to have been made for the insufficiency of money assessed for the repair of ways. The removal of the snow by which they are incumbered is considered as a repairing of them within the sense of the statute. *Loker* v. *Brookline*, 13 Pick. 343. The surveyor therefore, merely as such, without the consent in writing of the selectmen, had no power to create a liability upon the town, and the instruction in reference to this subject was correct.

SHEPLEY, C. J., RICE and APPLETON, J. J. concurred.

Exceptions overruled.

COUNTY OF WASHINGTON.

HAPGOOD *versus* FISHER *&* *als.*

A sale of property by a *debtor* is not necessarily to be held fraudulent and void as to creditors, although a contract for his own *future support* be a part consideration of the sale.

Thus, such a sale will be sustained, if the vender retained other property, sufficient for the payment of his debts.

A deposition, impeaching the general reputation of an opposing witness for truth, cannot be excluded, although it also shows that the reputation was founded upon the witness' neglect to perform his agreement.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

ASSUMPSIT upon an accountable receipt, given to a deputy sheriff, for cattle attached on writ.

The defence was that the cattle were not the property of the defendant in that suit; that, though formerly his, he had, several years before the attachment, sold them to his son. The plaintiff contended that the sale was fraudulent and void, as to the creditors of the father. The father was indebted at the time of the sale, and it appeared from the testimony that a part of the consideration of the sale was an arrangement, by which the son was to board and support the father.

The Judge was requested to instruct the jury that, if the purpose of the sale was in part to secure the maintenance of the father, he then being indebted, it was void as to the plaintiff. This request was refused. To that refusal the plaintiff excepted.

In a deposition, used by the defendant, the deponent, in answer to an interrogatory, stated that the reputation of an opposing witness for truth was "not very good."

On cross-examination, he stated, that the complaint against the witness was for not fulfilling his agreements. The plaintiff objected to these parts of the deposition as evidence.

But they were admitted. To that admission, the plaintiff excepted.

D. T. Granger, for the plaintiff. The requested instruction ought to have been given. *Rollins* v. *Mooers*, 25 Maine, 192; *Smith* v. *Smith*, 11 N. H. 460; *Cram* v. *Stickles*, 15 Verm. 252; *Jones* v. *Spear*, 21 Verm. 426; *Tyner* v. *Somerville*, 1 Smith, (Indiana,) 149.

The impeaching part of the deposition should have been excluded, as it related wholly to the witness' non-performance of his engagements. 1 Greenl. on Ev. 512, § 46; *Inhabitants of Phillips* v. *Inhabitants of Kingfield*, 19 Maine, 375.

Fuller, for the defendants.

Wells, J. — The question of fact tried by the jury was, whether the property attached belonged to David Fisher the debtor, or his son David Fisher, jr. It was sold by the father to the son in 1832, and was attached as the property of the father in 1840, to secure a debt, which originated in 1831. A part of the consideration of the sale was to be paid in supporting the father for a limited period, and a part in the payment of his debts.

The Judge was requested to instruct the jury, "that if they should be satisfied, that it was a part of the arrangement between D. Fisher and D. Fisher, jr., that the property should be paid for in supporting the father, the purpose being in part to secure the maintenance of the father, he being indebted, the transfer would be void."

The requested instruction does not embrace an inquiry into the effect of a conveyance merely voluntary, where there is no valuable consideration. Whether such a conveyance should be regarded as absolutely void in law, or only *prima facie* fraudulent and open to explanation, against prior creditors, is a question upon which the authorities are not in harmony. *Reade* v. *Livingston*, 3 Johns. Ch. 481; *Hinde's Lessee* v. *Longworth*, 11 Wheat. 199; *Seward* v. *Jackson*, 8 Cowan, 406; Story's Eq. Jur. § 354, *et sequen.* But the

request is based upon the ground, that a part of the consideration was the future support of the father. That would not be a voluntary consideration, but a valuable one to be paid by the grantee. Then the question would arise, whether the conveyance was made in good faith towards the creditors of the grantor. The consideration might be in part to secure the support of the grantor, and he might be indebted, and still the conveyance be good. The existence of these facts alone would not necessarily render it void. For the owner of property has the right to dispose of it as he may think proper, if he does no wrong to his creditors. And if he should retain property amply sufficient for the payment of all his debts, he would have an undoubted right to contract for his future support for a longer or shorter period. If a man in solvent circumstances should sell a part of his property, and agree to receive the price in board, the law would not declare the contract fraudulent and void against an existing creditor.

When one sells property to create a fund for his maintenance, without reserving sufficient means to pay his existing debts, such conduct is so manifestly unjust, that he is evidently guilty of an actual fraud. Such an act would fall within the 13 Eliz. c. 5; "the end, purpose and intent to delay, hinder or defraud creditors" would be quite apparent. But if he retains an abundance of property to discharge all his obligations, the sale could not be considered as a fraud in law. The jury must settle the question of fraud by an examination into all the facts and surrounding circumstances.

In *Twyne's case*, 3 Coke, 82, it is said, that "when a man, being greatly indebted to sundry persons, makes a gift to his son or any of his blood, without consideration but only of nature, the law intends a trust between them, scil., that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father and cousin, and not see *him* want, who had made such gift to him," &c.

In *Smith* v. *Smith*, 11 N. H. 460, it is said by PARKER, C. J. "it is an attempt to secure to the grantor a support dur-

ing life out of his property, to the prejudice of his creditors. Any person who takes such conveyance should take care that the existing debts of the grantor are paid, &c. Or, at least, show that full means for that object were left in the possession of the grantor, which the creditors may levy upon, or have lost by their own negligence." It is not enough to make the transfer void, that it was "in part to secure the maintenance of the father, he being then indebted." For he might have had sufficient property besides that conveyed to pay all his debts; it might have been to a large amount, and the debt have been small. The terms of the requested instruction cannot be changed by an examination of the facts, which were presented to the jury. The propriety of it must be determined by its own language.

The testimony elicited upon the cross-examination of Increase Fisher showed, that the reputation of David Blanchard for truth and veracity related to his not fulfilling his agreements. The Judge could not properly exclude the testimony in chief, which was admissible as responsive to the general question, and the jury had the right to judge of it in connection with the subsequent explanation.

No objections are made to the instructions which were given.

SHEPLEY, C. J., RICE, HATHAWAY and APPLETON, J. J. concurred. *Exceptions overruled.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1852.

COUNTY OF CUMBERLAND.

INHABITANTS OF YARMOUTH, *in equity, versus* INHABITANTS OF NORTH YARMOUTH *& als.*

Private corporations exist by legislative grants, conferring rights and powers for special purposes.

Such grants constitute legal contracts, and the Legislature cannot impair the obligation of them.

A company, incorporated as trustees of a fund, with the power and duty of investing it and appropriating its income to the public schools of a town, is a *private* and not a *public* corporation.

Though the Act incorporating the trustees authorized them to *create* the fund by a sale of the *town's* property, the approval of the Act, *by the town*, may be inferred from their long continued acquiescence in the trustees' proceedings according to its provisions.

In such a case, the trustees, holding the fund, *as a private corporation*, for the use of such schools, under a legislative contract, cannot be divested of it or of any part of it, by any legislative action.

A statute, therefore, which should assume to distribute the fund between the schools of such town and those of another town, would be inoperative, although the latter town be created by a division of the former.

Bill in Equity.

The defendants demurred, and also filed their several answers. But, at the hearing, the parties being desirous of a decision upon the merits, the demurrers were considered by the Court, as having been waived.

The following is an outline view of the claim. — Prior to 1806, the town of North Yarmouth owned a tract of land, appropriated to the use of schools.

In that year, the Legislature of Massachusetts incorporated certain persons, with their successors, as trustees of the *school fund* in North Yarmouth, authorizing them to sell the land, and convert the avails into a fund, and apply the income forever to the public schools in that town "among the several districts in proportion to what they pay of town taxes."

The land was accordingly sold, and a fund was thereby created, of which the income was duly applied to the schools, until 1821, when the town was divided and the westerly part made into the town of Cumberland.

Pursuant to the act of division, a part of the school fund was paid to Cumberland. The residue of the fund was kept at interest and its incomes continued to be duly applied to the schools in North Yarmouth.

In 1829, the Legislature empowered the trustees to apply the income of the fund in proportion to the number of scholars in each district in North Yarmouth. The application was accordingly so made, until, in 1849, a portion of that town was set off by an Act of the Legislature, and incorporated into the town of Yarmouth.

The fourth section of that Act provided as follows; "the school funds belonging to the town of North Yarmonth shall be divided between the said towns, in proportion to the number of scholars belonging to them respectively, according to the returns made by the agents of the several school districts in the present year. The trustees of the school funds in the town of North Yarmouth, who shall be inhabitants of the territory hereby created into a new town, at the time this Act shall take effect, shall be trustees of the school fund

of the town of Yarmouth, and, after the division of said fund, shall cease to be trustees of the school fund of North Yarmouth, and they shall have such powers and be subject to such duties in the care of the school funds of Yarmouth, and in the application of the same to the use of schools in said town as are prescribed by law in respect to the school funds of North Yarmouth."

Since that Act of incorporation, none of the school fund or of its income has been applied to the schools of Yarmouth; and the inhabitants of that town, in order to obtain a proportion of the fund or of its income for the use of their schools, have brought this bill against the inhabitants of North Yarmouth, and against the trustees of the school fund and against William Buxton, their treasurer.

Barnes, for the plaintiffs.

The Legislature had the power to direct the division of the fund, without, or against the assent of the town of North Yarmouth.

This results from the sovereignty of the State, always thus exercised over towns. It results also from the plain and equitable duty of dividing privileges with burdens, where compensating adjustments cannot otherwise be made.

The equitable discretion of the Legislature on such divisions is supreme.

Such sovereignty has been asserted and exercised from the earliest times, in the Commonwealth and in this State.

Such usage, long existing unquestioned, displays the essential principle on which it rests. *Windham* v. *Portland*, 4 Mass. 390.

The only limitation upon the sovereignty is, that in distributing the property and privileges of a public corporation, the division must be made *at the time*, when the corporation is divided. *Hampshire* v. *Franklin*, 16 Mass. 76; *Bowdoinham* v. *Richmond*, 6 Greenl. 112; *North Anson* v. *Anson*, (1849, not reported.)

The assent of the town is no more required, because the fund is in the hands of a trust corporation, than if in the

town treasury, or still in lands. The *form* in which the fund subsists, does not affect the relation of sovereignty between the state and the *town*.

The history of this particular fund, — the great antiquity of the original grant, — the large extent of the original town, — the want of sense in the idea that the whole enjoyment of the grant should, after many generations, be narrowed down to a small fraction of territory, retaining only the municipal *name* and *entity*, — the control assumed by the State in 1806, in placing the fund in the hands of trustees, with the new element, not in the original grant, that the benefit of the fund should be enjoyed according to the *property* in the several districts, — the imperative partition of the fund when Cumberland was set off in 1821, to which North Yarmouth *submitted*, not *assented*, — the resumption, by the State in 1829, of the original republican principle, which was in the original grant, that the fund should be apportioned among the people, equally, not upon property; all these go to unfold and to vindicate the sovereignty of the State, in directing and dividing the enjoyment of the fund, now, as heretofore, and show that the municipality of North Yarmouth has amply recognized and admitted the principle of sovereignty, arising in the case.

The assent of the trustees was not required, for the lawful division of this fund.

If it were, then the State is barred of its sovereignty, in one of its most common and necessary functions.

The division of a town is a measure of political convenience or necessity. The Legislature alone can determine the just conditions of division. If trustees of a fund like this can prevent the fulfillment of these conditions, then they can control and hinder the Legislative action, and forbid the division of the town, except at the risk of hardship and injustice to innocent parties.

The real question of constitutionality, if any, lies in this supposed issue between the trustees and the Legislature.

Upon this point, it is sufficient for the complainants in their

opening argument, to aver that the Act is constitutional, and that subjection to *this* Legislative control was a necessary element in the charter of the trust corporation.

Exclusive regard to a supposed *contract* between these parties and the State, or between the State and the present town, through the trustees, is a fallacy. It overlooks the prior and superior contract between the *original grantors* and the State.

This requirement that the fund be divided, creates no alteration or alienation of it. Not a fraction of a cent is turned aside from its former course. The *merit* of the division is, that it keeps up, the same appropriation precisely to the same persons, by the same men. By the Act of division, the fund was to be applied in 1850, and afterwards precisely as it had been for twenty years before, *per capita* of all the children in the two towns.

When the Legislature alter the *status*, the appendage changes with it. Subjection to legislative control is an element essential to the existence of a trust corporation. Such a corporation becomes a municipal one. How was it that, in 1806, the Legislature took away the fund, except on the expectation that it was subject to their future control?

Where then lie the equity, and the sense, and the common justice of the case?

W. P. Fessenden, for the defendants.

Howard, J. — The parties expressed a desire, at the argument, that this case might be heard and determined, as if free from technical difficulties. Yielding to their request, we pass the demurrers, to examine the general merits upon the bill and answers. The leading facts are not in controversy.

It seems that the town of North Yarmouth claimed a tract of land called the "school farm," consisting of about two hundred acres, originally appropriated for the use of schools in that town. Whether this was a grant from the proprietors, or from the government, does not appear. By a special Act of the Legislature of Massachusetts, of March 3, 1806, certain inhabitants of that town were incorporated as "the

trustees of school funds in the town of North Yarmouth;" they and their successors to be and continue a body politic and corporate, by that name forever; and to have a common seal, with power to sue and to be sued by that name. The Act provided further, that the number of trustees should not be more than eleven, nor less than seven, and that they should fill all vacancies occurring in the board, by death, resignation or otherwise, from the inhabitants of that town, and have power to remove any of their number who might become unfit from any cause, for discharging their duties as trustees. They were authorized and empowered by the same Act to sell the "school farm so called, consisting of two hundred acres more or less, belonging to said town of North Yarmouth, which was originally appropriated for the use of schools, and to put out at interest the money arising from such sale, in manner hereinafter mentioned, and for that purpose." They were to "sell and convey in fee simple," and place the proceeds on interest, and to invest the interest with the principal until the annual income should be $300, and then to apply that sum "towards the annual support of public schools in said town, to be appropriated among the several school districts in said town, in proportion to what they pay of town taxes. And it shall never be in the power of said town or trustees to alter or alienate the appropriation of the fund."

The trustees accepted the trust, conveyed the land, received the proceeds, and have had the exclusive possession and management of the funds. Whether the town assented does not directly appear, but it may fairly be presumed from their long acquiescence and receiving the income under the provisions of the Act without objection, that they assented to its passage. *Lanesborough* v. *Curtis*, 22 Pick. 320. The Act of 1821, providing for the incorporation of Cumberland, from a portion of North Yarmouth, and for a division of the school funds; and the Act of 1829, authorizing the trustees to appropriate the income of the funds, before the annual amount was $300, do not affect the principles of this decision.

We assume, then, that the trustees of the school funds in North Yarmouth, were legally incorporated, and that they have performed their duties according to the terms of their charter in raising, investing, managing, and in exclusively possessing and controlling the funds, in pursuance of the objects for which they were incorporated, until the passage of the Act of incorporation of Yarmouth, (August 8, 1849, c. 264.) This is admitted, or assumed at the argument. Indeed, the complainants proceed upon this assumption.

The plaintiffs claim a portion of these school funds, according to the provisions of the 4th section of their Act of incorporation. The defendants resist the claim, upon the ground that the funds were not within the control or direction of the Legislature, and that the fourth section, which provides for the division of the funds, is unconstitutional and void. It is not pretended that either North Yarmouth, or the trustees assented to the provisions of that section, but they seem to have resisted them throughout. Were they binding upon the trustees, and could the Legislature authoritatively require them to divide the funds thus intrusted, and deliver them to others? This brings us to the consideration whether the trustees were constituted a public or a private corporation.

The distinction between public and private corporations has reference to their powers, and the purposes of their creation. They are public, when created for public purposes only, connected with the administration of the government, and where the "whole interests and franchises are the exclusive property and domain of the government itself." Over these the Legislature has power, not limited by the constitution, to impose such modifications, extensions or restraints as the general interests and public exigencies may require without infringing private rights. All corporations invested with subordinate powers, for public purposes, fall within this class, and are subject to legislative control. All other corporations are private. They exist by legislative grants conferring powers, rights and privileges, for special purposes. These grants

are essentially contracts, which the Legislature cannot impair or change without the consent of the corporation. Coke Lit. § 413; Vin. Abr. Corp. a. 2; *Phillips* v. *Bury*, 2 T. R. 346; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Allen* v. *McKeen*, 1 Sumner, 276; *The People* v. *Morris*, 13 Wend. 325; *Penobscot Boom Corp.* v. *Lamson*, 16 Maine, 224; Story's Com. on Const. § 1385—1388; Angel & Ames on Corp. 9, 27, 28.

The fee of the "school farm" was in the town of North Yarmouth, in trust for the use of schools, in 1806, when the Legislature of Massachusetts, by consent of those interested, as we must presume from their entire acquiescence, authorized the sale of the land, and the creation of a personal fund from the proceeds, by the trustees then incorporated, in trust for the same use. This fund was never in the town, but was vested, by the Act, in the trustees, as a corporation, for the use mentioned, forever. They did not constitute a municipal or public corporation, although the object of its creation might have been a public benefit. Their charter was a grant from the State, partaking the nature of a contract, which they accepted, and in which the government had no interest. This was a franchise, which involved the right to possess and control property, and the right to perpetuate a corporate immortality. 2 Black. Com. 37. Though springing from the grant, the franchise, and the rights flowing from it, were no more subject to the control or interference of the Legislature, than were private rights of property, unless on default of the corporation, judicially determined. 2 Kent's Com. 306. *Trustees of the New Gloucester School Fund* v. *Bradbury*, 11 Maine, 118, is a case similar to this at bar, and directly in point. *Richardson* v. *Brown*, 6 Maine, 355; *Terrett* v. *Taylor*, 9 Cranch, 43; *Pawlet* v. *Clark*, 9 Cranch, 292.

The Act relating to the separation of this State from Massachusetts, provides, that "all grants of lands, *franchises, immunities, corporate and other rights, &c.*, shall continue in full force," after Maine shall become a separate State. The

first section of that Act, embracing the provisions referred to, forms a part of our Constitution, Art. 10, § 5, condition 7; Act of Massachusetts, June 19, 1819. The statute of this State, of February 19, 1831, c. 492, § 1, to which the Legislature of Massachusetts gave its consent, so far altered the terms and conditions of the Act relating to the separation of the States, "that the trustees of any ministerial or school fund, incorporated by the Legislature of Massachusetts in any town within this State, shall have, hold and enjoy their powers and privileges, subject to be altered, restrained, extended or annulled, by the Legislature of Maine, with the *consent of such trustees, and of the town for whose benefit such fund was established.*" In this case there was no consent.

It follows, that the "trustees of the school funds in North Yarmouth," constituted a private corporation; that they can hold and enjoy their rights and privileges under their charter, independent of legislative interference or control, except for causes which do not now appear; and that so much of the fourth section of the Act to incorporate the town of Yarmouth, as provides for the division of "the school funds belonging to the town of North Yarmouth," is inoperative and void. The constitution is imperative, that the *Legislature shall pass no law impairing the obligation of contracts.* Const. Maine, art. 1, § 11; Const. U. S., Art. 1, § 10, cl. 1.

This result renders further consideration of the merits, or of the objections, unimportant.

Shepley, C. J., Tenney, Wells and Appleton, J. J., concurred. *Bill dismissed with costs for defendants.*

Sawyer & *ux. versus* Goodwin.

It is only in the *form* of declaring, and not in any *matter of substance,* that the R. S. c. 115, § 13, has abolished the distinction between *trespass* and *case.*

An allegation of breaking and entering into land, is of *substance* and not of form merely.

A count, containing no such allegation, but framed technically in *case,* for injuries done to land, or in *trespass de bonis* for goods taken from it, cannot be sustained by merely proving an unlawful entry.

Nor can a declaration in trespass *quare clausum*, alleging *immediate* acts of injury to land, be sustained by merely proving an injury, *consequentially* resulting from acts done upon other land.

To such a declaration, an amendment, introducing a count, *framed as in case*, alleging the damages to have been *consequential*, is not allowable.

On Report from *Nisi Prius*.

Trespass, charging that the defendant with force and arms *broke and entered* the plaintiffs' close, and then and there carelessly and negligently set on fire and destroyed their trees and underwood. At the trial, the plaintiffs offered evidence of an injury to their land, resulting from the defendant's having carelessly set a fire upon his own land, which adjoined the plaintiffs'.

They then moved for leave to amend the declaration by inserting a count, in the form of a count of *trespass on the case*, alleging the injury to have been *consequential*. For the allowance of this amendment, they relied upon R. S. c. 115, § 13.

Whether the amendment could be allowed, was the question submitted for decision.

Shepley and *Dana* and *Ayer*, for the plaintiffs.

Swazey, for the defendant.

Tenney, J. — It is provided in c. 115, § 13, of the R. S. that "in all actions of trespass, and trespass on the case, the declaration shall be deemed equally good and valid, to all intents and purposes, whether the same shall be in form a declaration in trespass, or trespass on the case." When the whole section is examined in connection, it is obvious that the design of the Legislature was to abolish the distinction between two classes of cases, in *the form only* of declaring in the writ; so that proof, which should make out a case of one class, should not fail of effect on account of the writ being appropriate for the other class. But in cases, where the distinction is really of substance, the provision is inapplicable.

To entitle a party to damage for an unauthorized entry

upon his real estate, it cannot be doubted that there should be an allegation in the writ, that the defendant broke and entered the same. This is more than form, as a consideration of the various effects resulting therefrom will show. In an action of trespass and trespass on the case, there being no breach of the close alleged, the jurisdiction of the Courts, the pleadings of the defendant, the costs and the consequences of one and the other are the same. But an action of trespass *quare clausum fregit* may be unlike the two former, in all these particulars. In the action of trespass *quare clausum* the jurisdiction is local; it admits of different pleas in defence; and if the defence is upon a plea of title to the real estate, certain tribunals having jurisdiction of other trespasses are ousted thereof, and can proceed no farther in their judicial capacity. Costs are governed by different rules, and disputed titles to real estate may be as fully settled as in real actions.

We cannot suppose, that it was contemplated, that in a declaration of trespass on the case, or trespass *de bonis asportatis* in technical form, proof simply of a breach of the close, on which the injury was alleged to have been done, in the one, or from which the goods described as unlawfully taken in the other, would be sufficient to maintain the action. Or, that under a count for trespass *quare clausum,* without alleging any thing further in aggravation, evidence of injuries to the plaintiff's close described, occasioned by some remote act of the defendant upon his own land; or taking from the defendant's land, the plaintiff's goods without authority, would be attended with the same consequences as would satisfactory proof of a forcible breach of the close. Such a construction would at once break down all the established doctrines, in relation to venue, jurisdiction of different tribunals, costs, and title to property.

It is true, that counts for trespass *quare clausum* and trespass *de bonis asportatis* may be joined in the same action. And it is competent to allow an amendment, by adding a count for goods taken in an action of trespass upon real

estate, wherein is alleged, by way of aggravation, the taking of the same goods described in the new count. *Bishop* v. *Baker*, 19 Pick. 517. Without adding any new cause, this presents the charges in distinct form, so that the pleadings of the defendant, if necessary, may be shaped, so as to be applicable to one count and the other; and the issues under each be proper and well understood, and the findings of the jury be a matter of record, and the legal results arising therefrom, be distinctly known and established. But it cannot be admitted that a plaintiff would be entitled to a general verdict on both counts, on proof which would sustain only the last. It is believed no case can be found, where to a declaration of trespass *quare clausum* with an allegation of damages as aggravation, *entirely consequential*, an amendment by the addition of a new count for such damages, has been admitted. The declaration in the writ of the plaintiff, as it was, when the action was brought, is defective and the amendment proposed is inadmissible.

Shepley, C. J. and Howard and Appleton, J. J., concurred. — Wells, J. though concurring in the result of the opinion, dissented from its reasonings.

Plaintiff nonsuit.

COUNTY OF OXFORD.

Stowell *versus* Bennett.

In a suit upon the covenant of freedom from incumbrance, contained in a deed conveying real estate, nominal damages only will be recovered, unless the incumbrance have been discharged, although the plaintiff has yielded to an entry and possession by the incumbrancer.

On Facts agreed.

Covenant Broken.

This action is brought upon the defendant's covenant of

freedom from incumbrances contained in a deed conveying real estate. The deed was made by the defendant to one D. P. S., by whom the premises were conveyed to the plaintiff. At the time of the conveyance, there was an outstanding mortgage upon a portion of the estate. The debt, then due upon the mortgage, is still unpaid.

The mortgage was assigned to one Dewey, who entered upon the land, and took from it a quantity of timber, and paid several years' taxes. The value of the timber, however, was insufficient to pay the interest upon the note.

The plaintiff seasonably filed in Court, *for the use of D. P S.*, a release of *his* covenants in the deed.

The case was submitted to the Court for a nonsuit or default, according to legal rights, with power to assess damages, if the occasion should require.

J. Goodenow, for the plaintiff.

The acts of Dewey constituted an eviction of the plaintiff. He still holds the land by a paramount title. To support this suit, it is not necessary to show a foreclosure of the mortgage. The plaintiff might voluntarily submit to an entry under an older and better title.

The damage to which the plaintiff is entitled is either the consideration money paid to the defendant or at least that paid by the plaintiff to his own grantor. *St. John* v. *Palmer*, 4 Hill, 643; *Chapel* v. *Bull*, 17 Mass. 213.

Whitman, for the defendant.

HOWARD, J. — When the defendant conveyed to the grantor of the plaintiff, there was an outstanding mortgage upon a portion of the premises, which constituted a breach of his covenants against incumbrances. The plaintiff has succeeded to the rights of his grantor, in respect to the covenants, and having duly filed a release for his use, may maintain this action. R. S. c. 115, § 16.

The paramount right of the mortgagee may ripen into an absolute title, or it may be extinguished before an entry to foreclose, or before foreclosure. But it still exists as an in-

cumbrance only, to be discharged, or to become an unconditional estate, and operate as a breach of the covenants of warranty, as may be determined by subsequent events. The plaintiff having neither purchased it, nor discharged the mortgage, can have judgment for only nominal damages. *Bean* v. *Mayo*, 5 Maine, 94; *Randall* v. *Mallett*, 14 Maine, 51; *Prescott* v. *Turner*, 4 Mass. 627; *Delavergne* v. *Norris*, 7 Johns. 358; *Stanard* v. *Eldridge*, 16 Johns. 254; 2 Greenl. Ev. § 242.

SHEPLEY, C. J., TENNEY, WELLS and APPLETON, J. J. concurred. *Defendant defaulted.*

UNIVERSALIST SOCIETY IN SWEDEN *versus* KIMBALL *&* *al.* *Executors.*

A testator appropriated and bequeathed a sum of money, of which the interest was to be annually applied toward the support of "Universalist preaching," and directed his executors to pay the fund to the trustees of a Universalist society in the town of S., provided one should be formed within two years from the testator's death, and provided also that an additional *annual* specified sum should be raised and applied from other sources toward the support of such preaching.

The further direction of the will was that, upon a failure in the performance of the foregoing conditions, the fund should go to another Universalist society upon certain prescribed conditions, and that, if the last mentioned conditions should fail to be performed, the fund should be paid *by the executors* to the heirs of the testator; —

Held, that the bequest, being for charitable or pious uses, was sufficiently certain in its purposes to be upheld; —

that the society, if formed within the two years, would be competent, as *cestuis que trust*, to receive the *benefit* of the fund; —

that the *trustees*, whom the society should appoint, and not the *society itself*, were the legatees; — *that they* alone could maintain an action against the executors, for the fund; —

and *that* the requirement to raise and apply the prescribed additional sum annually, was a condition precedent to any claim by the trustees against the executors.

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

The following appear to be the material facts: —

Benjamin Webber, by his last will, appropriated and bequeathed $1000 to be put at interest, the interest to be annually applied toward the support of "Universalist preaching;" and directed his executors to pay over said sum to the trustees of any Universalist society in the town of Sweden, provided such society should be formed within two years after his decease, and provided further that the "additional annual sum of thirty dollars should be raised by subscription or otherwise, and applied to the support of Universalist preaching in said Sweden."

In case of a failure to form such a society in Sweden, or to raise the thirty dollars per annum, then the fund was to go, under certain conditions, to the trustees of a Universalist society in the adjoining town of Lovell, if one should be formed there within two years from the time of such failure; "the trustees of whichever society may receive said sum, to give a good and sufficient bond to their respective societies to put said sum at interest and to apply the interest and the interest only" to such preaching. Upon failure of all the above conditions, the fund was to be paid *by the executors* equally among the heirs of the testator.

A Universalist society in Sweden was formed within the two years prescribed, though the legality of its formation was questioned.

When this action was brought, a little more than two years from the death of the testator, fifty-four dollars had been obtained by subscription and expended by the society in Universalist preaching, and at the trial six dollars more had, in like manner, been collected and expended.

The defendants are the executors of the will. The fund was demanded of one of them, by the society, but he declined to pay it. Whereupon this action of debt was brought against the executors to compel them to transfer the fund to the society. The case was withdrawn from the jury, and submitted to the Court for a decision according to the legal rights of the parties.

J. Shepley and *Littlefield*, for the plaintiffs.

Clifford and *Blake*, for the defendants.

Howard, J. — The intention of a testator, as expressed in his will, must control its construction. This is settled doctrine, where the intention is consistent with the rules of law, whether it be indicated by technical language, or in terms less appropriate. Though parts of a will be inconsistent with other portions, yet, if the general intention be apparent and sustainable, it must govern, although it exclude a particular intent, mode or object.

The general intention of the testator, in the clause of the will under consideration, is apparent, and is not in conflict with public policy, or the rules of law. It was, in the peculiar language of the 13th clause, to "appropriate and set apart, and give, bequeath and devise the sum of one thousand dollars, to be put at interest, and the interest thereof to be annually applied towards the support of Universalist preaching." This was the general purpose, and in order to effect it practically, the testator proceeded thus, "I hereby direct my executors to pay over said sum to the trustees of any Universalist society in said Sweden, provided any such society shall be formed within two years after my decease, and provided further, the additional annual sum of thirty dollars shall be raised by subscription or otherwise, and applied to the support of universalist preaching in said Sweden."

Assuming that the plaintiffs constitute the society contemplated by the testator, they are not the legatees, or trustees of the sum thus set apart, by his direction, for the purpose declared. They were to receive, upon contingencies, the interest only, of the fund from trustees of their own appointment; and they were but the *cestui que trust* of the interest, without the right to possess or control the principal. Their right to maintain this action is, therefore, not apparent. But waiving this consideration, and supposing they have all the rights and powers which their trustees could have in this respect, the question arises, whether they are entitled to the bounty of the testator.

The bequest was for charitable or pious uses, and was sufficiently certain in its purposes to be upheld. The executors,

it would seem, were to retain the fund, until the contingencies occurred, upon which they were authorized to pay over to the trustees of the societies mentioned in the will; or until a failure of the conditions upon which the payments were to be made, and then they were to divide the amount among the heirs of the testator. The bequest might be upheld, although the objects of the charity were uncertain, and although the society, for whose use it was designed, was not in existence at the testator's decease. *Attorney General* v. *Oglander*, 3 Bro. C. C. 166; *Attorney General* v. *Wansay*, 15 Ves. 232; 2 Story's Eq. § 1169, 1170; *Inglis* v. *The Sailors' Snug Harbor*, 3 Peters, 114; *Sohier* v. *The Wardens, &c., of St. Paul's Church*, 12 Met. 250.

But the conditions, upon which the plaintiffs were to derive a benefit from the bequest, have not been performed. As it respects them, the bequest was in its nature executory. Yet there is no evidence that they have appointed any trustees, to receive the bounty; nor is the evidence satisfactory that the annual sum of thirty dollars has been raised and applied according to the provisions prescribed in the will. In reference to these, the language used is, "upon a failure of all the above conditions, the above sum of one thousand dollars to be equally divided among my heirs, by my executors." Thus showing that the testator intended, as before suggested, that his executors should retain the amount until the contingencies had occurred upon which the bequest might become absolute to either of the societies, or their trustees, and until, in case of the plaintiffs, the additional annual sum of thirty dollars had been raised within the time specified, and applied "*per annum*," by an investment, it may be, that would yield that amount yearly, for the purposes mentioned; or until the time had elapsed within which those contingencies could occur, and the heirs might be entitled to a dividend; thus clearly showing that the conditions were precedent, and not subsequent to the payment and reception of the bequest.

Upon the construction of the will contended for by the plaintiffs, they were entitled to the bequest, as soon as the

society had been formed, and the executors were not to be influenced in their proceedings by any failure of the conditions prescribed by the testator. For, after they had legally parted with the fund, and it had been appropriated, their duties and authority in respect to it would have terminated. And thus the plaintiffs would render the bequest unconditional and absolute. This, however, would be opposed to the language of the will, and its import, and in direct conflict with the manifest intention of the testator. *Non voluit et non dixit.*

SHEPLEY, C. J., and TENNEY, WELLS and APPLETON, J. J., concurred. *Plaintiffs nonsuit.*

BOLSTER *versus* CUSHMAN.

It is only when a husband dies *seized* that the R. S. c. 95, § 6, secures to a wife, *prior to the assignment of dower,* a third of the rents and profits of his land.

A widow, though entitled to dower, has no claim to occupy *any part* of the estate, until her dower has been assigned.

In the absence of other evidence, a deed, conveying real estate, does, *of itself,* raise a presumption that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee.

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

WRIT OF ENTRY.

Francis Cushman, in 1838, executed a deed of the premises to the demandant. The tenant was at that time his wife, and has ever since been in possession of the land. Mr. Cushman died in 1843, not having acknowledged the deed. It was however recorded since the commencement of this suit, its execution having been proved by the subscribing witness in Court.

SHEPLEY, C. J. — The tenant is the widow of Francis Cushman, who died in the year 1843. If her husband did not die seized of the demanded premises, she cannot by virtue

of the statute, c. 95, § 6, be entitled to receive one third part of the rents and profits until her dower shall be assigned. And although entitled to dower, she cannot claim to occupy any part of the estate before it has been assigned. There is no proof, that her husband died seized.

He conveyed the premises to the demandant on June 13, 1838. The execution of that deed was not proved, nor was it recorded until the year 1851. When this had been done, its legal effect and operation were the same, as they would have been, had it been acknowledged and recorded soon after it was executed.

It is insisted, that the demandant acquired no title, because there is no satisfactory proof, that the grantor was seized at the time of the conveyance.

The statute of Massachusetts, a revision of which was in force here, when the deed was executed, has received such a construction "that in the absence of other evidence the deed itself raises a presumption, that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee." *Ward* v. *Fuller*, 15 Pick. 185.

There is in this case no evidence to rebut the presumption, that the grantor was seized; and by the adoption of the same rule the conveyance will operate to confer a seizin upon the grantee, who will be entitled to recover.

TENNEY, WELLS, HOWARD and APPLETON J. J., concurred.

Tenant defaulted.

May, for the demandant.

Walton, for the tenant.

DAVIS *versus* MILLETT AND WIFE.

Neither the common law or any enactment authorizes an action on contract to be maintained against husband and wife jointly.

ON EXCEPTIONS from the *District Court*, EMERY, J.

ASSUMPSIT, for the price of a cooking-stove.

It was admitted at the trial that the defendants were husband and wife, whereupon the Judge ordered a non-suit, and the plaintiff excepted.

APPLETON, J. — This is an action of assumpsit, for a cooking stove, sold the defendants, who, it is conceded, were husband and wife. The sale, as it appears from the allegations in the writ, was made to them jointly. Whether, however, it was made to the wife alone, or to the husband and wife jointly, is immaterial, since the result must in either case be the same.

As a general rule, the wife, by the principles of the common law, cannot, during coverture, enter into any contracts, by which she can bind her own estate or that of her husband. 2 Bright, Husband & Wife, 5. Neither can she jointly contract with him. When acting as his agent, she may bind his estate but not her own. While such is conceded to be the doctrine of the common law, it is insisted that its provisions have been so modified by recent statutes as to allow the maintenance of this suit.

The common law remains in full and unimpaired vigor, unless it is changed by legislative enactment. The statute of 1848, c. 73, upon which the counsel for the plaintiff relies, is entitled "an Act in addition to an Act to secure to married women their rights in property." The Act referred to, and the preceding Acts on the same subject, do not authorize a married woman to enter generally into contracts in her own behalf. Neither do they empower her to become a joint contractor with her husband. New rights are given, new powers are conferred upon her, but they are limited to those necessary for the protection of her private estate. She is "entitled to the appropriate remedies as authorized by law in other cases to enforce and protect her rights thereto; and she may commence, prosecute or defend any suit in law or equity, to final judgment and execution in her own name, in the same manner as if she were unmarried; or she may prosecute and defend

such suits jointly with her husband." The right to commence suits, or to defend against those commenced, and the liabilities resulting therefrom must be restricted to the general objects of the Act, and cannot be enlarged or extended without doing violence to the natural import of the language used, or to the intention of the Legislature, as expressed in such language.

The contract set forth in the declaration is a joint contract. The wife cannot, by the common law or by any statute of this State, become a party to a contract of purchase jointly with her husband. Nor has she the general power so to contract as to bind the estate of her husband without his authority.

SHEPLEY, C. J., and TENNEY, WELLS and HOWARD, J. J., concurred.

Exceptions overruled. Nonsuit confirmed.

Bartlett, for the plaintiff.

Gerry, for the defendant.

COUNTY OF FRANKLIN.

WILTON MANUFACTURING COMPANY *versus* BUTLER.

If a judgment be recovered against a corporation, the levy of the execution upon their property is not a trespass against them, though, both in the judgment and in the execution, their name is variant from that given them by their charter of incorporation.

Whether the corporation were in fact the party to the said judgment, recovered under a name variant from their corporate name, is, (*as it seems,*) a question of fact, upon which parol evidence may be introduced to the jury.

An officer may be protected in the service of an execution, although there were such irregularities in the writ and in the service of it, as would, if pleaded, have abated the suit, and although, for such irregularities, the judgment was afterwards reversed on writ of error.

A sheriff is not accountable in trespass for the act of C., his deputy, in serving an *execution*, although C. committed a fraud in the serving of the *writ* on

which the judgment and execution were obtained, *if* when serving such *writ*, C. was the deputy, not of the *present*, but of a *former* sheriff.

Personal property having been duly advertised for sale on execution at a time specified, and a postponement of the sale for two days having been made by proclamation, without the posting of advertisements, the officer would not be liable in trespass to the judgment debtor for selling the property at the postponed time, if the postponement, both as to the time and mode of it, was made at the request of such debtor.

An omission by the officer, to affix his signature to the return of a sale of property on execution, may be amended on proof to the Court, that the return was according to the truth of the case.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J.

TRESPASS. One count was *quare clausum*, and another was *de bonis asportatis.*

The action was against the sheriff for the act of one Calden, his deputy, in entering upon the plaintiffs' lands and factory building, and setting off upon execution a part of the same, and levying the rents and profits of another part, and for carrying from said lands and converting to his use a wooden store and fifty cords of wood and a single sleigh, all the property of the plaintiffs. The general issue was pleaded with a brief statement, justifying under an execution against the "*President, Directors and Company of the Wilton Manufacturing Company,*" against which name the judgment had been recovered. That suit was brought before the District Court for the *County of Penobscot,* by Ivory F. Woodman, who styled himself in his writ to be of *Boston* in the *Commonwealth of Massachusetts,* and he recovered judgment therein by default for $2818,19.

1. The plaintiffs proved that their corporate name was the "*Wilton Manufacturing Company,*" and contended that they were not a party to that judgment, and that, therefore, the levy upon their estate was unauthorized.

The Judge considered this question to be one of *fact,* and thereupon the parties submitted it as a question of fact, to be decided by the full Court upon the evidence.

2. It appeared *that* the writ in that suit was served by Calden, he then being a deputy under a sheriff, who preceded

this defendant in that office, *that* Calden returned on that writ that he had served it by leaving an attested copy of it "in the factory store;" and *that* the execution thereon issued, (to the amount of $2818,34,) was levied by Calden, then a deputy of this defendant, upon the property of the plaintiffs, although he was requested not to serve the execution. The plaintiffs showed by appropriate evidence that that judgment had been reversed for the defect in the service of the writ.

They then offered to prove that the judgment was fraudulently obtained, and that Calden knew of the fraud and aided in it. To establish this proposition they relied, as they alleged, upon proving *that* Calden purposely made the pretended service in such form as would give no information of the suit to the plaintiffs in this action; *that* Woodman, the plaintiff in that suit, had no residence in Massachusetts but, at the issuing of his writ, was resident in this county. These plaintiffs thereupon contended that the Court in the County of Penobscot had no jurisdiction of that suit.

The evidence was excluded.

3. Calden's return of the levy certifies that he appointed one of the appraisers for the debtor, "the said President, Directors and Company of the Wilton Manufacturing Company, by their secretary, Elijah D. Robinson, refusing to choose any person." On this account, the plaintiffs contended that Calden was a trespasser, inasmuch as he did not return that he had given the debtors a reasonable specified time in which to choose an appraiser. This position of the plaintiffs was overruled.

4. The levy was made on February 28, 1850, and it satisfied the execution only in part. A further return was indorsed on the execution of a sale of personal property. This return stated that the sale was advertised to be had on the second day of March at four o'clock, and that, upon the arrival of that time, the sale was adjourned publicly by proclamation, without the posting up of advertisements, to the fourth day of March at two o'clock, at which last period the sale was effected. This return however was without signa-

ture. The defendant then proved that the adjournment, both as to its mode and time, was made at the request of the plaintiffs' agent.

The case was withdrawn from the jury without a verdict, and the questions of law involved in it were submitted to the Court for a legal decision.

John S. Abbott, for the plaintiffs.

1. The execution served by Calden was not against these plaintiffs, whose corporate name is the "Wilton Manufacturing Company" and not the "President, Directors, and Company of the Wilton Manufacturing Company." The counsel here commented largely upon the testimony as to that point; but, as it was submitted to the Court as a question of *fact* merely, the argument upon it need not be further stated.

2. The evidence tending to prove *that* Woodman's judgment was fraudulently obtained; *that* Calden knew of the fraud; and *that* he aided in it, was wrongfully excluded. For the purposes of this examination, these facts are to be now considered as proveable. How can Calden or any one, liable for his doings, justify under a precept obtained by such a fraud of his own? Woodman's residence was in the county of Franklin, as we offered to prove, though fraudulently described to be in Boston. The corporation had its established place of business in Franklin. It was in that county alone, therefore, that his suit, if he was entitled to any, should have been brought. The Court in Penobscot had no jurisdiction, and the judgment was void. There was nothing in the case showing jurisdiction. Woodman was described to be of Massachusetts. Nothing appears in the writ, to show that the defendant party had any established place of business in the State, or belonged to the State, or was incorporated or had any property within the State. No property was attached, and the officer's return showed no legal service of the writ. Can a judgment confer any authority, when thus fraudulently obtained, in a court having no jurisdiction, with no legal service of the writ, and with no actual or constructive notice to the party sued? The enormities of

such a proposition are too apparent for specification. They are glaringly illustrated in this very case. For nothing was ever due to Woodman from the Company. Remedies against *him* are worthless; and, unless this suit is maintainable, the Court gives sanction to a most flagitious transaction, by which the Company is hopelessly robbed of the whole amount of the fraudulent judgment.

The case of *Granger, Adm.* v. *Clark*, 22 Maine, 128, may be relied upon by the defendant. The case at bar may perhaps be distinguished from that in two particulars. In *that* case, upon the face of the papers, it appeared that the Court had jurisdiction. In *this* case, upon the face of the papers, it does not appear that the Court had jurisdiction. *Here* is no case so described, as to the action, parties and residence of the parties, that the Court *apparently* had any jurisdiction.

As the defendant is obliged to introduce parol proof that the original defendants belonged in this State, in order to make out a case of jurisdiction, it would be strange if the plaintiffs might not be permitted to introduce the same kind of evidence to show that the Court had *not* jurisdiction.

The case at bar is not between the parties to the first judgment; and for this reason, it may be distinguished from that.

But if otherwise, I respectfully suggest that that decision urgently needs a careful revision. It would seem from the opinion, that the decision was made, with nothing but dicta cited on the one side and under the impression that there was no authority to sustain the other side.

If that case is to remain the law in all its length and breadth, and is to be construed to embrace such a case as this, the mischiefs must be incalculable. In that case, a remark is made by the Chief Justice, that "it is commonly said that fraud vitiates every thing, and that a judgment rendered by a Court without jurisdiction is a nullity." It is that doctrine that I contend for, and that an execution issued upon such a judgment affords no protection to an officer, even if he be ignorant of the writ of jurisdiction, much less to one, who, as, in this case, had full knowledge of it.

I contend further that, if a party procures or aids in the procurement of a judgment by fraud, as did Calden in this case, he cannot justify, nor any other person liable for his misdoings, under such fraudulently obtained judgment. I have not been able to find any case, in which a party has been permitted to justify any act, by reason and virtue of his own previous fraud; and it would seem to be inconsistent with the plainest principles of justice that he should. 2 Stark. Ev. 223, 242, 243. The law laid down there is, that fraud destroys the effect of a judgment altogether. In a note on page 242, Lord Coke is cited for the doctrine that "fraud avoids all judicial acts, ecclesiastical and temporal. To the same effect are *Hull* v. *Blake*, 13 Mass. 157; *Potter* v. *Wheeler*, 13 Mass. 507; *Winchell* v. *Stiles*, 15 Mass. 230; *Borden* v. *Fitch*, 15 Johns. 121; *Andrews* v. *Montgomery*, 19 Johns. 164; 2 Stark. on Ev. 253; *Fairfield* v. *Baldwin*, 12 Pick. 388; *Westervelt* v. *Lewis*, 2 M'Lean, 501; *Boynton* v. *Foster*, 7 Met. 415; *Smith* v. *Knowlton*, 11 N. H. 191; 10 Met. 436; 7 Smedes & M. 85; 10 S. & M. 282; Cases cited in 2 U. S. Dig. 224, § 147, Supplement. In the case 4 U. S. Dig. 280, § 54, it was held that a judgment without notice is void, and that a sale under an execution on such judgment must be equally so. *Marshalsea case*, 10 Coke's R. 69.

It may be urged that the defendant is not responsible for the fraud of Calden, because committed under the appointment by the former sheriff. But we answer that the serving of the execution was a new fraud. And this was done under his appointment by the defendant.

3. By R. S. c. 94, § 4, 5, the officer, before selecting an appraiser for the debtor, is to give him notice, and allow "him a reasonable specified time within which to appoint an appraiser," and his return must show a compliance with every statute requirement. Failing to do so, if the officer proceed and turn the plaintiffs out of possession, he is a trespasser *ab initio*. In this case, he gave no such notice.

4. As to the personal property, there is no return of the

officer. By this, I mean that there is no return, *signed* by any one. It is unnecessary therefore to point its other numerous defects.

May and *Cutler*, for the defendant.

TENNEY, J. — The defendant was qualified as sheriff of the County of Franklin, on January 25, 1850, and Albert Calden as his deputy on Feb. 2, 1850. An action of assumpsit was commenced by I. Fenderson Woodman, plaintiff, declared to be of Boston, in the Commonwealth of Massachusetts, against the "President, Directors and Company of the Wilton Manufacturing Company," on Nov. 17, 1849, and service of the writ therein made on the same day by Calden, acting as the deputy of a former sheriff. The action was for the County of Penobscot, and at a term which began its session on January 1, 1850; the same was entered and the defendants therein made no appearance but were defaulted. Judgment was rendered on Feb. 12, 1850, and execution issued thereon, the 15th of Feb., and both were in legal form. By authority of this execution, levy was made by Calden on the plaintiffs' real estate on Feb. 28, and on personal property on March 26, 1850.

This action is trespass *quare clausum fregit* for the acts of the defendant by Calden his deputy, in making the levies upon the property of the plaintiffs. And the questions involved are, 1st. Whether the officer had the right to take the property of the "Wilton Manufacturing Company," the corporate name of the plaintiffs, upon the execution against the President, Directors and Company of the Wilton Manufacturing Company, on the hypothesis, that the judgment and execution were valid. 2d, Whether the execution under the facts proved and offered to be proved, is a protection to the defendant, for the acts done by the deputy in making the levies. 3d, Whether the proceedings of the deputy under a valid execution were according to legal provisions, and effectual to transfer the property from the plaintiffs.

The report of the case shows, that upon such evidence adduced at the trial as was admissible for the purpose, the

Court are to decide the question, as one of fact, whether the writ and judgment in favor of Woodman were against the plaintiffs, if by such decision there can be a final determination of the cause upon all the points raised.

1. The plaintiffs were incorporated as the "Wilton Manufacturing Company." All Acts of incorporation shall be deemed public Acts, R. S. c. 1, § 2. Of such courts of the same State are bound to take judicial notice. 1 Greenl. Ev. § 6. No corporation can be created with power to hold real estate or personal property in this State, excepting by the legislative power thereof.

The "Wilton Manufacturing Company" was incorporated on March 23, 1838, for the purpose of manufacturing cotton, linen and wool, in Wilton, in this State; and evidence was introduced, which was satisfactory, that the charter of that corporation was accepted, and an organization took place under it, and business was continued to be done in obedience to its provisions. No corporation in the State bears the name of the "President, Directors and Company of the Wilton Manufacturing Company," under any Act of the State, and there is no evidence, that there is any corporation which has assumed or been called by that name. It appears, that on Feb. 28, 1838, the "Wilton Upper Mills Manufacturing Company" was incorporated for the purpose of manufacturing wool, wood, cotton, iron and steel, at Wilton Upper Mills, in Wilton. But there is no evidence that any organization ever took place under the Act; but on the contrary, witnesses, who had full opportunity to know the fact if it existed, state, they have no knowledge that any other Manufacturing Company in the town of Wilton was organized, excepting that of the "Wilton Manufacturing Company." Consequently no mistake has been made by the defendant, acting by his deputy, in taking the plaintiffs' property, for the purpose of applying the same or the avails thereof towards the satisfaction of an execution against any other corporation in Wilton, having a legal existence.

The plaintiffs' agent gave a promissory note in their behalf

under the name of the "Proprietors of the Wilton Manufacturing Company." This shows that the plaintiffs' agent was not careful always, to use the corporate name. The balance of the execution, remaining unpaid, after the completion of the levies complained of, was paid by the plaintiffs' authorized agent. The evidence is plenary, that the original suit in favor of Woodman was designed to be against the plaintiffs, both by him and the attorney who made the writ and prosecuted the action. The service of the writ was intended by Calden to be returned as made against the plaintiffs. It cannot be doubted as a fact, that the writ in the suit, and the judgment and execution thereon were really against the plaintiffs, under a name differing in terms from that given to them in the Act of incorporation.

2. The plaintiffs deny that the execution in the hands of Calden was a protection to the defendant, for Calden's acts in making the levies, under the facts attempted to be shown, and excluded, in connection with all the facts reported. And they insist, that the Court in the county of Penobscot had in truth no jurisdiction of the original action, and that it was by the fraud of the plaintiff therein, known to Calden, and participated in by him, that the judgment was there obtained. And for this they rely upon the fact, *that* the plaintiffs were sued by a name not authorized by the Act of incorporation; *that* the plaintiff in that suit was a resident of Wilton, and *that* he procured Calden to make service in a mode which would communicate no information of the suit to the plaintiffs in this action. If that suit was in the name of one, who had his residence in Wilton at its commencement, or if the service had been essentially defective, and could not have been used by an amendment, or if the defendants therein were sued by a wrong name, the suit might have been abated in proper proceedings upon a plea of abatement in appropriate form and seasonably filed. But it does not follow, that on proof of these facts, the judgment and execution can be impeached, so that they furnish no ground of defence for the defendant.

The Court of the county of Penobscot had jurisdiction of

the subject matter of the suit, and of the defendants in that suit, if the corporation was in this State, and the plaintiff resided elsewhere. Upon the face of the proceedings, the plaintiff resided in Massachusetts, and the defendants were incorporated to do business in this State. The Court therefore, under the law of the State, and facts apparent upon the writ, had jurisdiction of the parties. And there being no appearance to controvert the facts thus appearing, the jurisdiction was legally exercised.

The Court having jurisdiction of the subject of the suit, and the parties, — the writ, the service and the evidence was before it, and having taken jurisdiction, the judgment was effectual between the parties, notwithstanding the defect in the service of the writ, and could not be reversed, excepting upon a writ of error. *Granger* v. *Clark*, 22 Maine, 128; consequently the judgment was also sufficient to authorize an officer to make service of an execution issued upon it, as long as it was in full force and not reversed. No obligation rests upon a ministerial officer, to look beyond a precept in his hands as a sufficient legal warrant to obey its commands, and it would be absurd to hold him accountable for any error in the judicial proceedings of the Court which awarded it.

It is not insisted for the plaintiff, that the fraud of Calden, unknown to any other officer, who might have had the execution, would make the latter a trespasser for the same acts, which Calden is complained of for having done. But a right to recover in this action is contended for, because the execution was the fruit of Calden's fraudulent agency, and he was requested not to take the property thereon. Hence, as is contended, the acts of Calden were unauthorized and amounted to a trespass at the time they were committed, and if a trespass in him, it was equally so in his principal the defendant.

The only fraud of Calden, was committed in the attempt to make the service of the original writ. That was at a time, when no relations of sheriff and deputy existed between the defendant and Calden, and the former could not *then* be responsible for the acts of the latter, or at any subsequent time,

for acts done by Calden before his appointment by the defendant. For such acts, the liability would be upon the deputy and the sheriff under whose commission he acted. Those acts were the cause of the injury charged as having been done to the plaintiffs. Can the defendant be made responsible for the effect, which has resulted from this cause, through a solemn judgment of a court having jurisdiction, because this effect has taken place during his administration? If so, and the defendant should be compelled to make payment of damages for the injury arising from such cause, the former sheriff could not be reached; and it would be unreasonable that he should escape liability for the fraud perpetrated by his deputy in his official acts, and that this liability should be shifted to the defendant and borne wholly by him, on account of his appointment of the same man to the same office, who levied the execution, obtained upon the judgment in the action, in which the fraud was committed. It cannot be admitted, that the levy of an execution upon a judgment of a court of competent jurisdiction is a *trespass*, or *a legally required act*, in the sheriff, according as it is in the hands of his deputy, who aided by a fraud, in the procurement of the judgment, while a deputy of another sheriff in the one case; *or* in the hands of the sheriff himself, or another deputy in the other. The judgment and execution cannot be treated as matters of such fluctuating power, that in the hands of the sheriff they impose upon him the duty imperatively to obey its direction, and in the hands of his deputy such obedience makes the principal a trespasser, and subjects him to the same liability to damages, as the same acts would do, unauthorized by any warrant whatever.

It was held in *Sims & al.* v *Slocum*, 3 Cranch, 300, that judgments of courts of competent jurisdiction, although obtained by fraud are not absolutely void; and all acts performed under them as respects third persons are valid. In the opinion of the Court, C. J. MARSHALL says, "a sheriff who levies an execution under a judgment fraudulently obtained is not a trespasser." "When the person, who has committed

the fraud attempts to avail himself of the act so as to discharge himself of a previously existing obligation, or to acquire a benefit, the judgment thus obtained is declared void. But it is believed, that no case can be adduced where an act which is the legal consequence of a judgment, has in itself created a new liability, even with respect to the party himself, much less with respect to third persons, who do not participate in the fraud."

3. Were the proceedings of the defendant's deputy, under the execution, wanting in conformity to legal requirements? In the return he states that one appraiser was chosen by him, another by the creditor, and the third by himself for the debtors, "the said President, Directors and Company of the Wilton Manufacturing Company, by their Secretary, Elijah D. Robinson, refusing to choose any person." By the authority of the case of *Fitch* v. *Tyler*, [see page 463 in this volume,] the return is not essentially defective in this particular.

By R. S. c. 117, § 6, an officer may postpone the sale of personal property not exceeding six days after the day appointed; and he is required to give the same notice of the postponement, provided for the original sale which is by posting notice in two public places in the town or place of sale, at least forty-eight hours prior to the sale. Sect. 5. The officer is not prohibited in terms from making a postponement for a time less than forty-eight hours; and if this should be done he could not give the notice, as it is required in a postponement for a greater length of time. But it becomes unnecessary in this case to discuss the effect of a postponement for a time less than forty-eight hours. The postponement seems from the return, to have been made in form and in substance at the request of the plaintiffs' agent; hence cause of complaint on their part is removed.

It is found by inspection of the certified copies, that the return upon the execution of the sale of the personal property is not authenticated by the signature of the officer. This defect is fatal, as it respects the personal property, unless it can be supplied. And a motion is made, that the officer

be permitted to amend his return in this particular. The amendment would come within the rule adopted in the case of *Fairfield* v. *Paine*, 23 Maine, 498. There is sufficient to render it probable, that there is an accidental omission. No design could be entertained to enter the return at length upon the back of the execution, of the seizure, the giving of notice, the adjournment and the final sale, specifically described unless the proceedings had been accordingly. On satisfactory proof being made to the Court, of the truth of the return, the officer is authorized to amend by affixing his signature to the return. If this should be done, the plaintiffs are to become nonsuit.

WELLS, HOWARD and APPLETON, J. J., concurred.

SMITH *versus* GUILD *et al.*

If one accepts a beneficial interest under a will, he is precluded from setting up any title or claim in himself, whereby to defeat the will in any of its provisions.

Letters of administration, granted in another State, give no power of administering the property of the deceased in this State.

A delivery of possession under a writ of *habere facias possessionem*, can furnish no justification for a previous invasion of the land.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J., presiding.

TRESPASS, *quare clausum.* The acts complained of, were alleged to have been committed on the *15th of May*, and on the *28th*, *29th* & *30th of June*, 1849, &c.

The general issue was pleaded, with brief statement; 1st, *that* an undivided half of the land belonged to the heirs of Harvey Clapp, and that the acts complained of were done by his direction, and 2dly, *that* by virtue of a writ of *habere facias possessionem*, issued in favor of the administrator of Harvey Clapp, the possession was delivered by the officer to one of the defendants, who was the agent of said administrator.

Much evidence was introduced. The defendants there-

upon submitted to a default, which is to be taken off, if the Court, in view of the evidence, shall adjudge the action to be unmaintainable. Upon the evidence, as its effect was determined by the Court, the following may be considered the material facts in the case.

The plaintiff has occupied the land and lived upon it from the year 1819 or 1820. Prior to that occupation, however, Benjamin Hawes and James Hawes, in 1819, conveyed the land to Jacob Clapp and Harvey Clapp, taking back a mortgage to secure the purchase money.

On the same day, a deed from J. & H. Clapp to this plaintiff was prepared and lodged with a third person, to be delivered to the plaintiff, if he should make certain payments. But these payments not having been made, the papers were canceled.

In 1826, Benjamin and James Hawes, the mortgagees, released the land to J. & H. Clapp, the mortgagers.

Jacob Clapp died in 1832, having by his will devised to his daughter, Sukey Smith, the wife of the plaintiff, "*the improvement of the place on which she resides,* during her life," and the remainder to his son, the said Harvey Clapp, whom he appointed his executor.

Harvey Clapp accepted the devise, and in April, 1840, conveyed the *whole* of the land to Sidney Smith, warranting that it was free from incumbrances, *except Mrs. Sukey Smith's right,* and taking back from Sidney Smith a mortgage to secure the purchase money.

The residence of Harvey Clapp was in Massachusetts, where he died in 1840. Edmund W. Clapp was one of his heirs, and took letters from the Probate Court in *that* State, as administrator. In 1848, without having then obtained administration in *this* State, he commenced a suit, *as adminstrator,* upon said mortgage, which had been given to his intestate by Sidney Smith. While that suit was pending, Sidney Smith conveyed his rights to this plaintiff. The conditional judgment in that suit was obtained by the administrator in 1849. Upon this judgment a writ of possession was issued,

and by virtue of it, the possession was delivered, in June, 1849, to one of these defendants, acting for the administrator under a power of attorney.

It was not until 1850, that the said Edmund obtained his letters of administration in this State.

Hannibal Belcher, for the plaintiff.

J. L. Cutler, for the defendants.

The plaintiff went into possession of the land, in 1819, under his agreement to purchase of J. & H. Clapp. That agreement was canceled and he ever afterwards held in subserviency to their title. This is fully shown by his acts, letters and other declarations. The acts complained of were done under that title, and could not, therefore, constitute a trespass against the plaintiff.

The plaintiff's counsel may possibly contend that, as Jacob Clapp, although owning but an undivided half of the land, gave the use of the *whole* of it to his sister Sukey for her life, and also gave to his son Harvey the reversion of the *whole*, and as this gift was beneficial to Harvey and was accepted by him, he, the said Harvey, could not be permitted, after thus taking the benefit of one part of the will, to set up title in himself to any other part, by which to defeat the operation of the will, *in any of its parts.*

But we deny such a doctrine, and we deny its applicability to this case.

1. A grantee, when there are no covenants of warranty, may show that his grantor was not seized. *Fox* v. *Widgery*, 4 Greenl. 218; *Ham* v. *Ham*, 14 Maine, 353; *Thompson* v. *Thompson*, 19 Maine, 241.

2. If any interest pass, there shall be no estoppel. Com. Dig. a. 1. B.; E. 2; E. 4; E. 8; Co. Litt. 352, a; 45, a; 363, b.

3. "Regularly, a man shall not be concluded by acceptance or the like, before the title accrued."

"An impropriation is made after the death of an incumbent, to a bishop and his successors; the bishop by indenture demiseth the parsonage for forty years, to begin after the death

of the incumbent; the deane and chapter confirmeth it, the incumbent dieth; this demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent." Co. Litt. 352, a; *Crocker* v. *Pierce*, 31 Maine, 177.

4. The covenants of warranty in the deed of a grantor are the foundation of the principle of the estoppel. There are no such covenants in a will. *Allen* v. *Sayward*, 5 Greenl. 227; *Baxter* v. *Bradbury*, 20 Maine, 260.

5. Here defendants claim title by deed anterior to any derivation under the will.

So far as the bequest to Sukey Smith is concerned, Harvey Clapp is a stranger. He derives no title, and sets up no title, under it.

The grantee or lessee in a deed poll is not in general estopped from gainsaying any thing mentioned in the deed; for it is the deed of the grantor or lessor only; (yet if such grantee or lessee claims title under the deed, he is thereby estopped to deny the title of the grantee.)

The reason wherefore a deed indented shall include the taker more than the deed poll is, that it is only the deed of the feoffor, donor and lessor; but the deed indented is the deed of both parties, and therefore as well the taker as the giver is concluded. Co. Litt. 363, b. before cited; 1 Greenl. Ev. § 22, 23 & 24.

Harvey Clapp was tenant in common, as owner of half the land, subject to Mrs. Smith's life interest. Edmund W. Clapp was an heir, as well as the administrator of his estate. He authorized Elliot Guild, one of these defendants, to take the possession. Neither Elliot nor the other defendant did any act injurious to the plaintiff. The officer's return shows that the possession was delivered to Elliot, for which he had a power of attorney. And this power being from an heir, as well as from the administrator, well justified his acts.

Though Edmund W. Clapp, not having been appointed as administrator in this State, may not have been sufficiently authorized to sustain the action upon the mortgage against

Sidney Smith, yet the judgment thereon recovered, is of full force till reversed.

But we have not exercised, nor do we set up, any claim inconsistent with the rights of Sukey Smith. It was for her interest that the mortgage should be foreclosed. Our claim is subject to her life estate.

6. Can the plaintiff, occupying merely under title of his wife, maintain this suit in his own name alone?

Tenney, J. — Jacob Clapp and Harvey Clapp, had an indefeasible title to the premises, as early as May 6, 1826, the day on which the release of Benjamin Hawes and James Hawes was made. No change in their title having taken place, they were the owners and tenants in common and undivided in equal moieties till the death of Jacob Clapp, which occurred in 1832. Jacob Clapp, by his will, dated May 8, 1832, and approved July 3, 1832, devised to his daughter Sukey Smith, the wife of the plaintiff, the improvement of the entire premises, during her life; and the remainder in the whole to Harvey Clapp; he also devised and bequeathed to Harvey Clapp, one fourth part of all the residue of his property, both real and personal, of which he was the owner at the time of his decease; and the remaining portion of his property, real and personal, he devised and bequeathed to two other sons.

The death and the will of Jacob Clapp could not alone divest Harvey Clapp of the interest, which he previously had under the deed from Benjamin and James Hawes, in the premises. But it is a doctrine well established in equity and in law, that if one accept a beneficial interest under a will, he thereby bars himself from setting up a claim, which will prevent its full operation. *Thellason* v. *Woodford*, 13 Ves. 209; *Hyde* v. *Baldwin*, 17 Pick. 303; *Weeks* v. *Patten*, 18 Maine, 42.

By the provisions of the will, instead of an absolute estate, in an undivided half of the premises, which he owned, Harvey Clapp obtained the whole thereof, after the termination of

the particular estate in Sukey Smith, and other interests also, in the testator's property, the value of which is not disclosed. The evidence is plenary, that he accepted what he regarded as a beneficial interest under the will. He treated the right in the entire premises, after the decease of Sukey Smith, derived by the will, as his own. According to the testimony adduced by the defendants, he negotiated their sale as early as 1836; and on April 1, 1840, he conveyed the whole of the premises to Sidney Smith, and took back a mortgage of the same to secure the notes given for the purchase money.

This is sufficient to show, that he accepted the interest under the will, as beneficial to him, and he is held by the principle adverted to, to confirm and ratify every other part of the will; and he cannot set up his former claim, though in other respects legal and well founded. In addition to this, the mortgage deed from Sidney Smith to Harvey Clapp, which is in the case, contains a recital that the premises therein described, which are identical with those in controversy, were conveyed on the same day to Sidney Smith, by Harvey Clapp; and the right of Sukey Smith is excepted from the conveyance, and from the covenants of general warranty. The right of Sukey Smith under the will, which Harvey Clapp had confirmed, was the improvement of the premises during her life. The only interest of Harvey Clapp was under this mortgage deed, and he accepted it according to its terms. He is, therefore, barred of his original claim to one half the premises. He had no power to controvert the right of Sukey Smith under her father's will, or to deprive her or her husband who was in possession, of any interest, which either of them had, by the operation of his original title in the premises; or to enter into the possession of the same, during her life.

Harvey Clapp is proved to have died in the year 1840. Have the proceedings since his death changed the rights of the plaintiff? Edmund W. Clapp first obtained letters of administration from a Probate Court in this State, on April 2, 1850. But as administrator of the goods and estate of Harvey Clapp, who resided in Massachusetts at the time of his death and

previously, but not under any appointment in this State, he instituted a suit in the county of Franklin, against Sidney Smith on the mortgage given by him to Harvey Clapp, for the purpose of obtaining possession for condition broken, and to foreclose the same. This action was entered at a term of the late District Court, holden for the county of Franklin, on the last Monday of September, A. D. 1848, and continued to the next term of the same Court, holden on the last Monday of March, A. D. 1849, when the defendant therein was defaulted, and the conditional judgment was rendered. The condition not having been fulfilled, a writ of possession issued, on May 30, 1849; and upon it an officer returned, on June 4, 1849, that he had caused Edmund W. Clapp, administrator, to have possession of the premises described, by his agent Samuel E. Guild, who it appears had a power of attorney for such purpose, dated May 3, 1849, executed by Edmund W. Clapp, administrator.

Before this judgment, Edmund W. Clapp had no power as administrator of the goods and estate of Harvey Clapp in this State. *Goodwin* v. *Jones*, 3 Mass. 514. He was a stranger to the premises till that time. This judgment was limited in its effects to its own legitimate operations. It had no authority by implication. The one, in whose favor it was, could have no rights under it, beyond the power, which it conferred under the statute. It gave him no right to possession, until after two months, from the time it was rendered. The possession under it, given to one of the defendants as the agent of Edmund W. Clapp, was subsequent to the time alleged in the writ in this action, when a part of the acts complained of, were committed. The case finds no other time, when they were actually done. And the possession given by the officer afterwards could be no justification.

If the alleged trespass was after the possession under the officer, as it is said for the defendants in argument, that it was, it could have no effect to relieve them from liability. The judgment was against Sidney Smith, upon his mortgage.

At the commencement of this action, no privity existed between him and the plaintiff. The quitclaim deed from the former to the latter, pending the suit upon the mortgage, could take away none of the rights of the plaintiff previously existing, if it conferred none, and could yield none to Edmund W. Clapp. The officer not having removed the plaintiff from the premises, and the plaintiff not claiming to hold them by the deed of Sidney Smith, exclusively, his rights remained as they were before. It is insisted that the plaintiff, by acts and declarations, contained in letters, held the premises in submission to Harvey Clapp before his death and to Edmund W. Clapp since. No evidence in the case shows a valid surrender of his possession to either. It is true he treats Harvey Clapp as the owner of the land in some respects. This may have been from a misapprehension of his own rights, or with a view to the acquisition of the title to the remainder, after the death of his wife. And if the title had been in Clapp at the time, and the plaintiff was now setting up an adverse possessory title, the possession of the plaintiff might be qualified by these acts and declarations, and be regarded in consequence thereof as in submission to his superior right; but when it is seen, that Clapp had no title during the life of Sukey Smith they cannot confer one.

The plaintiff being in possession at the time of the alleged trespass and for a long time before, and Edmund W. Clapp, as administrator or otherwise having no present interest in the premises as against the plaintiff, or not claiming under any one, having such interest, he could give no rights to the defendants to perform the acts done. They were an injury to the plaintiff's possession and a violation thereof.

Judgment upon the default, and
damages as entered on the docket.

WELLS, HOWARD and APPLETON, J. J., concurred.

COUNTY OF YORK.

NEW ENGLAND MUTUAL FIRE INSURANCE COMPANY *versus* BUTLER *&* *al.*

A policy, issued by a mutual insurance company, and a premium note given at the same time for the payment of assessments, are independent contracts.

When mutual contracts are independent, the neglect of one party to perform will not absolve the other party from performance. A contract, made by a mutual insurance company with one of its members, is equally binding as if made with a stranger.

A vote by such a company that, if the assessments upon its premium notes should not be punctually paid, the insurances previously made should be suspended, is of no validity, unless assented to by the insured.

Such a vote, if unassented to, will not impair the force of the policy; so it will not absolve the insured from liability upon his premium note, unless when *first apprized* of it, he notify the company of his assent.

ASSUMPSIT.

The plaintiffs are a Mutual Fire Insurance Company. On the 24th Nov. 1847, they issued a policy to the defendants for three years, and received their note of that date for $250, "payable in such portions and at such times as the directors may, agreeably to their charter and by-laws, require." By these proceedings, the defendants became members of the company.

By section 10, of the Act of incorporation, it is provided, that "all assessments shall be determined by the directors, and shall always be in proportion to the original amount of the deposit note; and any member of said company, or his legal representatives, neglecting or refusing to pay the amount which he may be assessed on his note in conformity to this Act, for the space of thirty days after demand shall have been made for the payment of the same in manner the said directors shall appoint, shall be liable to the suit of said directors for the recovery of the whole amount of said note with costs of suit."

On Jan'y 12, 1848, an assessment was duly made for the payment of losses incurred by the company. The amount assessed against the defendants was $4,25. On June 7, 1848, they received from the treasurer a written notice as follows; viz. — "Treasurer's Office, Concord, N. H., June 5, 1848. "The assessment on your deposit note, amounting to $4,25, which was ordered by the directors on the 12th of Jan'y last, remains unpaid. By a vote of the corporation, passed at the annual meeting on the 23d of May, 1848, your insurance is suspended in thirty days after you have been notified by letter or otherwise, if payment be not made; and should your property be destroyed by fire, during such suspension, you will have no remedy upon this company. The directors rely upon the prompt payment of the assessments to meet losses, and if these fail, the members of the company cannot receive their pay when their property is destroyed by fire. Be pleased to transmit the amount of your assessment at once to the office by mail or otherwise.

"Yours, &c.

"Jno. Whipple, Treas."

An assessment of $33,75, was made on Nov. 15, 1848, and a further one of $40,00, was made on July 15, 1849. This suit was brought to recover these last two assessments; the amount of the first one, $4,25, having been previously tendered.

The defence was based upon the notice of the 5th of June, 1848, given as aforesaid to the defendants.

The case was submitted to the Court for a legal decision.

D. Goodenow, for the plaintiffs.

Eastman, for the defendants.

The note is not payable absolutely, but upon contingencies and in proportions, to be subsequently ascertained.

When the note was given, there was no power in the plaintiffs, either by their charter or by-laws to suspend a risk, on account of the non-payment of assessments. The by-law, authorizing such suspension, was a subsequent enactment. That by-law, with the notice under it of June 5,

1848, was a gross and palpable violation of the company's contract. By it, they undertook to dissolve the contract. They notified the defendants that they were no longer insured. They cut off the obligation of the policy, the very obligation upon which the consideration of the note rested. As to all subsequent assessments, the note became void.

Between original parties, a partial failure of consideration is a defence, *pro tanto,* upon a note. *Herbert* v. *Ford,* 29 Maine, 546.

The policy and the note were one transaction, and constituted mutual and dependent contracts. The suspension of the former defeated the obligation of the latter. The company have never revoked that suspension, nor done any thing to revive the obligation of the note. In withdrawing *their* liability, they canceled *ours,* and we had good right to take them at their word. The first notice of the intent to suspend the obligation of the policy was given in June, and related back to a previous date, so that the policy had then been suspended for months, without the knowledge of the insured. The consent of the insured to be discharged from *such* a company may well be presumed. That consent was also shown by the refusal to pay the subsequent assessments. Having been turned out of the company, the defendants were content to remain out.

Shepley, C. J. — The suit is upon a note given by the defendants to the corporation in payment, of so much as should be required, of the premium for a policy of insurance issued to them for the term of three years. It is admitted, that they thereby became members of the corporation and liable to be affected by its charter, by-laws, and regulations. And that the assessments claimed were duly made; the last two of which the defendants refused to pay.

The defence rests upon a notice or communication made on June 5, 1848, by the treasurer of the corporation, that by a vote passed at its annual meeting holden on May 23, 1848, their "insurance is suspended in thirty days" after they have

been notified, "if payment be not made; and should your property be destroyed by fire during such suspension, you will have no remedy upon this company."

The argument for the defendants concedes, that the corporation by its charter, or by-laws, or by the conditions of the policy, or of the note, had no right to suspend the risk for neglect of prompt payment of assessments. A mutual insurance company by its contract with one of its members becomes as perfectly bound by the terms of that contract, as it would, if made with a stranger. The vote of the corporation can amount to no more, than the declaration of one party to a contract, that he will consider himself discharged from it, if the other party does not perform his part of another contract, which formed the consideration of it.

When the contracts of the respective parties are not dependent, the omission of one to perform punctually, does not authorize the other to rescind or annihilate his own contract. The policy and the note were independent contracts, neither could be suspended or rescinded by one party without the consent of the other.

If the defendants had suffered by a loss of their property within the terms of their policy and had claimed an indemnity from the corporation, its own vote passed before that time, that their policy was suspended, could have had no effect upon their rights. It could only have been considered as a vain effort made by a party to relieve itself from its contract without the consent of the other party. And to do it upon terms and in a manner not contained in any charter, by-law or stipulation operative upon both parties.

It is said, that the vote of the corporation "was a gross and palpable violation of the contract on the part of the company;" and it is thence inferred, that the other party was discharged.

The violation of a contract by a party to it, which will discharge another party, must consist of some omission of an act required or commision of one forbidden by it and essential to the continued performance of the contract. A

mere declaration made by a party, that he will not do a future act, which it has not and may not become his duty to perform, or a mere denial, that upon a future contingency, the other party shall not have any benefit from the contract, is not such a violation of it, as will without the assent of the other destroy its efficacy.

The defendants might, as the argument for them alleges, have had a right "to take them at their word," if they had notified them, that they consented that the policy should terminate upon the conditions named in their vote.

Having continued to the termination of their policy to have the right to enforce it for the recovery of any loss, that might have occurred within its terms, they cannot be relieved from the performance of their contract which formed the consideration of it. *Defendants defaulted.*

TENNEY, WELLS, HOWARD and APPLETON, J. J., concurred.

COUNTY OF CUMBERLAND.

FOWLER *& al. versus* LUDWIG.

The by-laws of a corporation required that transfers of shares in its capital stock should be "noted and subscribed in a book, kept for the purpose;" *Held,* that the sale of a stockholder's shares would not exonerate him from individual liability upon corporation debts, contracted *prior* to the time of noting and subscribing the sale upon the transfer-book.

If negotiable paper be received for an existing debt, the presumption is that it was taken as a *payment* of the debt.

This presumption may be rebutted by proof of circumstances showing that it was not the creditor's intention to receive it as a payment.

Such a misapprehension, by a creditor, of his rights, as would repel the presumption of payment, must be a misapprehension arising from a want of full knowledge, not of the law, but of the facts.

If the negotiable paper accepted is not binding upon all the parties under previous liability, the presumption of payment may be considered as repelled.

But this rule, *it seems,* extends only to cases of an *absolute* liability, and not to the case of a liability which is merely *contingent.*

Of a negotiable order accepted by the creditor of a corporation for a previous debt, the presumption is, that it was taken *as a payment*, although it was drawn merely by the prudential officers of the corporation upon its own treasurer.

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

ACTION OF THE CASE, submitted to the Court upon the evidence.

The material facts, as determined by the Court, are as follows. — The George's Canal Company was incorporated after the 16th of February, 1836. Its shareholders, therefore, to the respective amounts of their stock, were subject to personal liability for the debts of the company, as prescribed. R. S c. 76, § 18, 19 and 20.

The defendant, in July, 1846, subscribed for six shares at $50, each. This subscription he duly paid. Upon the stock book of the company he was charged, Aug. 1, 1846, for 12 shares $600, and credited in 1847 "by cash, as per treasurer's account, $300, six shares."

A by-law of the company provided that transfers of stock should be noted on the stock book and "subscribed by members." In 1847, the defendant sold to one Levensaler six shares, but the sale was not then noted in the stock book. The transfer, however, was made and subscribed in the book, on *December* 12, 1848.

In February, 1847, the plaintiffs contracted with the company to do, upon the canal, certain work which they completed in November, 1848.

For that work they received, *December* 13, 1848, negotiable orders of that date for $5662,50; and on January 10, 1849, a negotiable order of that date for $966,34, and on March 2, 1849, a negotiable order of that date for $604,55. These orders were all drawn by the president upon the treasurer of the company. The plaintiffs' bill for the work was receipted under date of the same 2d March, 1849, at which time they received from the president a schedule of the orders, to which was appended a statement that "all bills between the parties are settled."

Upon these orders, the plaintiffs recovered judgment against the company at the March term of the Court, 1849, for $7341,52. That suit was brought upon the original contract and upon the orders of Dec. 13, 1848. The judgment, however, by consent of the president, was taken to the amount due upon all the orders, although one of them was drawn after the suit was brought. The officer, holding the execution, pursued the statute provision requisite for making the defendant personally liable, and the corporation is admitted to be insolvent.

This action is brought in order to recover of the defendant to the amount of his stock in the company.

Shepley & Dana, for the plaintiffs.

The sale of the six shares to Levinsaler took effect, as to third persons, on the 12th of Dec. 1848. If the judgment against the company was recovered *wholly upon the orders*, the earliest of which was given December 13, 1848, it may possibly be urged by the defendant that the orders, being negotiable, constituted a payment of the contract debt, and that therefore this defendant cannot be liable, because he was not a stockholder at any time after the debt, evidenced by the orders, was created.

We know that in some States, when a party, bound to the payment of a simple contract debt, gives his own negotiable promissory note for it, the presumption of law is, that it is accepted in discharge of the preëxisting debt. It is so presumed, *because* the party receiving it relinquishes no security, but has the same responsibility for payment which he had before, with more direct and unequivocal evidence of the debt, and with power, by indorsement, to transfer the whole interest to another. But, when the promissory note given is not the obligation of *all* of the parties who are liable for the simple contract debt, and, if held to be in satisfaction, would wholly discharge the liability of a portion of those previously liable, the presumption, if it exist at all, is of much less weight. It then becomes a question of fact on the evidence whether the note was given and received in

satisfaction and discharge of the original debt. *Maneely* v. *McGee*, 6 Mass. 143 and Rand's notes. See also opinion of SHAW, C. J., in case *Melledge* v. *Boston Iron Company*, just rendered and published in the newspaper.

This presumption of payment may also be rebutted by proof of facts or circumstances inconsistent with it. *Descadillas* v. *Harris*, 8 Greenl. 298. [The counsel then argued largely upon the evidence to show that, in this case, such a presumption is rebutted. But as this part of the argument was *upon matter of fact*, addressed to the Court when acting as a jury, it can be of no profit to insert it here.]

If the plaintiffs knew what would be the effect of their receiving these orders as satisfaction of the prior debt, they never would have so received them. If they took them thus in ignorance of that effect, and in misapprehension of their rights, they are not bound by such acceptance, and may repudiate the orders and rely upon the original contract. *French* v. *Price*, 24 Pick. 13. As the company was known to be insolvent, it would better subserve the purposes of law and justice, and is therefore the presumption of the case, that the orders were accepted only as collateral.

But suppose these orders were independent securities, and that they amounted to an extinguishment of the prior debt, what does that avail this defendant? We have seen that the last order could not enter as a foundation of the judgment. For the action was commenced before that order was drawn. The judgment must have been rendered, then, on the contract described, except so far as the same had been paid by the orders, the *amount* being fixed by the agreement.

By referring to the case, we find that the debt was contracted and due in November, whereas the defendant's transfer was not recorded till afterwards. The last order, which failed of its design, amounted to more than the defendant's stock, and consequently, supposing the other orders *did* amount to payment, there was more of the debt, contracted during defendant's ownership of stock, unpaid at the time judgment was rendered, than the amount of his stock, so that no injury

can possibly be done him by making him liable with the other members.

But we yet insist with all confidence, that the defendant still owns six shares of stock in the Canal Company, which he has never transferred.

It seems, too, a matter of great doubt if *in any case* the mere *order* of one officer of a *private* corporation upon another, should be presumed to be taken in payment of a preexisting debt; especially doubtful is it, when the corporation is known to be insolvent, and by taking the order, the creditor gains no additional or better security and may lose all that he had before.

A. P. Gould, for the defendant.

SHEPLEY, C. J. — The right of the plaintiffs to recover will depend upon their being creditors of the Georges Canal Company, while the defendant was an owner of its stock. He subscribed for six shares on July 23, 1846. These were informally transferred to Caleb Levinsaler on December 7, 1847. No transfer of them was made upon the books of the corporation until December 12, 1848. The defendant, as it respects a creditor of the corporation, must be considered as their owner until that time.

He was charged on the stock book of the corporation with twelve shares under date of August 1, 1846, and he is there credited for cash $300, and for six shares of stock. There is no other evidence, that he was the owner of more than six shares. It does not appear, that the charge for twelve shares was at any time admitted by him to have been correctly made; or that he ever paid any assessment on more than six shares; or that he claimed to be the owner of a greater number.

The charge with the credit of six shares made during the following year would rather indicate, that he never consented to become the owner of more than six shares. The charge made by the corporation cannot make him the owner of more, without some evidence that it was admitted or sanctioned by him. The by-laws of the corporation required, that the stock

book should be subscribed by the members of the corporation. He must therefore be regarded as the owner of six shares only, until they were transferred on December 12, 1848.

To prove that they were creditors of the corporation before that time, the plaintiffs introduced the record of a judgment founded, as they allege, partly or wholly upon a contract made between them and the corporation during the month of February, 1847, with testimony to show, that they had performed the services required and completed them in the month of November, 1848; and that the orders presented in the case were drawn for work performed under that contract.

On December 13, 1848, three orders, drawn by the president on the treasurer of the corporation, payable to the plaintiffs or their order, were received by them for labor performed under the contract. There were counts in the declaration upon the contract and upon these orders.

On January 10, 1849, another order was drawn by the president upon the treasurer for the same purpose, payable to one of the plaintiffs or his order, and it was received by them.

On March 2, 1849, a settlement was made between the plaintiffs and the president of the corporation, when another order payable to the plaintiffs or their order was drawn in like manner and received by them. The plaintiffs signed a receipt for the bills presented for services performed under the contract as settled; and received from the president a statement, that they then held the orders named, with an assent by him as one of the directors, that a default should be entered in their action then pending against the corporation.

In this and in some of the other States of the Union an existing debt is presumed to have been paid by the reception of a negotiable promissory note for it.

In the case of *Varner* v. *Nobleborough*, 2 Greenl. 121, it was decided, that the same presumption would arise from the reception of a negotiable order drawn by the selectmen of a town upon its treasurer. That decision is in principle applicable to the present case.

This presumption may be rebutted by proof of the circum-

stances, under which the negotiable paper was received, showing that it was not intended to operate as payment.

Some of the circumstances, which might have such an effect, have been noticed in the decided cases. If the negotiable paper was accepted in ignorance of the facts or under a misapprehension of the rights of the parties, it has been held, that the presumption might be considered as rebutted. *French* v. *Price*, 24 Pick. 13. So if the paper accepted is not binding upon all the parties previously liable, or if the paper of a third person be received not expressly in payment, the presumption may be considered as repelled. *Melledge* v. *Boston Iron Company*, cited by the counsel.

In this case the insolvent corporation would remain equally liable, whether the original debt arising out of a performance of the contract was or was not extinguished by an acceptance of the orders in payment. No party liable in the first instance would be discharged by an acceptance of the orders in payment. The defendant and perhaps others, who were liable in case the corporation should fail to pay, would be discharged. It does not appear, that any stockholder except the defendant would be thus discharged; or that the person, to whom the defendant had transferred his shares, was not of equal ability to pay. When by an extinguishment of a debt some persons collaterally liable will be discharged, and others will become liable to pay the paper accepted in payment, no serious change of the ability of those liable to pay can be inferred without some proof of it. If responsible persons could not be expected to become purchasers of the stock of an insolvent corporation, it may be a fair inference, that no great change of stockholders would take place.

The testimony does not prove, that the orders were accepted in ignorance of the actual state of facts. The plaintiffs must have been aware, that stockholders of corporations may be constantly changing, while their stock is considered to be of any value. When it becomes apparent, that their share holders may suffer loss, no great changes can be expected without the imputation of fraud, and that cannot be imputed without proof.

The plaintiffs may have received the orders without knowing what the effect would be upon their rights. A misapprehension of rights, which would rebut the presumption of payment, must be something more than this. It should be a misapprehension of rights arising out of a want of full knowledge of the facts.

The suit might be defeated, it is said, if the parties intended to extinguish the original debt; and it is obvious, that the intention was to allow it to proceed to judgment. The suit as commenced might have been maintained for a large amount consistently with an extinguishment of the original debt; and for the full amount with an assent to a default. As between the parties with such an assent the judgment may be valid, although it included an amount not due, when the suit was commenced.

If the judgment may be considered as rendered in whole or in part upon the original contract, the defendant not having been a party or privy to it may prove any fact showing, that the plaintiffs had no legal claim upon him.

The receipt of the plaintiffs, in discharge of their claims arising under the contract may be explained by parol testimony; but the testimony of the president of the corporation, who assisted to make the settlement, tends to support rather than to repel the presumption of payment.

The acceptance of negotiable paper for their debt; their receipt given in discharge of it; the memorandum of the settlement received by them; and the testimony of the president; present strong proofs of an extinguishment of the original debt due to the plaintiffs.

The facts relied upon to repel and overcome the presumption of payment and the corroborative testimony are not deemed sufficient to authorize the Court to determine, that the orders were not received in payment.

The result is, that the defendant is not liable to pay any portion of the debt due from the corporation to the plaintiffs.

Plaintiffs nonsuit.

TENNEY, WELLS, HOWARD and APPLETON, J. J. concurred.

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 Justices.
Hon. SAMUEL WELLS,	
Hon. JOSEPH HOWARD.	

Fitch *versus* Tyler.

In a levy of real estate, the officer may sufficiently return that the appraisers were sworn, by referring to indorsements, made upon the execution by the magistrate and by the appraisers, containing certificates that the requisite oath was taken.

No particular ceremony is required in seizing real estate on execution by an officer. It is not essential that he should enter upon the land during any stage of the proceedings in a levy.

Upon a levy of land, the "specified time" to be given by an officer to the debtor, in which to appoint an appraiser, is to be mentioned in the notice given to the debtor, but need not be stated in the return upon the execution.

What is a "reasonable" time, to be allowed to the debtor, in which to choose an appraiser, is submitted to the judgment of the officer.

A return by the officer that the debtor "refused" to appoint an appraiser, is a sufficient substitute for an allegation that any notice was given to the debtor. It implies that the debtor made no objection to the time given.

In the levy of land, the R. S. c. 94, requires, § 6, that the appraisers shall proceed with the officer and view the land, and also, § 24, that the officer shall state in his return that they appraised and set off the same; — this requirement is complied with, if the appraisers' certificate shows that they viewed the land, and appraised and set it off, *and* if the officer, in his return, refer to the appraisers' certificate, and state that they "appraised" the same, *as therein appears*."

It is not requisite that the appraisers should be residents of the county, in which the land lies.

An omission by the officer to state, in his return, by whom one of the appraisers was appointed, is fatal to the validity of the levy, unless the deficiency can be supplied.

The person, however, who was the officer in making the levy, though not now in office, may, on motion to Court, supply the deficiency by an amendment according to the fact.

On Facts Agreed.

Writ of Entry.

While Oliver M. Pike was owner of the land, it was levied on an execution against him in favor of one Pease, under whom the tenant makes title. Nineteen months after the levy was made, Oliver M. Pike conveyed the land to Oliver M. Pike, jr. who conveyed the same by deed to the demandant. This deed was prior to the deed from Pease to the tenant.

The question then is upon the sufficiency of the levy. If that was valid, the tenant's title is good, and this action is unmaintainable.

The proceedings to constitute the levy were indorsed upon the execution, and were as follows: —

"Cumberland ss. April 18, 1845.

"Then personally appeared Augustus Johnson, James O. McIntire and William Fitch, jr., who made oath that, in appraising such real estate of the within named Robert McDonald and Oliver M. Pike, as should be shown to them to satisfy this execution and all fees, they would act faithfully and impartially according to their best skill and judgment.

"Before me, John Warren, Deputy Sheriff."

"Cumberland ss. April 18, 1845.

"We the subscribers, having all this day been duly chosen,

appointed and sworn to the faithful and impartial appraisement of such real estate of the within named Robert McDonald and Oliver M. Pike, as should be shown to us to be appraised in order to satisfy this execution and all fees, have this day viewed a tract of land, [here the land was described] shown to us by Samuel P. Small, attorney for the within named Pease, as the estate of the said Robert McDonald and Oliver M. Pike, which said tract of land we have, on our oaths aforesaid, appraised at the sum of one hundred and eighty-four dollars and ninety-one cents and no more. And we have set out the said tract of land by metes and bounds to the creditors within mentioned to satisfy this execution and all fees. In witness whereof we have hereunto set our hands.—

"Augustus Johnson,
"William Fitch, jr.,
"J. O. McIntire."

"Cumberland ss. April 18, 1845.

"Having, at the request of the within named Simeon Pease, caused the above named Augustus Johnson, William Fitch, jr. and James O. McIntire, three disinterested and discreet men, viz, the said James O. McIntire chosen by ——— ———, Augustus Johnson, chosen by myself, and the said Wm. Fitch, jr., chosen by me for the debtors, they refusing to choose, faithfully and impartially to appraise the real estate above mentioned and they the said Augustus Johnson, Wm. Fitch, jr. and James O. McIntire, having upon oath appraised the same at the sum of one hundred eighty-four dollars and ninety-one cents, as above appears, I have this day agreeably to law delivered possession and seizin of the said estate to Samuel P. Small, Att'y to Simeon Pease, the creditor, to have and to hold the same to him the said Simeon Pease his heirs and assigns forever, in full satisfaction of this execution and charges of levying the same, which charges amount to the sum of twenty-eight dollars and sixty-six cents, and have left the said Small in quiet possession of the same. I do therefore return this execution fully satisfied.

"John Warren, Deputy Sheriff."

Swazey, for the demandant.

The objections taken to the levy, and the authorities cited to sustain them, were as follows : —

1. It does not sufficiently appear, by the officer's return or otherwise, that the appraisers were legally sworn. R. S. c. 94, § 4 and 24; Amendment of 1843, c. 13; *Phillips* v. *Williams*, 14 Maine, 411; *Howard* v. *Turner*, 6 Maine, 106; *Smith* v. *Keene*, 26 Maine, 411; *Chamberlin* v. *Doty*, 18 Pick. 495.

2. It does not appear by the officer's return that he took the land on the execution; or at what time he took it; or that he notified the debtors thereof and allowed them a reasonable specified time, within which to choose an appraiser. R. S. c. 94, § 5 and 24; *Gault* v. *Hall*, 26 Maine, 561; *Means* v. *Osgood*, 7 Maine, 146.

3. It is not stated that the appraisers proceeded with the officer and viewed and examined the land, or that the land was set off by the appraisers. R. S. c. 94, § 6, 24; *Monroe* v. *Reding*, 15 Maine, 153; *Roop* v. *Johnson*, 23 Maine, 335.

4. It does not appear that the appraisers were of the county of Cumberland, within which the land lay. *Nickerson* v. *Whittier*, 20 Maine, 223.

5. It does not appear by whom James O. McIntire, one of the appraisers, was appointed. R. S. c. 94, § 24; *Banister* v. *Higginson*, 15 Maine, 73.

The officer, at a previous term, moved the Court, that he might, though then out of office, amend the return according to the fact, so that the return should show that James O. McIntire, one of the appraisers, was chosen by "Samuel P. Small, attorney of said Pease."

This amendment was objected to by the demandant; because the officer, who made the levy, has long been out of office; — because the plaintiff in the mean time has acquired a vested right in the land; — because the question is not between the original parties, the plaintiff's deed being long prior to the deed from Pease to defendant; — because the fact to be added to the record by the proposed amendment

cannot thus be supplied;—and because, if the amendment were at this time allowed, it could not relate back so as to affect the plaintiff's title, it could take effect only from the time of the amendment. *Howard* v. *Turner*, 6 Maine, 106; *Means* v. *Osgood*, 7 Maine, 146; *Berry* v. *Spear*, 13 Maine, 187; *Fairfield* v. *Paine*, 23 Maine, 498; *Banister* v. *Higginson*, 15 Maine, 73; *Emerson* v. *Upton*, 9 Pick. 167.

Clifford and *Appleton*, for the tenant.

Tenney, J.—The decision of this case must depend upon the answer to the question, whether the levy of the execution in favor of Simeon Pease against Robert McDonald and Oliver M. Pike can be sustained. Its validity is objected to on several grounds; First, that there is not sufficient evidence, that the appraisers were sworn; 2, that it does not appear in the return, that the officer took the land in execution, or that he notified the debtors thereof, and allowed them a reasonable specified time, within which to choose an appraiser. 3. It is not stated, that the appraisers proceeded with the officer, and viewed and examined the land, and that the land was set off by the appraisers. 4. It does not appear that the appraisers were of the county, where the land lay. 5. Because the return omits to state, by whom one of the appraisers was appointed.

1. The officer shall state in his return, substantially among other things, that the appraisers were duly sworn; the time, when the land was taken in execution; how the appraisers were appointed; and that they appraised and set off the premises after viewing the same at the price specified. R. S. c. 94, § 24.

The officer certifies, that the oath was taken by the appraisers before him. It was in proper form, and he was authorized to administer it. Statutes of 1843, c. 13. It is stated in the return, that the appraisers, who were before named, having upon oath appraised the land, at the sum mentioned, as *above appears*. The certificate of the caption of the oath and the appraisers' return precede the officer's return

on the back of the execution and the reference in the latter will apply to both.

2. No particular ceremony is required by an officer in seizing real estate on execution, and it is not made essential that he shall enter upon it during any stage of the proceedings. *Bond* v. *Bond*, 2 Pick. 382; *Hammatt* v. *Barrett*, 2 Pick. 564. When he is notified by the creditor to levy the execution upon real estate, and he informs the debtor of his purpose, and requests him to appoint an appraiser, he may be considered as having seized the land in execution. The statute of Massachusetts, c. 73, § 22, is similar in this respect to the provision of the statute of this State, c. 94, § 5; and in *Hall* v. *Crocker*, 3 Metc. 245, the Court say, "It has been decided many years since, that an entry is not necessary. It is sufficient for the officer and appraisers to view the land, and that is necessary, only for the purpose of making a just estimation of its value." "It appears to us very clear, that the act of the officer in giving the notice to the debtor to choose an appraiser must be deemed a good beginning of the service of the execution." "The statute having fixed upon no specific act, which will constitute a seizure of land on execution, the Court are of opinion, that when an execution has been delivered to an officer, with direction to levy the same upon real estate of the debtor, and the officer accepts the execution with such directions, and consents and undertakes to execute it, any act done by him in pursuance of that purpose is a beginning to execute, and constitutes a seizure."

The proceedings by the officer, shown by the return, were commenced on April 18, 1845, and completed the same day. A notice of some kind to the debtors to choose an appraiser, is necessarily implied, and the time when the land was taken in execution is substantially stated in the return.

It was held by the Court in Massachusetts, before the revision of their statutes in 1836, that though the statute did not in terms, require the officer to give the debtor notice to appoint an appraiser, yet that it was manifestly implied by the provision, that the debtor had the power to choose one of the

appraisers; and that the provision should have a liberal construction to effect the object intended; and that it should substantially appear by the return, that such notice was given to the debtor, or the levy would be void. But a general return of this fact by the officer was deemed sufficient, there being no mode prescribed. And a return that the debtor had *neglected* to choose an appraiser was adjudged sufficient, on the ground, that he could not have neglected without notice of the time, place and occasion. *Blanchard* v. *Brooks*, 12 Pick. 47. The Court say, "if it had been shown that the debtor *had refused* to appoint, the return would have been sufficient. *Eddy* v. *Knapp*, 2 Mass. 154; *Whitman* v. *Tyler*, 8 Mass. 284.

The statute of this State having required, that the officer shall give notice to the debtor, and allow him a reasonable specified time, within which to appoint an appraiser, has in terms provided for those acts substantially, which in Massachusetts were deemed necessary, upon a proper construction of a more general requirement in the former statute of that Commonwealth. And that which would dispense with a particular return of the notice given to the debtor to appoint an appraiser in one case, would be sufficient in the other. What time may be given to the debtor for that purpose, is submitted to the judgment of the officer. It is not necessary that he should state in the return, the time allowed, but that the time, which he may deem reasonable to give, shall be specified in the notice, so that the debtor may know when it will expire. In this case the officer does not state, that he gave a "reasonable specified time," but that the debtors refused to appoint, which is a sufficient substitute, implying, that they made no objection to the *time* given, but, that they should not avail themselves under the circumstances, of their legal privilege.

3. The appraisers state in their return, that on April 18, 1845, they had viewed a tract of land, which is described, shown to them, by the attorney of the creditor, as the estate of the debtors, which they appraised upon their oaths, and set off the same by metes and bounds to the creditor within

named to satisfy the execution and all fees. The officer returns under the same date, that they appraised the same at the sum mentioned, as above appears. This reference is general, and must be understood to include whatever the appraisers state, not only that they viewed the land, and the value which they placed upon it, but that they set off the same by metes and bounds in satisfaction of the debt and costs of levy, and it is a substantial compliance with the statute requirement.

4. The appraisers must be discreet and disinterested men. R. S. c. 94, § 5. No other qualification is demanded in terms by the statute. In the case of *Nickerson* v. *Whittier*, 20 Maine, 223, the question arose under the statute of 1821, c. 60, § 27, by which the appraisers were required to be freeholders in the county. Under the present law, this case is not an authority in point. It is contended in argument, that the appraisers must belong to the county, because he has no power to go beyond its limits to make the choice. The officer cannot compel the service of one, who resides in the county as an appraiser; but if he procures those, who are competent, whether of the county or not, the requirement of the statute is answered.

5. The return omits to state, by whom one of the appraisers was appointed. This is certainly not a compliance with the statute requisition, and is fatal to the validity of the levy, unless the defect can be supplied. There is nothing from which it can be necessarily inferred, that the appointment was made by one having authority to do it.

Can the officer be allowed to amend his return by supplying the omission, according to the fact, the person, who made the return not now holding the office, in which he acted at the time of the levy? To make a valid levy, it is not required that the person, who acts as a sheriff, deputy sheriff or other officer, should continue in office, till the proceedings are complete, if they were commenced by him, when he had official power for the purpose. R. S. c. 94, § 5. It follows, if a return may be made entirely, after his removal,

he may be permitted to make an amendment by supplying defects if proper in other respects. Every act connected with the return, is supposed to be done under the sanctions of his office, without reference to the time.

In this case, it appears by the certificate of the oath, that three persons were sworn to make the appraisal, and by their own return, that they were duly chosen and sworn, and that the land was shown to them by the creditor's attorney. In the officer's return, it is stated, that he has caused the persons named faithfully and impartially to appraise, &c. "James O. McIntire, chosen by ——— ———, Augustus Johnson, chosen by myself, and the said William Fitch, jr., chosen by me, for the debtors, they refusing to choose." The execution and the proceedings touching the attempted levy were by legal requirement made matter of record, and all interested in the land were constructively notified thereof. The blank in the return, immediately after the name of McIntire, and the unfinished sentence render it perfectly clear, that the officer did not profess to have made perfect his return, but to have omitted something which was designed to be supplied. The officer had exhausted his power of appointment in choosing one appraiser *ex officio*, and the other in consequence of the refusal of the debtors to make an appointment on their part. The direction was given to him in behalf of the creditor to make the levy. His attorney was present and gave direction touching the land to be appraised, and received seizin and possession of the same for him. It is not to be presumed, that the appointment of McIntire was made by one not authorized, and it is not improbable that the appointment was made by the creditor's attorney, and his name not being upon the execution as was the creditors, it was omitted in the return, till the officer could ascertain what it was. We think there is sufficient to show, that all the requirements of the law had probably been complied with, and the debtor should stand chargeable with all, the existence of which is indicated, by what is stated in the record, and can be satisfactorily shown to the Court. *Fairfield* v. *Paine*, 23 Maine, 498. We think

this is a case, where an amendment may be proper to be made according to the fact.

The Court are informed by the affidavits of the officer and the creditor's attorney, what the amendment will be, and if made accordingly, the levy may be considered sufficient to transfer the land to the creditor.

Mason, *Administrator*, *versus* Tallman.

There are cases, in which a party may, *by his own affidavit*, show to the *Court* that a paper has been lost, in order to the introduction of secondary evidence to prove its contents.

In no case, however, is such an affidavit receivable as evidence of any fact for the consideration of the *jury*.

When a question, made by one party, has been but partly answered by the witness, the residue of the answer may be elicited on inquiries by the other party.

An inference founded upon hearsay is no more admissible in evidence, than a fact obtained in like manner would be.

On Exceptions from *Nisi Prius*, Howard, J. presiding.

Assumpsit. The first count was for $4000, money had and received of the intestate. The second count charged that at different times the intestate had lent and advanced to the defendant various sums, amounting in all to $4000, for which the defendant had given his promissory notes, yet unpaid and now lost by inevitable accident. The third count charged the same loans, and that notes were given therefor, and that the intestate was afterwards drowned at sea by the foundering of the ship Michigan, upon which occasion the notes were lost and destroyed. At the commencement of the trial the last two counts were stricken out. A witness for the plaintiff, testified that the plaintiff's intestate, was a shipmaster, and sailed with his wife for Europe upon a voyage from which neither he or the wife or the ship ever returned; that just prior to sailing upon the voyage, he placed $200 in the hands of the witness for the defendant, which

amount he paid over to the defendant. The defendant's counsel interposed a question, "whether Tallman gave any receipt or note for that sum." The witness answered; "I sent him the money in a draft in a letter," and produced a paper which he exhibited to the *defendant's* counsel. The witness then proceeded to mention the date of the paper, and the *plaintiff* asked him if that paper was the defendant's acknowledgment of having received the draft. To this inquiry the defendant's counsel objected, but it was allowed, and the witness testified that it was.

The plaintiff offered his own affidavit, stating substantially, that he was sole heir at law of the intestate, and that having reason to believe that the intestate, at the time of his decease, was possessed of sundry notes and evidences of debts, being part of his estate, he, the affiant, had made diligent search for any such notes or written evidences of debt, signed by the defendant; that he had inquired at the banks and of the relatives of the intestate and of other persons, with whom any of the intestate's effects had been left or were likely to have been left, and at all places where he had reason to suppose that any such effects might have been left or deposited, but had been unable to find any. To the admission of this affidavit, the defendant objected, but it was received, and was read to the jury.

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

Shepley and *Dana*, for the defendant.

1. The witness testified to the contents of a paper, and gave his opinion of its effect. Such evidence is inadmissible. The paper should have been produced. 1 Greenl. on Ev. § 463, 82, 83, 84, 88, 90 and notes. It was not upon the defendant's but upon the plaintiff's inquiry, that this evidence was given, and against the defendant's objection. Except in answer to that inquiry, there was no evidence that the defendant had received any money.

2. The affidavit of plaintiff should not have been read. It was not offered to the Court, to lay the foundation for the

introduction of secondary evidence of the contents of a lost paper; but as independent and original evidence to satisfy the jury that no such paper was in existence; thus making the plaintiff of record, and in interest, a witness in his own case, and in such a manner that defendant had no opportunity for cross-examination.

This affidavit contains the only evidence in the case to rebut the presumption that a note was outstanding against defendant for this very sum. The plaintiff's neglect to furnish himself with other testimony in regard to the matters stated in the affidavit, does not render his own admissible.

"It is not of the usual course of business, and there must be something peculiar and extraordinary in the circumstances of the case, which would justify the Court in admitting the oath of the party." See opinion of ROGERS, J., in *Clark* v. *Spence*, 10 Watts, 335, cited in 1 Greenl. on Ev. 348, n. See also *Tayloe* v. *Riggs*, 1 Pet. 596 – 7.

W. P. Fessenden and *Barnes*, for the plaintiff.

1. One exception is to that part of the witness' testimony, which stated that "the paper was an acknowledgment by defendant of the receipt of the draft." But this was a paper, not called for by the plaintiff. His testimony was complete without it. When called out by the defendant, our inquiry was simply to show that the paper was *inter alios*. Our inquiry was not made till defendant had proved that a receipt had been given. We did not inquire for the contents. Even if it had been a receipt to Mason, it would be rather the discharge, than the evidence of a debt. The testimony was therefore immaterial.

2. The direction given by the intestate to the witness as to the disposal of the money, was rightly admitted, as a part of the *res gestæ*.

3. The admission of the affidavit was justified by the peculiarity of the case.

Testimony of indebtedness being put in, the presumption would have arisen from the nature of the case, that the "evi-

dence of debt" was within the control of plaintiff personally. The affidavit went only to displace that presumption.

Had not the plaintiff purged himself by affidavit, the jury would naturally have presumed the "evidence of debt" to be in his possession. There was no other way to prevent it.

For such a purpose merely, the affidavit may be as proper to the jury as in the ordinary case to the Court, for the introduction of secondary evidence.

The affidavit did not tend to the prejudice of defendant. It did not tend to prove that Tallman owed, but rather the contrary. Not that no "evidence of debt" was taken, but only that it was not within the control or reach of plaintiff personally.

If not prejudicial to defendant, then not exceptionable. *Dodge* v. *Greely*, 31 Maine, 344.

The merely inferential tendency, if any, that, because plaintiff could not find the "evidence," therefore none was taken, was too remote and slight to have affected the jury.

Tenney, J. — In answer to a question interposed by the defendant's counsel, *whether a note or receipt was taken for the sum*, which he had before stated on the plaintiff's examination, he had paid to the defendant, the witness said, *that he sent the money in a draft, in a letter to the defendant*, and he exhibited a paper to the defendant's counsel. Whereupon the inquiry was made in behalf of the plaintiff, *if that was the defendant's acknowledgment of the receipt of the draft*, which the Court allowed against the defendant's objection. The witness did not attempt to give the contents of the paper exhibited further than was demanded by the question of the defendant. The witness' full affirmative reply to that question, when he produced the paper, by supplying the elipsis, would be, "*the defendant did give me a receipt for the sum.*" The answer as given to the plaintiff's question is substantially, "*this*, (referring to the same paper) *is the acknowledgment by the defendant* of the receipt of the draft." The latter was

not an improper answer to the defendant's question, and cannot have been incompetent evidence, when that question had not been fully answered, till the question of the plaintiff had called it out.

The direction given by the plaintiff's intestate to the witness, at the time he placed the money in his hands, were clearly a part of the *res gestæ*, and therefore admissible, and this ground of exception does not seem to be relied upon by the defendant.

The plaintiff's affidavit, allowed to be read to the jury, was incompetent, the defendant objecting. A party may sometimes show the loss of a paper in this mode to the Court, in order that the secondary evidence may be introduced, but it is not admissible as facts for the consideration of the jury. It was read in this case, to show that written evidence of the plaintiff's alleged indebtedness did not exist. This was thought by the plaintiff's counsel at the trial, to be material, or it would not have been adduced. It was in no respect different from that which would have come from a person shown to have been the depositary of the intestate's papers. The affidavit also states, that inquiries were made of persons, supposed by the plaintiff to have had possession of the papers of his intestate, and he was unable to find them, implying, that those of whom he inquired could give no account of such papers. There is nothing showing, that the plaintiff made any personal examination of the papers of the persons, of whom he sought information, and the inference is, that he was informed by them, that such papers were not in their possession. An inference founded upon hearsay, is not more admissible than a fact obtained in like manner.

Exceptions sustained, new trial granted.

NOTE. — WELLS and HOWARD, J. J., on account of relationship to the parties, took no part.

LARRABEE & *al. petitioners, versus* LARRABEE.

Fraud in the procurement of a deed of land can be established only upon proof, that the grantee or his agent performed some *act* or made some *representation* which was deceptive or false, knowing it to be so.

A testator devised land. The heir at law resisted the probate of the will, alleging the insanity of the testator. Upon a promise by the devisee, that the evidence before the Judge of Probate in favor of the will should be withdrawn, and that he would consent that the will should be disallowed, the heir conveyed a part of the land to the devisee;—*Held,* that in order to set aside the deed upon the allegation, that it was procured by fraud, proof of the insanity is not admissible, unless connected with evidence tending to prove, or with an offer to prove, that the insanity was known to the devisee or his agent, prior to the taking of the deed.

Upon such an investigation in this Court, evidence is admissible to show what testimony, prior to the execution of the deed, was given of the insanity, in the presence of the grantee, on the trial of the will in the probate court; because it affects him with knowledge that the insanity was charged.

But to authorize any effect to be given to such evidence respecting any fact, or state of facts, the *whole* of it should be produced.

A deed conveying land may be valid between the parties to it without consideration.

For a grant, by an heir at law, of a reversionary interest in land, authorizing the grantee to take possession at the termination of the life estate, a sufficient consideration, if it need any, is constituted by an agreement, (made by the devisee of the reversion,) that he would assent to the disallowance of the will by the Judge of Probate, and would withdraw the testimony already laid before the Judge in support of it.

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

PETITION FOR PARTITION.

William B. Larrabee died, possessed of personal and real estate. He left a wife, Mary W. Larrabee, and also a sister, Mary Larrabee, who was his sole heir at law.

He made a will, by which he bequeathed to his wife all his personal estate, with the exception of a clock, and devised to her the use of his real estate for her life. He bequeathed the clock to William Larrabee, and to Nehemiah Larrabee he devised, (to him, his heirs and assigns,) *two thirds* of his real estate, subject to said life estate; he also devised to Sarah C. L. Hanson, her heirs and assigns, *one third* of his real estate, subject to said life estate. The probate of the will was re-

sisted on the ground of insanity. Evidence upon that point was presented before the Judge of Probate, who, by a decree of March 5, 1842, disallowed the will, and it was never probated. At the time of the disallowance of the will, it was known to the Judge of Probate, that an arrangement had been made, by parties concerned, that the evidence already before him in favor of the will should be withdrawn, and the will disallowed.

On the same 5th of March, Mary Larrabee, the said heir at law, gave a bond to the widow, Mary W. Larrabee, stipulating that, if the will should be disallowed, she would, by deed, convey to her all the personal property which she might inherit from her brother, and also the whole of the real estate for the lifetime of the said Mary W.

Such a deed was executed on the 9th of March, 1842. On the same 9th of March the heir executed a deed to said Nehemiah Larrabee of the one half, and to Sarah C. L. Hanson of one third of the real estate, the said Nehemiah and the said Sarah "to come into possession upon the death of Mary W. Larrabee."

All these deeds were in the common form of quitclaim deeds, and each acknowledged a consideration of $500.

This is a petition for partition. It is brought against said Mary Larrabee by said Nehemiah and Sarah, for their respective parts of said estate, according to said deeds. The respondent, the grantor in those deeds, pleads sole seizin.

The petitioners introduced their respective deeds.

The petition, after being amended by striking out one of the lots of land described in it, claimed a division of the Larrabee homestead" and of the "hundred acre lot."

The respondent contended that the deeds, under which the petitioners claim, were obtained from her without consideration, and by imposition and fraud; that it was fraudulently and falsely represented to her that the Judge of Probate was intending to approve the will, and was also represented to her that, if she would make these deeds, the efforts to get it approved, and the evidence already offered in its favor would be withdrawn, and it would then be set aside.

She put in the deposition of Nathaniel Groton, the Judge of Probate. It shows that the questions were put to him, as to what evidence, on the matter of the insanity, certain witnesses gave before him. These questions were objected to. The exceptions show that "that part of Judge Groton's testimony, in which he gives an account of the evidence given before him at the trial on the will," was excluded.

The deposition stated that after having occupied three days in the trial, the contending parties withdrew, saying they should adjust the matter; whereupon Judge Groton replied, that he must adjudicate upon the testimony, and did decree that the testator was not of sound mind.

The record shows this decree, and that, on the same day, Mary W. Larrabee was appointed administratrix.

The respondent also introduced the depositions of John Low, Abigail Low, Ammi R. Mitchell and Israel Putnam.

The exceptions show that "the Judge excluded those portions of those depositions which were objected to, *being such parts as relate to the insanity of William B. Larrabee, and such parts also as relate to facts testified to in the Probate Court.*"

The respondent also introduced the deposition of Anthony P. Raymond. It stated many of the acts and sayings of W. B. Larrabee, tending to show his insanity. Among other things he testified; Larrabee "wanted me to build a platform on the top of the house I lived in for the muses to dance on, as he said, and wanted me to assist him in selecting ten of the prettiest and most active, and in placing them on the platform to sing and dance every Monday morning. He insisted on my doing this with a great deal of pertinacity and repeated the request a great many times."

The exceptions show that "so much of this deposition was excluded as relates to the insanity of W. B. Larrabee."

The respondent's counsel requested the presiding Judge to give the jury the following instructions among others.

1. If the respondent was induced to give the deeds for a promised consideration, which the promising parties had not

in law power to perform, to the full extent to which that undertaking purports to go, and if they induced her to expect an advantage from such promise, which could not legally follow, the deeds are voidable.

2. That the Judge of Probate could not lawfully allow the parties to withdraw the motion and evidence, and consequently the promising party had not power in law to perform their promise to withdraw, and that, if the jury find this promise to be the supposed consideration of the deeds, they are voidable.

3. That if they had legal power so to withdraw, the record shows that they did not do it, and it is a question for the jury to determine whether they intended to do it, when the promise was made.

4. If this was an artifice to obtain deeds from the respondent by imposing upon her credulity, in giving to her a promise, which the parties at the time of promising did not intend to perform, and never did perform, this constitutes a fraud, which vitiates the deed.

5. If the Judge of Probate, before the making of the deeds, informed the parties, adverse to the respondent in this action, that he could not recognize and carry into effect the proposed arrangement, but should adjudicate upon the evidence, and these parties did not inform this respondent of that fact, but suffered her to go on in ignorance of the fact, and make the deeds in consideration of the supposed withdrawal of the evidence, and the agreement to have the will broken, this is both a failure of consideration and a fraud upon this respondent, and the deeds therefore are voidable.

These requested instructions were refused so far as they are not contained in the instructions which were given. The jury were instructed, *that* the question for their consideration in this part of the case was, whether the deeds made by the respondent were valid conveyances; — *that* a deed conveying lands might be a valid and effectual conveyance between the parties to it without any consideration; — *that* the adjustment of the controversy, respecting the validity of the will of Wil-

liam B. Larrabee appeared to have been the only consideration, and, if that adjustment or settlement was made without fraud, it would be a sufficient consideration for the deeds, if one were required; — *that* the consideration or the want of it was unimportant, further than it might have a tendency to prove, that the conveyances were obtained by fraud, and *that*, so far as it might have such an effect, it was a proper subject for their consideration; — *that* if they were satisfied from the testimony that the respondent was deceived or circumvented, and thereby induced, or, by any false and fraudulent representations made to her, was induced to make the conveyances, they would be invalid, and the verdict should be in favor of the respondent for the hundred acre lot; and *that* if not so satisfied, the verdict should be in favor of the petitioners.

The testimony and the instructions respecting the homestead are not presented. The jury found a verdict for the respondent respecting the homestead, and for the petitioners respecting the hundred acre lot.

To these instructions and refusals to instruct, the counsel for the respondent excepted.

Upon the return of the verdict, which was at the November term, 1850, the *respondent* moved that the verdict be set aside, because against evidence and the weight of evidence. The case came up for argument at the April term, 1852, at which term the *petitioners* petitioned that the verdict be set aside and a new trial granted, upon the ground of newly discovered evidence.

Gilbert, for the respondent, upon the exceptions.

It is conceded that a deed either of feoffment or of gift, may be valid without a consideration. These deeds are neither of feoffment or of gift; not of gift, because they acknowledge a pecuniary consideration; not of feoffment, because they profess, in their terms, to give possession *in futuro*. The terms therefore are repugnant to a livery of seizin, which is an essential requisite of a feoffment.

Neither are they covenants to stand seized, because they

want the consideration of blood or marriage, and because the use was not in the grantor. *Welch* v. *Foster*, 12 Mass. 93. They are not deeds of bargain and sale, because the use, having been vested in another for a life term, the grantor could not be seized to the uses of these grantees. 2 Black. Com. 338.

The estate of the grantor was but a reversion, lying not in livery but in grant. In such a grant, a consideration is essential to its validity. *Parker* v. *Nichols*, 7 Pick. 111; *Gault* v. *Hall*, 26 Maine, 561. Then, was there a consideration for these grants? If so, it was in the agreement that the will should be set aside, and the evidence should be withdrawn.

The Judge of Probate had no authority to permit the evidence to be withdrawn. That agreement, therefore, was in violation of law, and could not constitute a consideration. If, in any case, such an agreement could be acted upon by the Judge of Probate, it could only be when all parties in interest should concur. In this case, there was no concurrence of Sarah C. L. Hanson, one of the devisees, or of William Larrabee, one of the legatees.

To show that such an agreement cannot support the deeds, as a consideration, I cite Chitty on Con. (Perkins' Amer. Ed.) 46, 675, 669, 670, 671 and notes, 287, 673, 677; *Cole* v. *Gower*, 6 East, 110.

The agreement that the evidence should be withdrawn, was one which neither the petitioners nor the Judge himself could carry into effect. It was ineffectual, and of no value, and could not be a valid consideration. 3 Term Rep. 17. It was an artifice to entrap this aged, ignorant woman, the respondent, into the conveyance of her valuable estates, under a belief that the will was broken, *in consequence* of the agreement, when, in fact, all who were concerned on the other side, knew it was impossible to sustain the will. Were not such facts a fraud? and perhaps the jury found these facts to exist. Ought not the Judge, then, to have given specific instructions on this point?

Portions of certain depositions were excluded. This ex-

clusion was wrongful. If the agreement relied upon could constitute a consideration, it is in the nature of an agreement to delay the prosecution of a claim; a claim, valid in the law. In this case, it is shown that the attempt to sustain the will could not have prevailed. The evidence which was rejected in the depositions, would have proved the impossibility. It was the evidence of the subscribing witnesses that the testator was insane, corroborated by others.

The will then, beyond all question, was destined to a defeat. The agreement not further to try to sustain it, was of no value; it was a mere pretence. The deeds then were without consideration. It follows, of course, that the rejected testimony ought to have been received.

[The same counsel also argued, at much length, the respondent's motion to set aside the verdict.]

Tallman, for the petitioners.

The opinion of a majority of the Court was drawn up by

SHEPLEY, C. J. — The principal issue on this part of the case presented for decision by the jury was, whether the conveyances from the respondent were fraudulently obtained. To show this, there must be proof of acts or representations of the grantees or of their agents; and that these were deceptive or false; and that they were at the time known to be so.

Testimony tending to prove that William B. Larrabee before, and at the time of executing his will was insane, could have no tendency to prove the alleged fraud, unless the facts exhibiting such insanity were known to the grantees or their agents. Testimony tending to prove facts exhibiting unsoundness of mind, which facts were not known by the grantees or their agents, could be suited only to mislead the jury, and thereby to operate unjustly. Whether the testator was of unsound mind, as an independent fact, could not properly or justly be presented to the jury for consideration and decision. If he was in fact insane, and that was not known to the grantees or their agents, testimony to prove that fact could have no legitimate influence upon a decision

of the question presented, whether the conveyances were fraudulently obtained. If there had been testimony offered having a tendency only to prove, that the facts or any of them, offered to be proved to exhibit unsoundness of mind, were known to either of the grantees or their agents, the testimony offered to prove insanity, and excluded, should have been admitted; and the jury should have been permitted to decide, whether the grantees had knowledge of those facts. If on the contrary, there was no testimony tending to prove, that the facts so offered to be proved, or any of them were known to either of the grantees or their agents, the testimony offered to prove insanity could not have been legally or justly admitted.

The Court cannot come to a conclusion, that the tetimony offered to prove insanity was erroneously excluded, unless there be found some testimony reported in the bill of exceptions, or found in the depositions named therein, tending to prove, that the facts stated in the testimony to prove insanity, or some of them, were known to the grantees or their agents. No such testimony appears to have been reported in the bill of exceptions; and none has been noticed in the testimony excluded. Nor has any been pointed out in the arguments presented. The facts offered to be proved to exhibit insanity, and which were excluded, were not of a character to be publicly known; and there is no testimony tending to prove an intimacy between the families of the grantees and that of the testator. Ammi R. Mitchell on his examination in chief states, that the testator "was considered in such a state of mind that for a spell he was watched," and that "he got away from his watch one time and there was quite a time in hunting him up." On cross-examination he was asked to state his means of knowledge and he stated "it was from general conversation about the town," and that "it was about thirty years ago." This testimony was clearly inadmissible as resting upon mere rumor or town talk.

Testimony to prove the facts exhibited by the testimony received in the Court of Probate should be received in this

Court, for it would exhibit the knowledge of one of the grantees of those facts before the conveyances were made. But the whole of the testimony received in the Court of Probate, respecting any fact, or state of facts, should be presented in this Court to authorize its reception here. Otherwise the respondent might present the account or statement of a fact tending to prove insanity, and omit to have the accompanying circumstances stated, and thereby present to the jury in this Court an entirely erroneous, if not false account of the aspect of the case as it was exhibited in the Court of Probate and known to that grantee.

By the application of these rules it will not be difficult to determine, whether any testimony was erroneously excluded.

It appears from the bill of exceptions, that portions of the depositions of Israel Putnam, John Low and Abigail Low, "which are objected to, being such parts as relate to the insanity of William B. Larrabee" were excluded. The portions excluded might have been more clearly designated, but it is believed, that they can be satisfactorily ascertained. These witnesses did not testify in the Court of Probate, and there is no testimony tending to prove, that the facts, or any of them stated in their depositions, and which were excluded, were known by either of the grantees, or by any agent of theirs before the conveyances were made; and the portions excluded could not have been received without a violation of legal rules, and without their operating to produce injustice.

Ammi R. Mitchell was a witness to the execution of the will, and he testified in the Court of Probate, and the facts which by his testimony were exhibited in that Court, were admissible as testimony in this Court, if presented in such a manner as to be legally receivable. Most of his testimony respecting the insanity of the testator, contained in his deposition, appears to have been received. The greater part of it was presented by the cross-examination, and it was received without objection.

The only portions of his deposition, which were excluded, or appear to have been excluded, were the questions and answers contained in the fifth and sixth direct interrogatories.

The fifth interrogatory is in these words: — "Did you or not testify, that in your opinion said Larrabee was not sane at the time of making his will"? This question had reference to his testimony in the Court of Probate, and it was an appropriate one, and it should have been received if the answer had been of a like character. The answer was — "I did testify, that he was not sane in my opinion on some subjects." He does not state what those subjects were. If this testimony had been received it is very obvious, that it would not have presented his testimony in this Court, as it was presented in the Court of Probate. The subjects named in the latter Court, upon which in the opinion of the witness he was not sane, might have been such as to exhibit the absurdity of the opinion of the witness. To have admitted this testimony, would have been to receive that part of his testimony unfavorable to the sanity of the testator unaccompanied by that part which was favorable.

The sixth interrogatory asks the "purport" of a written paper not produced, and which the witness concluded exhibited indications of insanity. The answer is in substance, that he could not "form an opinion as to what it meant at the time." Comment is useless.

A. C. Raymond testified in the Court of Probate and the facts, to which he there testified, accompanied by all the explanatory circumstances there exhibited, would be admissible in this Court. He states many facts in his deposition tending to prove the testator to have been insane within a short period before his will was executed; and this testimony would have been most material to prove the alleged fraud, if it had come to the knowledge of the grantees in the manner in which it is stated in the deposition. But such does not appear to have been the fact. The witness having stated that he had testified in the Court of Probate, is then asked, whether he "did or not give the same testimony there, that you have now given in this deposition?"

The answer is, "I did so far as respects the muses, and so far as I was questioned."

It is obvious that this answer leaves it entirely uncertain, what portions of the testimony in the deposition were presented in the Court of Probate, with the exception of "so far as it respects the muses." What portion of his deposition he referred to "as respects the muses," is left too uncertainly designated to be admissible.

The Judge of the Probate Court, Mr. Groton, does not state in his deposition any fact as of his own knowledge, tending to prove that the testator was insane. The complaint is as stated in the bill of exceptions, "that part of Judge Groton's testimony in which he gives an account of the evidence given before him at the trial on the will," was excluded. So far as he stated what any witness before him testified, it was not excluded. So far as he stated what he considered to be the substance or effect of the testimony of any witness, or in the words of the exceptions, so far as "he gives an account of the evidence given before him," it was excluded; and it was clearly inadmissible.

No error is perceived in the instructions which appear to have been appropriate.

The requested instructions so far as they were not embraced in the instructions given, were properly refused. The exceptions are overruled, and the motion to set aside the verdict and the petition for a new trial must be denied.

Cushman *versus* North-western Insurance Company.

A policy, after insuring $1700, upon a mill and fixed machinery, and $150 on moveable machinery therein, proceeded, *in written words*, as follows; "said insured being the lessee of said mill for one year from November 1st, 1850, and having paid the rent therefor of $2171,01, which interest, diminishing day by day, in proportion to the whole rent for the year, is hereby insured; — *Held*, that the policy was a valued one, although, in a *printed* part of the instrument, there was a provision that the "loss or damage should be estimated according to the true and actual cash value at the time such loss or damage shall happen."

The manuscript provision is to be viewed as the agreed basis, upon which to ascertain the true and just value.

In such a case, it is not competent for the defendant, (except for the purpose of proving a fraud practiced by the insured,) to introduce evidence that the rent, paid by the insured for the mill, was less than the sum stated in the policy.

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

ASSUMPSIT, upon a policy of insurance against fire.

On October, 1850, the plaintiff took the lease of a cotton factory mill, for one year from November 1st, 1850. The lease stated the consideration to be $2171,01, then paid by the cancelation of bills for repairs and improvements already made upon the factory, by the lessee, this plaintiff.

On Nov. 8, 1850, the defendants in the *written* part of their policy insured the plaintiff "to the amount of $2000; viz. on the building and fixed machinery of the cotton mill, $1700; on moveable machinery therein, $150; on stock, raw and wrought, $150, said Cushman being the lessee of said mill for one year from Nov. 1, 1850, and having paid the rent therefor of $2171,01, which interest, diminishing day by day in proportion for the whole rent for a year, is hereby insured." Another part of the policy, being in *printed* words, was as follows: — the "said loss or damage to be estimated according to the true and actual cash value of the said property at the time such loss or damage shall happen."

The mill was destroyed by fire, Nov. 23, 1850, with all the machinery, and all, or nearly all the stock.

The policy prescribed the preliminary proceedings necessary to be taken by the insured in order to obtain the insurance money in case of loss, and it was admitted that those proceedings had been taken.

The defendants offered to prove that the amount of the repairs and improvements actually made upon the mill by the plaintiff, and estimated in the policy at $2171,01, was fifty per cent. less than that sum. The plaintiff consented that the defendants might show, if they could, that the plaintiff, when applying for the policy and before it was issued, represented to the defendants in any way, except by exhibiting his lease to them, that he had paid rent to the amount of

$2171,01; also that defendants might prove, if they could, that there was fraudulent collusion between the plaintiff and his lessor in computing the amount of the bills. For any other purpose, the plaintiff objected to the testimony.

The Judge ruled the evidence to be inadmissible, beyond the purposes thus assented to by the plaintiff. Whereupon the defendants declined to introduce it.

The defendants then contended that the plaintiff was bound to prove the extent and value of his interest in the property destroyed.

The Judge ruled that, as to the $1700 upon the building and fixed machinery, and as to the $150 on the movable machinery, the policy was a valued one. The plaintiff thereupon waived all claim as to the $150 upon the stock.

The defendants charged that in some material particulars, the survey and representations of the plaintiff were false and fraudulent. These charges were negatived by the verdict.

The jury returned a verdict for the plaintiff, assessing the damage, including interest, at $1872,12, with a special finding that the loss on the movable machinery was $151,79, which is included in the said verdict.

The case was submitted to the Court, with a stipulation, among others, that if the foregoing rulings of the Judge were correct, judgment should be rendered on the verdict.

Fessenden & Deblois, for the defendants.

1. The policy was not a valued one. The plaintiff was entitled to recover no more than the value of the property at the time of the loss. We offered to show that the building and fixed machinery were not worth the $1700.

In fire policies, indemnity for loss is all that can be recovered. To this effect is the case, *Lawrent* v. *Catham*, 1 Hall, 41. That was a New York case, and this is a New York policy. The defendant corporation is a New York institution, and the authority cited is a New York authority. *Lynch* v. *Darrill*, 3 Bron. Par. Cases, 497.

The *Saddlers' Co.* v. *Babcock*, 2 Atk. 554. This case shows a strong leaning of the Court against valued policies

in fire cases, unless the express language of the policy absolutely demands such a construction.

The language usually, if not universally employed to designate valued policies is, (after designating the property insured,) "valued at." We think we may safely say such is the universal mode of making a valued policy.

Judge DUER, in explaining what are valued policies, says, "It is valued when the parties *have agreed* upon the value of the interest insured, in order to save the necessity of further proof, *and have inserted the valuation in the policy*, in the nature of liquidated damages." 1 Duer, 97, § 4, 8, 9, 10.

In our policy there was no language constituting it a *valued policy*. The term, "valued at" was not used, nor any term tantamount to it. The words "said Cushman being the lessee of said mill, for one year from Nov. 1, 1850, and having paid the rent therefor, of $2171,01, do not amount to a valuation. He might have *paid more* or he might have paid *less* than the *actual value* of the lease. *Agreeing* that he paid such a sum for it, is not *agreeing* that this was the true value. At most it is but a description of the property, not a valuation.

Nor does the further clause, viz: "which interest diminishing day by day in proportion to the whole rent for the year is hereby insured," aid in making it a *valued* policy.

"Which interest," may better apply to the $1700 insured, than to the $2117,01 paid for rent; at all events, with just as much force to the $1700, the sum insured, as to the sum of $2117,01, paid for rent.

But suppose the language is equivocal, which is the most the plaintiff can claim for it — then we say we must apply the legal rules of construction.

Duer says: the true meaning of the parties must be collected from the *whole instrument*, not from separate consideration of doubtful clauses.

Apply this rule, and bring to your aid the subsequent provision in the policy, "that said loss or damage must be estimated according to the true and actual *cash value* of the said property at *the time* such loss or damage shall happen."

This provision absolutely extinguishes all pretence of a valued policy, and controls the language above referred to. The cash value *at the time* of loss, is to be the rule, and this value is to be proved, necessarily, because it might essentially vary between the time of effecting the insurance, and the time of the loss by fire.

It is of highest importance to preserve, between the assurers and the insured, every barrier to fraud.

If *value policies*, in fire insurance, were easily admitted, the room for fraud would be much enlarged.

On a policy, in which the property is fully, not to say extravagantly, valued, the temptation to carelessness, or fraud would be much increased. This is recognized in *Williams* v. *Mutual Fire Ins. Co.* 31 Maine, 220.

All the cases in the books, in which the properties in fire risks are *valued*, are cases in which the insurance companies were by their charter restricted as to the percentage they can take on the value of the property.

It is sometimes said that the *written* part of the policy controls the *printed.* But language is not to be wrested. All parts are to be equally considered. Written words have equal, but no more than an equal, effectiveness with printed ones. To allow more weight to one than the other is an indiscretion. Whenever done, it has been upon the narrow view of bending the law to avoid a particular mischief. The adoption of the rule could not fail to operate more extensive evils. I repudiate the idea that one part of the language shall supersede the other. Printing is but writing. Shall words in the Roman character have more force than Arabic? Shall a word have more or less effect, because the penman has formed the letters straight or sloping? The dogma contended for is senseless. Adherence to it is derogatory to any self-respecting tribunal. If adopted, what are its limitations? and upon what reason are they founded? In deeds of conveyance, in bills of exchange, in bills of lading, can it prevail? If words be in direct conflict, it may be that neither can stand. But if words in one of the forms *can* be con-

trolled by words in the other, it is only when they are absolutely irreconcilable, which is not the fact in the case at bar. The written recital of the sum paid for the yearly rent, is but a *description* of the property, and it stands consistently with the printed clause, which provides that such loss shall be estimated, "by the true and actual cash value of the said property at the time such loss or damage shall happen."

Suppose a freshet or a tornado had swept away the principal part of the building, and a fire should consume the rest, what would be the damage? It could be but the value of the part burnt. The original cost could be no element in the computation.

TENNEY, J. — Suppose it had been a distillery, and a law should pass prohibiting distilleries, and it should then be burnt, how could the damage be estimated?

Fessenden. — That law might *increase* the value of the *site.* But if the insurance was on the cash value of the building, and the *law* had destroyed its value, nothing could be recovered.

Should it be said, in this case, that the value of the interest, it being but a leasehold, is incapable of proof, and that, therefore, the policy must be treated as a valued one, the obvious reply is that such a value is capable of proof, and that evidence for such purposes is of every day's introduction. Beyond that loss, the defendant never intended to insure. And I offered to prove that the amount mentioned in the policy, as the rent, was fifty per cent. more than the reality.

But especially are we unable to perceive on what ground the Judge ruled, that the "movable machinery" was *valued* by the parties at $150, and that as regards this machinery, it was a valued policy.

The very nature of the articles insured, shows the parties could not have contemplated a valued policy. It was *moveable, changeable*; might be *more* in value one day and *less another.* It had nothing of a permanent character, such as it would hold during the whole time covered by the insurance. *Higginson* v. *Dall,* 13 Mass. 102; *Holmes & al.* v. *Charles-*

town Mutual Fire Ins. Co., 10 Met. 212; *Borden* v. *Hingham Mutual Fire Ins. Co.*, 18 Pick. 523; *Fuller* v. *Boston Mutual Fire Ins. Co.*, 4 Met. 206; *Williams* v. *Mutual Fire Ins. Co.*, 31 Maine, 220.

2. In excluding the evidence of the real value of the services paid by the plaintiff for the rent, there was error. It was a matter of fact, and the Judge admitted it was receivable for the purpose of proving fraud. If receivable for any purpose, we had right to lay it before the jury. The Judge might, in his charge, direct the application of it. Can the Court say, you shall tell me beforehand, the exact object for which testimony is offered? Must it be excluded, unless I will promise not to use it for some particular purpose? *McLelland* v. *Lindsay*, 1 W. & S. Penn. 360.

W. P. Fessenden, for the plaintiff.

Tenney, J. — Is the policy in this case, in any respect a valued policy? A contract for insurance like others is to be construed upon an examination of the whole instrument, and therefrom the intention of the parties is to be ascertained. No particular form of words is required to give effect to the intention when discovered. It is proper to see what property was the subject of the policy. The plaintiff held a lease for the term of one year of the mill described, with all the privileges and appurtenances thereto belonging. The whole machinery of the mill both fixed and movable were evidently intended to be embraced. He had at the time of the insurance stock, raw and wrought, and it is apparent, that he expected, that such would continue to be in the mill, though it might change from time to time.

The defendants make insurance for the plaintiff against loss or damage by fire to the amount of $2000; $1700 of which is on the mill and fixed machinery, and $150 on the moveable machinery; the balance of the $2000 was on the raw and wrought stock. The property last referred to, is fully specified, and the policy so far was clearly open. But to prevent any question as to the portions before specified, the

policy states that "the said Cushman being the lessee of said mill for one year from Nov. 1, 1850, and having paid the rent therefor of $2171,01, which interest, diminishing day by day in proportion to the whole for the year, is hereby insured. By natural, and also by the most strict grammatical construction, the "interest" here referred to, was that which the plaintiff acquired by his lease. The raw and wrought stock could not have been the "interest," without a forced construction; and this is not insisted on by the defendants' counsel. No other interest or right of any kind is previously mentioned in the policy, and the plaintiff is not shown to have had any other right. The sum of $2000, and its subdivisions cannot be regarded as the interest insured, for that is the amount of the value upon which the insurance of the "interest" is made.

The lease was effectual between the parties thereto; and in an open policy, neither the plaintiff nor defendants would be benefited in any degree, by the insertion therein particularly, of the rent paid by the assured to his lessor; it was wholly immaterial and unnecessary. Again, if the policy was open, there was no occasion that it should recite, that the interest should diminish "day by day," &c. This would be only one element in the computation of the value of the loss, and one so obvious, especially if the policy was near its expiration, or had run any considerable time, that it could not be expected to be overlooked.

The price paid by the plaintiff for the lease, a few days before the policy was executed, may be presumed to have been in his opinion, the value of that interest, as he paid the consideration therefor in advance. And the defendants, when they executed the policy, which recited the price of the interest, must be understood as assenting to that as the value agreed upon.

1. It is objected, that the clause in the policy which is in the following words, is inconsistent with the construction contended for by the plaintiff; viz. "the said loss or damage to be estimated according to the true and actual cash value of

the said property, at the time such loss or damage shall happen." We cannot suppose that this clause in the printed part of the policy was designed to annul the meaning of previous matter, which was *written* in the blank. But effect must be given to every part of the instrument if possible. And it is believed that this may be done in the policy now before us, without doing violence to any provision found therein. The policy, so far as it was intended to cover the stock, was such as to require proof of the amount of loss or damage of that portion of the property. And although it was agreed that the loss or damage should be estimated according to the actual value at the time of the loss or damage, still the parties could fix upon a rule to determine this value. And if they had agreed that the actual value of the rent for any given period during the year, should be the same as for a like period at its commencement, such agreement would not be repugnant to the meaning of the clause we are considering. They did fix upon a basis, by which the cash value should be determined, and the value would vary daily by the application of the rule, and was not inconsistent with other parts of the policy.

2. It is insisted for the defendants, that the evidence offered, and rejected, excepting for the purpose of showing a fraud in the plaintiff, should have gone to the jury without restriction. If the representation of the value of the plaintiff's interest in the mill and machinery was made without fraud, it is not easy to perceive on what principle, the evidence offered was competent. The defendants were so satisfied with the plaintiff's estimation, that they adopted it, and had the benefit of the premium. And they could not change the value by proving simply, that others would have fixed upon a different estimation. To allow them to introduce the evidence offered for other purposes, than to prove a fraud, would be a permission to vary a written contract by parol testimony. *Judgment on the verdict.*

CUSHING, *in Equity, versus* THOMPSON.

The right which a mortgager has to redeem against an execution sale of his right of redemption, is to be exercised within one year from the sale.

When the mortgager and his tenants have retained the possession, without paying rent to the purchaser, though it was demanded of them, such mortgager, in redeeming against the sale, is not entitled to require of the purchaser any account for rents.

The insurance money which such a purchaser may receive within the year upon an insurance effected on the property by himself, for his benefit, belongs to him and not to the mortgager.

Thus, the purchaser of such a right, acting for his own benefit, insured against fire a building standing upon the land, and within the year received the insurance money, the building having been burnt; *Held*, that in redeeming against the sale, the mortgager was not entitled to the benefit of the insurance.

BILL IN EQUITY by a mortgager to redeem his right of redemption, against a sale of it made on execution against him.

The bill and answer show the following state of facts: —

The plaintiff was seized of the right to redeem certain mortgaged land, of which he was in possession. That right was sold on an execution against him. The defendant was the purchaser at $850. There was a building upon the land, which was occupied by the plaintiff and by several of his tenants. The defendant notified the plaintiff and the tenants that he claimed the rents to be paid to him. But he has never obtained any actual possession of the property, or received any of the rents or profits.

On the day of his purchase, the defendant *for his own benefit*, insured $850, upon his right in the building, against loss by fire for one year.

Within the year the insurers paid him the $850, less the premium, the building having been burnt. The plaintiff seasonably demanded of the defendant a statement of the amount necessary to be paid in order to redeem the property from said sale on execution, and the defendant thereupon sent to him a written statement of that amount, making it to be the sum at which the execution sale was made, together with interest from the day of the sale.

The plaintiff, considering that statement to be unjust, made no payment or offer of payment, but, within the year, caused this bill to be brought and served, for the purpose of redeeming against the sale.

Barnes, for the plaintiff.

In 1 Hilliard, Real Estate, 407, it is said, "mortgagee will not be allowed for insurance, unless effected at mortgager's request. It is said, however, that there is no inflexible rule on this subject, but the question of allowance is in the discretion of the Court, subject to the particular facts of each case.

The cases between mortgager and mortgagee do not necessarily control this case, which is between the purchaser of an equity and the redemptioner.

This relation is wholly *in invitum* as against the redemptioner. Mortgager enters into mortgage by voluntary agreement, and may then arrange respecting insurance, or suffer loss, if he does not.

But the purchaser of an equity applies a statute compulsion against the redemptioner, prevents his obtaining insurance, or embarrasses him in collecting it, if he has one, for double insurance is disallowed.

Double payment of the debt will result, if the purchaser is not to account for the insurance money received, but, if he accounts, redemptioner will have but one indemnity.

Analagous to case of collision at sea, where if the party in fault, makes restitution to the party suffering, the latter recovers nothing from his insurer.

If the defendant should have accounted for the insurance money, then he did not render a true and just account upon the demand, made by redemptioner.

Or, if not accountable for the insurance money, he should have accounted for the rents, which he stopped.

The plaintiff was entitled to have the rents, with which, in part, to make redemption. But, by the acts of defendant, he lost this benefit, from all the tenants, except himself.

Many cases show the absolute control over rents, which the purchaser of an equity acquires. *Fernald* v. *Linscott*,

6 Greenl. 234; *Fox* v. *Harding*, 21 Maine, 104; *Crosby* v. *Harlow*, 21 Maine, 499. If he chooses to exercise this control, while the right to redeem subsists, he should, when called upon to account, give the redemptioner the full benefit of it.

Shepley and *Dana*, for the defendant.

TENNEY, J. — The defendant levied his execution upon the complainant's right in equity of redemption of the premises described in the bill on Sept. 4, 1849. On August 21, 1850, the complainant, desirous of redeeming the interest, upon which the levy was made, called upon the defendant, to render a true account of the sum due for such redemption. The defendant had not actual possession of the premises and had received no rents and profits therefrom. On the 22d of August, 1850, he sent to the complainant an account in writing of the sum claimed for the redemption, being the sum, for which the right was sold with interest thereon from the time of the sale. This bill was filed on August 27, 1850, and notice thereof served upon the defendant, on August 29, 1850.

By R. S. c. 94, § 25, 26, 27 and 28, the modes of redeeming from a levy of an execution by the debtor are provided. But it is necessary, that the sum should be tendered, or so ascertained, that there is an opportunity to receive it within the year, in order, that the redemption may be effected. *Boothby* v. *Com. Bank*, 30 Maine, 361. In the case before us, no tender was made, and no course pursued, which has resulted in a determination of the sum due for redemption.

But it is insisted, that in March, 1850, the defendant actually received money, which should be applied so far as was necessary to redeem the interest, which was sold on the defendant's execution. After the levy, the defendant effected insurance upon his interest to the amount of $850. And on Dec. 1, 1849, the buildings on the premises were destroyed by fire, and payment of the amount for which they were insured, was made in March, 1850.

The interest insured was that of the defendant alone. It does not appear, that the complainant paid any part of the premium, had any connection with the insurance, or knew of its existence, till the loss of the property. The defendant could not have compelled payment from the complainant of the premium or any part of it. It is well settled, that a contract of insurance does not run with the estate, as incident thereto, but is an agreement with the underwriters against a loss, which the *assured* may sustain, and not the loss, which *another* may be subjected to, having an interest as mortgager, redemptioner, or otherwise. *Adams* v. *Rockingham Ins. Co.* 29 Maine, 292; *White* v. *Brown & als.* 2 Cush. 412.

Unless the defendant was accountable for the full amount for which the equity sold, within a year after the levy, as rents and profits, which is not insisted on, the relief prayed for cannot be granted. *Bill dismissed with costs.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE

MIDDLE DISTRICT,

1852.

COUNTY OF KENNEBEC.

STATE *versus* KEEN.
STATE *versus* HUTCHINSON.

The exceptions in the enacting clause of a penal statute are to be negatived in the indictment.

But it is not requisite that the negation be expressed in the exact words of the statute. Other words, excluding with equal certainty the exceptions of the statute may be employed.

Under the Act of 1851, for the suppression of drinking houses and tippling shops, an indictment, charging that the accused was a common seller of intoxicating liquors, *without any lawful authority, license or permission*, is not invalidated by its omission to charge that he was *not appointed as the agent of any city or town to sell liquors for medicinal and mechanical purposes.*

The liability of such an agent to a revocation of his appointment and to a suit upon his bond, would constitute no protection from the penalty of the eighth section of the Act, if he should wilfully become a common seller.

CASES ON EXCEPTIONS AND ON DEMURRER from the *District Court*, RICE, J.

INDICTMENTS under the Act of June 2, 1851, "for the suppression of drinking houses and tippling shops."

The second section of the Act authorizes the appointment, in each city or town, of some suitable person, as its agent "to sell at some central and convenient place within such town, spirits, wines and other intoxicating liquors, to be used for medicinal and mechanical purposes and no other.

Section third requires such agent to give bond, &c.

Section seventh provides that, on a breach of such bond, the agency shall be revoked and the bond put in suit.

The eighth section provides, that no person shall be allowed to be a common seller of spirituous or intoxicating liquors, without being duly appointed as aforesaid, on pain of forfeiting, &c.

The indictments respectively charged that the defendants on divers days, &c., "*without any lawful authority, license or permission*, did presume to be and were common sellers of spirituous and intoxicating liquors."

Keen pleaded that he was not guilty, and the verdict was returned against him. He thereupon moved in arrest of judgment, "because the indictment is insufficient in form and substance, and because it does not allege that he was a common seller, *not duly appointed to sell as agent for the town.*

The motion was overruled, and the defendants excepted.

May, in support of the exceptions.

The indictment is insufficient. Every word of it may be true, and yet no indictable offence committed. There may be two classes of common sellers; 1st, persons who have no authority to sell liquor in any form or for any purpose; 2d, an agent of the town may violate his obligations and make himself a common seller.

For such a case, the statute has provided an appropriate remedy. His agency is to be revoked and his bond sued. But no indictment can lie against him.

It cannot be doubted that in thus becoming a common seller he acts "*without any lawful authority, license or permission.*" For his appointment to *sell for medicinal and mechanical purposes only* would not be a "lawful authority, license or permission" to make himself a *common seller.* And

yet by becoming such common seller, though he might be liable on his bond and removable from office, he would not be indictable.

Now, so far as appears by the indictment, the defendant may have been of that class. He may have been an agent duly appointed to sell, and therefore, unindictable. The indictment no where negatives this supposition. The defendant therefore, though a common seller, and though the allegations of the indictment may all be true, may have committed no indictable offence. —

Otherwise, such an agent thus becoming a common seller, would be liable to be twice punished; viz, by a judgment against him on his bond, and by the penalties of the eighth section.

Vose, County Attorney, for the State.

To the indictment against *Hutchinson*, there was a general demurrer, which was joined.

Bean, in support of the demurrer.

1. The indictment is defective, because it contains no averment, that the defendant was not appointed as the agent of any town or city in this State to sell intoxicating liquors, to be used for medicinal and mechanical purposes in accordance with the statute of 1851.

2. When an offence is created by statute, and there is an exception in the enacting clause, or, in the same clause which creates the offence, the indictment must show *negatively* that the defendant, or the subject of the indictment, does not come within the exception. *Rex* v. *Mayor, &c. of Liverpool*, 3 East, 86; 1 Chitty on Crim. Laws, 284; 3 Chitty on Crim. Laws, 671; Archbold's Pleading, 52; *Williams* v. *Hingham Turnpike Corp.* 4 Pick. 431; *Commonwealth* v. *Maxwell*, 2 Pick. 169; *Little* v. *Thompson*, 2 Maine, 228; *Smith* v. *Moore*, 6 Maine, 274; *State* v. *Godfrey*, 24 Maine, 232; *Commonwealth* v. *Tuck*, 20 Pick. 362; *Commonwealth* v. *Odlin*, 23 Pick. 275.

3. It is well settled that, if all the allegations in an indictment may be true, and yet constitute no offence, the indictment is insufficient.

All the facts alleged against the defendant in this indictment may be true, and still he may not be guilty of any indictable offence, and for this reason the indictment is insufficient. *State* v. *Godfrey*, 24 Maine, 232; *Commonwealth* v. *Odlin*, 23 Pick. 275; 2 Hale's P. C. 167; *State* v. *Hewett*, 31 Maine, 396; *State* v. *Philbrick*, 31 Maine, 401.

Vose, County Attorney, for the State.

APPLETON, J. — No rule of criminal pleading is better established, than that, when the enacting clause describes the offence with certain exceptions, it is necessary to state all the circumstances which constitute the offence, and to negative all the exceptions. If the allegations in the indictment may be true, and yet constitute no offence, it must necessarily be deemed insufficient. The counsel for the defendants have invoked these principles in aid of the defence, and if, on examination they shall be found applicable, the result which they seek to attain must inevitably ensue.

While all the exceptions in the enacting clause are required to be negatived, it is immaterial what precise words are used, if they clearly and explicitly accomplish that purpose. There is no necessity that the exact words of the statute should be adopted. Other language of the same legal import, excluding with equal certainty the exceptions of the statute, may be employed. The substantial meaning, not mere verbal identity, should be regarded.

In *Spiers* v. *Parker*, 1 D. & E. 141, which was an action of debt on a penal statute, and where the same principles as in indictments apply, BULLER, J., says, "nothing is to be presumed, but what is expressly stated in the declaration, or what is necessarily implied from the facts which are stated. I know of no decision against this rule." In *Williams* v. *Hingham Turnpike*, 4 Pick. 346, PARKER, C. J., says, "it cannot be presumed that facts not stated have been proved, unless they are of a nature to be necessarily inferred from those which are alleged." "In civil or penal actions enough must be stated in the declaration or must necessarily be inferred from what is stated, to show a perfect right of action."

Whatever is necessarily inferrable, is in fact stated, else there would be no ground for such necessary inference; and whatever is thus stated, the Court cannot disregard. No greater absurdity can be conceived, than when an offence is fully and clearly set forth, to discharge the guilty, because the precise words, adopted by the draftsman of the statute, had not been inserted in the indictment. It would be to ascribe the same sacredness to the words of a statute, which the Roman jurisconsults ascribed to verbal formulas and to corporeal symbols. In *United States* v. *Bachelder*, 2 Gal. 18, STORY, J. says, "it is not in general necessary, in an indictment for a statutory offence to follow the exact wording of the statute. It is sufficient if the offence be set forth with substantial accuracy and certainty to a reasonable intendment. The cases cited from the common law, where a different rule is supposed to prevail, do not apply. In these cases, the very technical words used are those only, which constitute the specific offence. The law allows no other because no other words are exactly descriptive of the offence.

In *State* v. *Little*, 1 Verm. 534, Hutchinson, J., refering to the indictment, says: "It does not attempt to charge the defendant in the words of the statute. Nor was that necessary, if other equivalent words were used. That technical notion of construing language used in criminal proceedings, which would exclude every common and reasonable intendment, seems in modern instances to have been exploded." The same principles received the sanction of the Court in *People* v. *Rynders*, 12 Wend. 425. In *Commonwealth* v. *Odlin*, 23 Pick. 275, the defendant was indicted for selling spirituous liquors in less quantities than fifteen gallons. The objection taken was, that the indictment did not sufficiently negative that quantity. In reference to that, the Court remark, "we do not consider that any particular form of words must be adopted, but some words must be used, which convey the idea of a sale under fifteen gallons,

The Court therefore are to look at the language of the indictment to ascertain whether it excludes the possibility of the defendants' having been duly appointed to sell, for if not thus appointed, as that is the only defence, the verdict must stand.

The indictment charges that each of the defendants "without *any lawful* authority, license or permission, did presume to be and was a common seller of spirituous and intoxicating liquors," &c. The words "without being duly appointed," therefore, are not to be found in the indictment. The question therefore is whether this language excludes the case of an appointment, for if not, judgment must be arrested. No provision is made for granting a license by this statute. As the law now is, none can be granted. The only authority under which a legal sale can be made, is by virtue of § 2. Now the agent appointed under that section, and he alone, would have "lawful authority." No other person can have "lawful authority" to sell. The existence of lawful authority is denied. The existence of a due appointment, the only mode of conferring lawful authority is equally negatived. The proof of an appointment would disprove the allegation in the indictment, would establish legal authority and protect the defendant, *if the sales were within the appointment.*

It is insisted in the defence, *that* by a just construction of the statute no one who has been appointed agent, though he may have knowingly and intentionally violated its provisions and sold for other than medicinal and mechanical purposes, can be indicted and punished as a common seller; — *that* in such case he is only liable to a suit on his bond and to a revocation of his authority; — *that* if he were punishable criminally, he would suffer twice for the same offence; and *that* therefore the appointment must be negatived by express words in the indictment.

To decide this satisfactorily, it will be necessary to examine different sections of the statute for the purpose of gathering therefrom the real intentions of the legislature. The first section prohibits the sale of any spirituous or intox-

icating liquors or any mixed liquors a part of which is spirituous or intoxicating, except as hereinafter provided. The only provision for selling is to be found in section second, which provides for the appointment of "some suitable person as the agent of said town or city, to sell, at some central and convenient place within said town or city, wines or other intoxicating liquors to be used for medicinal and mechanical purposes and no other; and said agent shall receive such compensation for his services as the board appointing him shall prescribe," &c. The agent thus appointed, previous to receiving his certificate of appointment, is required to give bond to conform in all respects with the provisions of the law relating to the business for which he is appointed. For any violation of this contract, and for that alone, the individual appointed would be civilly responsible in damages. It presents the ordinary case of a contract to do or to refrain from doing certain specified acts and nothing more.

The argument of the counsel for the defendants assumes that it was the intention of the legislature, that no one thus appointed should be criminally punished, however numerous and intentional may be his violations of the statute. The appointment is required to be of some suitable person. It reposes trust, it implies confidence in the integrity of the person thus appointed. The violating the trust, the forfeiting the confidence thus reposed, furnish no reasons for exemption from the inflictions of penal law. The statute is violated if the individual appointed knowingly sells without the authority given and in violation of his bond, equally as if he had never received any appointment. What the law prohibits is done in either case, and little reason is perceived why the offender should be exonerated from its penalties, because to the violation of its provisions he has superadded the aggravation of a breach of implied faith as well as of contractual obligation.

It is said that in this way he will be twice punished for the same offence. But it is not so. In a suit on the bond, the extent of liability will be such damages as the jury under

proper directions from the Court may assess for a breach of the conditions of the bond. No penalty for an offence created by statute will have been imposed. If then an indictment cannot be sustained, or an action of debt for a penalty be maintained, the deliberate and intentional violations of law will escape all punishment. An individual enters into a recognizance to keep the peace as to all the good citizens of the State, but particularly as to A B, and after giving such recognizance commits a breach of the peace by making an assault upon him. He is liable on his recognizance, he is responsible to the person assaulted in damages, but he is none the less liable to indictment. The cashier of a bank gives bonds for the faithful performance of his duties, and embezzles its funds. Would it be any defence to criminal proceedings, that he might be liable for a breach of his civil contract? Civil and criminal proceedings are separate and distinct, and in no instance can a civil liability be set up as a bar to criminal process. In some cases the civil remedy remains in abeyance till after the termination of the criminal prosecution, if one has been commenced, and if such prosecution is not commenced, the civil injury is by the common law, deemed forever merged in the public offence. In no case is the precedence given to the rights of individuals over those of the public, — and there is nothing in this statute which indicates an intention on the part of the legislature to be indulgent to offenders, still less to those, who, on every principle of morality, must be deemed as especially deserving of punishment.

Sales for medicinal and mechanical purposes by one not appointed an agent, would constitute the person selling a common seller, and render him liable for the statute penalty. The second section provides for the appointment of an agent, by whom alone sales can be made, and exempts him from the penalty which would otherwise accrue. The words in § 8, "without being duly appointed as aforesaid," do not refer to a manufacturer of spirituous or intoxicating liquors, for no provision authorizes or permits their manufacture. They do not refer to a common seller, for the agent appointed is

peremptorily inhibited from being one. For what purpose then, are these words inserted? Undoubtedly to protect the limited sale for medicinal and mechanical purposes, which the agent under § 2, is authorized to make. The exemption from punishment is only coëxtensive with the authority conferred, and is limited by it. As the appointment is to sell for medicinal and mechanical purposes and none other, so those only are to be exempted from the penalty, attached to a violation of the statute, who act within their appointment. Any other construction would involve the absurdity that the same section which imposes the penalty, absolves from all liability those whose violation of its prohibition is most without excuse. No one is or can be "duly appointed" a manufacturer or common seller in its more general sense, and no one in either case is protected as such. If his appointment be under the statute and he sells under it, his sales are by "lawful authority," and his defence would be established. All other sales would be against the spirit and object of the law, and when knowingly and intentionally made in disregard of its provisions, no reason can be perceived why the penalties attached to its violation should not be imposed. The law presumes good faith and integrity on the part of an agent in all sales made by him, but if the presumptions of law are overcome, if the jury are satisfied that he has designedly and intentionally disregarded the provisions of the statute, it would be a reproach to its administration if the guilty were to escape its penalties. The authority to do a lawful, can be no justification for the intentional performance of an unlawful act. In *State* v. *Hutchinson* the indictment is adjudged good. In *State* v. *Keen* the exceptions are overruled, and judgment is to be rendered on the verdict.

Shepley, C. J., Tenney and Howard, J. J. concurred.

ROBINSON *versus* FURBUSH *and Trustees.*

In a trustee process, co-partners, summoned as trustees, and indebted to the principal defendant, may set off a claim due from him to one of the co-partners.

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

TRUSTEE PROCESS.

The question was upon the liability of the trustees. They disclosed and showed that as co-partners, they owed the principal defendant at the time of the service of the writ, $56,51, but he was indebted to one of them, in his individual capacity, $73,27. The Judge allowed the claims to be set off, and discharged the trustees. The plaintiff excepted.

Lancaster & Baker, for the plaintiff.

B. A. G. Fuller, for the trustees.

HOWARD J. — The assumed allegations, and proof of facts not stated or denied by the supposed trustees, were not relied upon, at the argument, under the provisions of the R. S. c. 119, § 33, and amendment, 1842, c. 31, § 15. The exceptions only, are properly before us, for consideration. Upon them, however, we are authorized to reëxamine and determine the whole case, both as to fact and law, " when, in the discretion of the Court, justice shall require. Stat. 1849, c. 117, § 1, 2.

The supposed trustees were partners, and disclosed the state of the accounts between themselves and the principal. They were indebted to him, and are trustees, unless a payment by one of them, can be retained or deducted from the credits in their hands R. S. c. 119, § 70.

Each partner is liable for the partnership debts, and may discharge them with his private funds, or with those of the partnership, as he pleases. Existing relations and rights, in this respect, are not affected by the interposition of the trustee process, excepting in reference to subsequent payments.

One summoned as trustee of several defendants, not general partners, to whom he is indebted, having a claim against a

part of them, may set it against his indebtedness to those who are thus indebted to him. *Fisk* v. *Herrick & trustee*, 6 Mass. 271. But when the defendants are partners, his indebtedness would constitute partnership funds, which he could not appropriate to the payment of the private debts of the individual partners, and the set-off could not be allowed.

Where the supposed trustee has a debt due from the defendant jointly with others, whether partners or not, he may set it against what is due from him to the defendant, as the latter would be liable for the joint debt, and the demands would be mutual.

So when one of several jointly indebted to the defendant, is summoned as his trustee, having several demands against him, he may be allowed to set it against his joint liability, whether the joint debtors be summoned or not, and whether they be partners or not; upon the principle that any one liable for it, may discharge a debt. Yet, one thus summoned may object to answering, on account of the non-joinder of the joint debtors; and those not summoned may discharge the joint indebtedness, unaffected by the trustee process. *Hathaway* v. *Russell*, 16 Mass. 473; *Hutchinson* v. *Eddy*, 29 Maine, 91.

The demand of one of the trustees, in this case, against the principal debtor, accruing before service of this process, was allowable in set-off to his joint liability.

Exceptions overruled, the judgment of the District Court affirmed, and the Trustees discharged.

SHEPLEY, C. J., TENNEY and APPLETON, J. J. concurred.

EATON *versus* MCKOWN.

A bill or note may be negotiated after it is paid, if no person would thereby be made liable upon it, who would otherwise be discharged.

If the owner of paper negotiated in blank, deposit it for collection, and the depositary transfer it as his own property; the owner, after paying its amount to the transferee, may maintain suit upon it against the parties previously liable, such payment not being a discharge as to them.

If paper, which a person has negotiated, come again to his possession, he may, in the absence of controlling proof, be regarded as the owner, and as such may recover upon it, with or without striking out any special indorsement.

On Report from *Nisi Prius*, Wells, J. presiding.

Assumpsit upon a bill of exchange drawn by the defendant payable to his order and by him accepted and indorsed to the Franklin Bank, upon a settlement of accounts. It had an indorsement as follows: — "Pay to the order of J. C. Brewer, Cashier. John Otis, President of Franklin Bank." Though objected to, the plaintiff, by leave of the Judge, struck out the last indorsement. There was also a certificate, made by the cashier of the Suffolk Bank upon the bill, that its contents had been paid by the plaintiff. The defendant insisted that that payment defeated the bill, or at least took away its negotiability, so that this suit is unmaintainable.

Otis, called by the plaintiff, was a stockholder in the Franklin Bank. He was objected to, but was admitted. He testified that, by an arrangement before the draft matured, the "plaintiff was to take it at his own risk, and pay it to the Suffolk Bank, if the defendant did not; that it was sent to the Suffolk Bank for collection, that the plaintiff paid it, and the amount was placed to the credit of the Franklin Bank, in account with the Suffolk Bank.

The defendant, with a view of showing that there were mistakes in the settlement between himself and the Franklin Bank, introduced and examined witnesses upon several particulars in relation to which the mistakes were alleged to have been made, and contended that the connection of the plaintiff with the bank was such as that he must be considered as having the draft, subject to equities.

The case was submitted to the Court, with power to settle the facts upon the testimony.

Paine, for the plaintiff.

Evans, for the defendant.

1. The plaintiff is no party to the draft in suit — has no connexion with it, and can maintain no suit upon it.

He is the holder of it, only in virtue of having *paid it.*

He paid it *voluntarily*, — being under no obligation to do so. It was not paid for the honor of the drawer, accepter or indorser.

If he had been liable on the draft, and had taken it up, he could look to the prior parties. *Nevis & al.* v. *DeGraw*, 15 Mass. 436.

But he was in neither of these positions, and as a stranger to the draft, paid it in his own wrong.

The draft having been paid, was *functus officio*. It was discharged.

If the plaintiff have any remedy, it is by action for money paid, &c., and it must then be shown that it was paid at defendant's request.

2. Plaintiff had full knowledge of the origin of the draft, and stands in no better condition than the bank would, if the action had been in its name. All the original defences are open.

3. Upon the facts proved, it is beyond question that the defendant was not indebted to the bank when the draft was given.

4. The draft was therefore without consideration, or it may be regarded as given upon mutual mistake — a supposed indebtedness when none existed.

The defendant relied upon the assurances of the plaintiff or the bank, their books, the means of corrections not being then at hand, they cannot now object to this defence. *Union Bank* v. *Bank of U. S.*, 3 Mass. 74; *Whitcomb* v. *Williams*, 4 Pick. 228; *Garland* v. *Salem Bank*, 9 Mass. 408; *Morton* v. *Marden*, 15 Maine, 46.

Shepley, C. J. — The suit is upon a bill of exchange drawn by the defendant upon himself and payable to his own order. When offered in evidence it appeared to have been indorsed by him in blank and to have been indorsed by the president of the Franklin Bank to the cashier of the Suffolk Bank.

The plaintiff was permitted to erase the last indorsement.

In the case of *Dugan* v. *United States*, 3 Wheat. 172, it was decided, that a person, who indorses a bill to another and comes again to the possession of it, may be regarded as the owner, unless there be testimony to the contrary, and as such may recover with or without striking out any special indorsement. That rule has been received in this State. *Green* v. *Jackson*, 15 Maine, 136.

There was an indorsement on the back of the bill made by the cashier of the Suffolk Bank, that the bill had been paid to that bank by the plaintiff.

It is insisted, that such payment will prevent a recovery by the plaintiff.

The rule has been long established, that a bill or note may be negotiated after it has been paid, if no person would thereby be made liable upon it, who would otherwise be discharged. *Callow* v. *Lawrence*, 3 M. & S. 95; *Hubbard* v. *Jackson*, 4 Bing. 390; *Mead* v. *Small*, 2 Greenl. 207; *Warren* v. *Gilman*, 15 Maine, 70.

This bill having been indorsed in blank by the defendant became negotiated by delivery.

It appears from the testimony of Otis, that the plaintiff was to take the bill at his own risk as the immediate holder from the Franklin Bank, and that he was to pay it, if the defendant did not. Those banks appear to have been employed to collect it; and yet the Franklin Bank appears to have transmitted it to the Suffolk Bank as its own property and to have received credit for it. As the defendant failed to pay it, the plaintiff was obliged to pay it to regain possession of it. Such payment would not operate to discharge the defendant as drawer and indorser.

Otis does not appear to have been interested in the event of this suit, and he was properly admitted as a witness for the plaintiff.

The plaintiff is in a position no more favorable to a recovery, than the Franklin Bank would be; and it is insisted, that nothing was due to that bank, when this bill was drawn to pay a balance supposed to be due.

If there had been no settlement made between the defendant and the bank, the testimony now introduced in defence would, in an action between them, have been sufficient to prevent a recovery for certain sums charged to the defendant as paid on his account to H. K. Stevens, for which no other vouchers were produced at this trial, than letters from the defendant to the cashier of the bank authorizing him to honor the drafts of Stevens. The burden of proof in such a suit would have been upon the bank, and it must have failed upon the proof now presented.

The rights of these parties are presented under very different circumstances. This bill was drawn to pay a balance found to be due to that bank, upon a settlement deliberately made between the cashier and the plaintiff acting for the bank and the defendant, which was signed by the cashier and the defendant on the books of the bank. The charges now alleged to have been improperly made by the bank were then entered upon its books and were admitted by the signature of the defendant. The cashier had deceased before this trial. The plaintiff could not testify. The grounds, upon which that settlement was made, are exhibited but very imperfectly. There may then have been letters, drafts, orders, vouchers, or other evidence, produced by the cashier, which satisfied the defendant, that those sums had been paid to H. K. Stevens in consequence of his letters authorizing it. With respect to the other charges, respecting which errors are alleged to have been made, the testimony is still less satisfactory. It is very uncertain, whether the bank was not justly entitled to make them.

By the settlement the whole burden of proof has been changed. The bank can no longer be called upon to establish its right to make the charges. The burden is now upon the defendant to prove clearly, that there were errors made in that settlement, and show distinctly, what they were. It is not now sufficient for him to show, that certain charges were admitted by him upon insufficient proof, that they were

due. He must, to be relieved, show, that they were not in fact due.

The testimony falls much short of this; and fails to prove clearly, whether there was or was not any error committed in that settlement. The defence therefore fails.

Defendant defaulted.

TENNEY, HOWARD and RICE, J. J., concurred.

BOOTHBY *versus* STANLEY *&* *al.*

If one party introduce a mutilated paper, the other party is not bound to explain the mutilation.

In a case submitted to the Court, upon the evidence, there appeared to have been a material alteration in a return made by the officer upon one of the legal precepts submitted for consideration. No suggestion was offered, that the alteration was not made by the officer, or that the return, in its altered state, did not conform to the facts; — *Held*, that the presumption was, not that a fraud had been committed, but that the alteration was rightfully made before the signing of the return.

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

PETITION FOR PARTITION. The petitioner claimed title under sale to him of an equity of redemption by an officer upon execution. Whether that title was valid, depended upon the sufficiency of the officer's return on the execution. In relation to the notices of the time and place of the sale, there appeared to be an erasure upon the return. That erasure is described in the opinion of the Court.

The parties agreed that, unless the Court should be of opinion upon the evidence, that the petitioner is entitled to a judgment for partition, he is to become nonsuit.

Paine, for the petitioner.

May, for the respondent.

HOWARD, J. — The title of the petitioner to the premises claimed originates in a sheriff's sale, on execution, of an equity of redemption of a mortgage, and depends upon the sufficiency of the proceedings of the officer in effecting the

sale and conveyance. Unless he complied with the requirements of the statute, in the transaction, the sale was inoperative, and gave to the purchaser neither seizin nor title.

Preparatory to the sale, the statute provides, among other things, that the officer shall cause notifications of the time and place of sale "to be posted up in some public place in the town where the land lies," &c. R. S. c. 94, § 37.

The land in this case lay in the town of Leeds, and the officer's return states, that he gave "public notice of the time and place of sale, by posting up notifications thereof in the said town of Leeds, and also, by posting up notifications thereof in two public places in each of the adjoining towns, of Wayne and Monmouth," &c.; but does not state that he caused notifications to be posted up in some *public place* in the town of Leeds. This is not in compliance with the requirements of the statute.

The return appears to have been first written so as to read, that the notifications had been posted in *two public places in* said town of Leeds. But the word *two* is altered to *the*, and the words *public places in* are erased, as if by the mark of pen and ink drawn across, with a design to obliterate them. It is not suggested, that the alterations were not made by the officer; or that the return is not in conformity with the facts. So far as they are traceable, these alterations appear to have been made in the same ink and handwriting with the body of the return. In such cases, fraud cannot be presumed, unless the ordinary rules of presumption of honesty and innocence be disregarded. The alteration of any legal instrument, in the absence of proof, or satisfactory explanation, to the contrary, should be presumed to have been made simultaneously with the instrument, or before its execution. 1 Greenl. Ev. § 564; *Gooch* v. *Bryant*, 13 Maine, 386. But if the rule were otherwise, as the return was introduced by the petitioner, the respondent is not called upon to explain any circumstances of suspicion attending it, tending to its impeachment.

We cannot regard the portion thus erased as any part of

the return; and consequently, must hold the notification posted in Leeds to be insufficient, and the sale and deed by the officer to be inoperative. *Franklin Bank* v. *Blossom*, 23 Maine, 546; *Abbott* v. *Sturtevant*, 30 Maine, 40; *Grosvenor* v. *Little*, 7 Greenl. 376.

The sale being void, the petitioner has not shown either legal title, seizin, or possession of the premises, and cannot have partition. R. S. c. 121, § 2, 11; *Marr* v. *Hobson*, 22 Maine, 321. *Petition dismissed.*

SHEPLEY, C. J., and TENNEY, RICE and APPLETON, J. J., concurred.

DUNLAP *versus* GLIDDEN.

It is not a rule of law, that all the points, which may be raised by the pleadings in a case, are necessarily involved in the decision.

In trespass *quare clausum*, an absolute title in the plaintiff is not essential. Such title is therefore not admitted by a default of the defendant.

A judgment upon such default is no estoppel to the defendant, in a subsequent suit, to assert title in himself or in another.

If the ground of a judgment be not shown by the record, it may be proved by parole.

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

TRESPASS, *quare clausum*.

This plaintiff had, on a former occasion, brought *quare clausum*, for trespass upon the same land against this defendant, who thereupon pleaded the general issue, with a brief statement, that the title to the land was in one Brann, and also in one Harriman, and that by the authority of them respectively, the defendant did the acts complained of. He, however, failed to prove any such authority.

In that suit, the *plaintiff* claimed title to the land by the levy of it made in 1836, upon an execution in his favor against one Bruce.

The *defendant*, as a second defence, relied upon a conveyance from Bruce to Brann, made before the levy, and a subse-

quent conveyance from Brann to himself. These conveyances he failed to establish, and judgment was rendered for the defendant. 31 Maine, 510.

In this case, the defendant offered to prove that, before the plaintiff's levy or attachment of the land, it was in fact conveyed by a sufficient deed from Bruce to Brann, of which the plaintiff, at the time, had actual and express notice; also, that the deed has been lost without having been recorded; and also to prove its contents.

The trespass complained of in this suit covers the time from *March* 7, 1847, to Oct. 1849. The defendant also offered to prove, that the land was conveyed to him by Brann on *April* 26, 1847, also that it was released to him by Bruce on *June* 3, 1847.

This evidence was objected to by the plaintiff on the ground, that the same question of title had been settled between the same parties in the former suit.

The Judge was of opinion, that notwitstanding such evidence, if admitted, the jury would be bound to render a verdict for the plaintiff, because of the proceedings in the prior suit. The case was then taken from the jury, and submitted to the full Court.

Lancaster & Baker, for the plaintiff.

The title derived from Bruce to Brann and from Brann to the defendant, is the question now put in issue. This is precisely the same issue, which was settled in favor of the plaintiff in the former suit. The judgment in that case is therefore conclusive against the admissibility of the testimony offered by the defendant. *Dunlap* v. *Glidden*, 31 Maine, 435, and 510.

But if that judgment was not conclusive, the facts offered to be proved, establish no title in the defendant. By the levy against Bruce in 1836, the plaintiff took a seizin in the land. He then entered into possession claiming an indefeasible title. That possession he retained till the trespasses sued for in the former action were committed. The facts offered to be proved are, that, pending that suit the defendant

bought up an outstanding title; — one, however, which had lain dormant nearly twenty years. That title never had a valid existence; was merely a pretended one, and cannot affect the plaintiff's rights.

F. Allen, for the defendant.

HOWARD, J. — In a former suit of trespass, upon the close described in the declaration in this case, between the present parties, the defendant pleaded the general issue, and filed a brief statement of title in Brann and Harriman and justified under them. By the report in that case, which, with the judgment, is referred to, and made a part of this, it appears that the defendant offered to read in evidence a paper as an original deed, and that its execution was denied, and was not proved; and that he offered to prove the contents of a deed alleged to be lost, of the execution of which there was no proof. This evidence was rejected at the trial, and thereupon the defendant submitted to a default, which was to stand, if, in the opinion of the Court, the plaintiff was entitled to recover upon the evidence legally admissible, and if the evidence offered by the defendant was properly rejected. Judgment was subsequently rendered upon the default, by the full Court. *Dunlap* v. *Glidden, jr.* 31 Maine, 510.

The defendant, in this suit, claims to have acquired the title of Brann, and places his defence upon it, by pleading the general issue, and title in himself. The question now presented is, whether he is estopped to set up that title, by the adjudication in the prior suit. We think he is not.

The judgment, in order to be conclusive, must have been upon the same subject matter. Every point which might have been raised by the pleadings, is not necessarily involved in the decision. When the record of a judgment does not exhibit the grounds upon which it proceeded, it may be shown by parol proof, that matters which might have been admissible under the pleadings, were presented and considered in the adjudication, or that they were withheld. *Seddon* v. *Tutop*, 1 Esp. R. 401; *Ravee* v. *Farmer*, 4 T. R. 146; *Phillips* v. *Berick*, 16 Johns. 136; *Wood* v. *Jackson*, 8

Wend. 9; *Bridge* v. *Gray*, 14 Pick. 55; 1 Greenl. Ev. § 528, 532.

It cannot be determined by the record of the judgment, that the title of Brann was passed upon, and considered, in confirming the default in the prior suit. Or, at most, it would not afford conclusive evidence of a prior adjudication of the title, and proof *aliunde* is admissible to show that it was not, in fact, considered in the former action. And it appears, that that case turned upon other considerations than the title of Brann. The defendant failed to show any evidence of license or authority under the alleged owners, and their title was of no importance to him. He had no connection with it, and it could not have afforded him any protection, whatever may have been its character. It was not material to the result, was not presented for consideration, by the defendant, and could not have been determined by the Court.

An absolute title to the *locus in quo* is not essential, in the action of trespass *quare clausum*, and the defendant cannot be considered as admitting it to be in the plaintiff, by consenting to a default; nor is he thereby estopped, subsequently to assert that the title was then in himself, or in another, whatever may have been the form of pleading. By submitting to a default, unless under special stipulations, he, in effect, withdraws the issue from the Court and jury, and yields to the claim of the plaintiff, without surrendering other rights *in præsenti*, or *in futuro*.

The case must stand for trial.

Shepley, C. J., and Tenney, Rice and Appleton, J. J., concurred.

Smith *versus* Davenport.

If one part of a commercial contract, upon a literal construction, be found at variance with another part, the part which contributes more essentially to the contract and becomes the more material, will be entitled to more consideration than the part which is less so.

Where a cargo is shipped to a foreign country, without naming any particular port or place of delivery in that country, it is fair to conclude that the port of *general* delivery of *such* cargoes in that country, was the place intended in making the shipment.

When goods on shipboard are consigned to the captain for sale, his power to sell at the port of destination is not revoked by a sale made while the goods are at sea, and of which he had received no notice. The purchaser, in such case, adopts the captain as *his* consignee, until he appoints some one else to act for him.

If the goods thus sold while at sea, were by the contract of sale to be delivered to the purchaser on their arrival, and he have no one there to receive them, the captain, when unlading them, is to be deemed the agent of the seller in delivering, and of the purchaser in receiving them.

Covenant Broken.

The plaintiff was owner of one eighth of the barque Arco Iris, and of her cargo. Among other things the cargo consisted of a quantity of boards. The barque sailed from Maine about August 1, 1849, under command of Captain Coburn, a part owner, bound to California, with general authority to dispose of the vessel and cargo according to his discretion. He touched at Monte Video, where, in October, 1849, he took in passengers, sold a small part of the boards, and used a few, not exceeding five hundred feet, in erecting some new berths, &c.

On the 5th of January, 1850, the barque having then been about five months on her way, the following contract was made by these parties, under their seals, viz: —

"Whereas the said Smith is owner of one eighth of a part of a cargo of boards amounting to one hundred and eleven thousand two hundred and eighty feet, more or less, shipped from Gardiner on board the barque Arco Iris, and now supposed to be on the way between Monte Video and California, it is agreed between the parties that the said Smith hereby sells and transfers to the said Davenport all his right, title and interest in the said boards at the rate of two hundred dollars per thousand feet, for what are delivered in California, to be paid in six months from the date of the arrival of the lumber at California at the port of discharge. The said Smith is to deliver the said lumber alongside at a reasonable time after its arrival. The said Davenport has the privilege

of appointing an agent to receive and sell the said lumber, and is to pay all expenses incident thereto, and is to give his note in payment of said lumber as soon as its arrival and delivery can be ascertained.

"And in case the lumber, from any cause, should not arrive, then this agreement to be null and void."

The barque arrived at San Francisco in California in February, 1850. No person appeared there to take any delivery or charge for the defendant. The boards were disposed of by commission merchants, by direction of the captain. There were no wharves at San Francisco, and vessels were unloaded half a mile from the shore, at great expense, by the aid of lighters.

On May 29, 1850, Capt. Coburn addressed a letter to the plaintiff from San Francisco, stating the quantity of boards, landed at California, to be 89,421 feet. This letter also names the prices, expenses and commissions of the sale, and was placed in the defendant's hands several weeks prior to the commencement of the suit, which was on April 29, 1851. The captain in his testimony states that, at the time of testifying, he had rendered an account of sales of a part only.

On July 16, 1850, the plaintiff apprised the defendant in writing, that the vessel arrived at California on February 19, 1850, and that his one eighth of the lumber landed there, was 11,177 feet, for which he claimed the defendant's note at $200 per thousand, amounting to $2335,40, payable at six months from the time of said arrival.

On the 29th of the same July, the plaintiff apprised the defendant in writing, that his proportion of the avails of the California sales was $375,10, which was deposited, subject to his order, in the hands of H. T. one of the joint owners.

This action was brought upon the contract between the parties. The defendant pleaded the general issue, *non est factum*, with brief statement; 1st, that he has not broken but has kept and performed his covenants; 2d, that the plaintiff, at the time of making the contract, was not the owner of one eighth of said cargo of boards, although in and by

the contract, he engaged that he was such owner; 3d, that one eighth of the boards never arrived at California, in a condition to be there delivered to the defendant, nor did the plaintiff ever deliver the same or any part thereof, to him or to his agent there; 4th, that the time of the arrival of the boards, for which the plaintiff claims, "was never ascertained and made known by the plaintiff to the defendant nor by said plaintiff and defendant before the commencement of this suit," according to the meaning of the contract.

The case was submitted to the Court for its adjudication, with power to draw inferences as a jury might do.

H. W. Paine, for the plaintiff.

Emmons, for the defendant, offered an argument of much length and research.

The following epitome cannot adequately present it, and yet it is all for which room can be here allowed.—

By the contract in suit, Smith guarantees to the defendant, that he was *then* the owner of one eighth of a part of a cargo of boards, the exact quantity unknown, but supposed by Smith to be 111,280 feet, on board the barque, and supposed to be on the way between Monte Video and California; and he sells to Davenport all his right and interest in the one eighth of a part of such cargo of boards, and binds himself to deliver the same in California, to Davenport's agent, appointed to receive the same; with a proviso, that, if said one eighth of a part of said cargo of boards should fail of arrival at California, the contract was to be void.

The obligations of the contract were mutual and dependent. In such cases, the one party can claim performance of the other, only upon his own performance of his part of the obligation. 2 Poth. App'x, 43; 4 T. R. 671; 7 T. R. 125; 8 T. R. 366; Chipman on Con. 47. This principle appears to be conceded by the plaintiff; for he has deemed it necessary to allege, that the boards which he sold to the defendant arrived at California, and that the time of the arrival was ascertained on July 16, 1850. The *onus* is then upon the plaintiff to prove performance of his part of the contract.

1. The plaintiff warranted his *then* ownership of one eighth of *that* cargo of boards which had been shipped at Gardiner on board the barque. The contract being under seal, he is estopped to deny such ownership. Smith's Law of Contract, Law Lib. April No. of 1847, p. 23, note c.; *Carpenter* v. *Butler*, 8 M. & W. 200; Co. Litt. 352, b. He must, therefore, prove that ownership. It was upon the faith of that warranty, that the defendant purchased. The plaintiff undertook to deliver to the defendant at California the full one eighth of said cargo of boards. He cannot, therefore, be permitted to allege that his ownership was, *at the time of the contract*, less than the one eighth of the cargo as it was, when shipped from Gardiner, or that the delivery of a less quantity than that, is a performance on his part.

But the facts proved are that, *before the time of making the contract*, a part of the boards had been sold, and a part used by the captain, at Monte Video.

By the failure to deliver that full one eighth of the original cargo of boards, the contract, according to its express terms, became void; nor will this effect be avoided by the words that the defendant should pay "for what are delivered in California." For, "in all contracts, he that speaks obscurely or ambiguously, speaks at his own peril," "and such expressions are to be taken most strongly against him." Noy's Max. 148.

The expression, "*for what are delivered in California*," manifestly refers only to the words, "*more or less*," in the contract. As it was unknown from the first, what was the quantity on board, it was to be ascertained on the delivery. Otherwise, the plaintiff might have retained any part, which his interest or caprice might dictate, and the defendant's purchase thereby become fruitless.

Neither can it be maintained that the defendant was merely to take the plaintiff's place in relation to the cargo; because, 1st, The contract shows that the plaintiff was but a tenant in common, and yet, by the effect of the contract, he stipulated or the delivery of a *divided* eighth. It was to the defendant

a valuable part of the contract, that he should receive his part in severalty; 2dly, because it is a rule that every part of an instrument shall, if possible, be made to take effect. Chit. on Con. 4th Ed. 69, 73; 9 Pick. 422; 10 Pick. 230; 13 Pick. 167. That the defendant's part of the boards were to be delivered in severalty, is apparent from the plaintiff's agreement "to deliver them alongside," and that defendant might appoint an agent "to receive and sell" them.

The contract was imperfect. It fixed California as the place for delivery of the boards. California had several ports. It could not be known at which one the delivery should be made. Unless that were known, the defendant could not have the benefit of appointing an agent. A further agreement therefore was necessary, without which the contact cannot be enforced.

But if, from the evidence and the circumstances, the Court might infer that San Francisco was the contemplated place for the delivery, the plaintiff is not relieved from difficulty. That city was without wharves or landing-place. Vessels were discharged half a mile from shore. The harbor was full of vessels. Where should the defendant's agent apply for the boards, to have them delivered *in a reasonable time*, as agreed? Was not something to be done, or some notice given by the plaintiff to secure to the defendant some availability in having an agent as stipulated? Was the agent to watch month after month, and explore every vessel till he should find the Arco Iris? The requisite acts on the part of the plaintiff in this respect, have not been proved, nor can be, for they were never performed.

Nothing has occurred in this case to exonerate the plaintiff from a full performance on his part. Before entitled to a suit upon the contract, he was to do every thing *that could be done* without the concurrence of the other party. Chit. on Con. 53; Chit. on Plead, 315, 3d Ed; 2 Salk. 623; 2 Poth. App. 44, No. 8; Yelverton, 87, Ed. by Metc.; 1 Poth. part 3, art. 6, § 2, 360.

The plaintiff alleges the delivery of 11,177 feet. This was

short of the quantity stipulated for. The Captain testified that he sold some, and used some in October, at Monte Video, and his deposition, which is referred to, shows that he there sold over 15,000. This was *before* the sale to the defendant.

Thus the plaintiff never had in California the quantity of boards which he contracted to deliver there to the defendant's agent. It was, therefore, out of his power to perform as he had agreed. The contract was entire, and cannot be apportioned. 2 Poth. 45, App. 8, 46; 7 T. R. 381; 3 Wend. 112; Comyn's R. 117; 2 Penn. 63; Chit. on Con. 4th ed. 352; 2 Doug. 620; Cro. El. 272; Comyn's Dig. Pleader, c. 52; 2 Saund. 351; 2 Lev. 23; Willes 496; 6 T. R. 665; Yelv. 76.

The principle established by these and many other authorities, demonstrates that unless the plaintiff carried and delivered the *full quantity* of boards contracted for, he can recover nothing.

There was no *delivery* of *any* boards at California; there was no preparation to deliver any. Mere unloading was not delivery. Neither were the boards contracted for ever carried there.

Thus was there an entire failure of the plaintiff to perform his contract.

Has he then any excuse for non-performance? There surely is no excuse that he can *rely* upon, for he has *averred* none. In 1 Chit. on Plead. 309, it is laid down, "when an obligation on the defendant to perform his contract depends on any event, which would not otherwise appear from the declaration, it is obvious that an averment of such event is essential to a logical statement of the cause of action, and should precede the statement of the defendant's breach. Such averments in a special action of assumpsit usually are, of the performance or an *excuse for non-performance.* See Chip. on Con., Specif. Art. 41. A plaintiff, counting upon a dependent contract must aver performance on his part, or that he has done all in his power to a performance.

The plaintiff then, not having averred any excuse for non-performance, can rely *alone* upon proof of *actual and full*

performance on his part. But it has been already shown, that there was no such performance. The plaintiff was not at California to deliver the boards; he had no one there authorized or capable to do it; and the boards were never there. Hence it was unnecessary that the defendant should have had any agent there to receive them. The plaintiff can find no protection in the fact that, *prior* to his contract of sale to the defendant, the boards, the very subject matter of the sale, had been sold to another. It was for *him* and not for the *defendant* to foresee and guard against such a contingency. 2 Black. Com. 340; Co. Litt. 206, a; Broom's Max. (110, 111,) 90 p.; Noy's Max. 137, (31); 2 Co. Litt. 334.

The note of the defendant was, by the contract, to be given on the ascertainment of the day of the barque's arrival. Until after the bringing of the suit, that day had not been ascertained. The plaintiff relies solely upon his letter to the defendant stating the time. Could such a bare statement, by the plaintiff only, bind the defendant, when perhaps the barque had never arrived, but been lost at sea? And to this day the quantity of boards carried to California has never been ascertained. So says the Captain's testimony. His return of the amount was "of a part only." With no ascertainment of the time of the arrival, with no ascertainment of the quantity carried, with no notarial documents, with not even a survey bill, and when in fact the lumber contracted for had never arrived, how could the defendant be bound to give his note to so large an amount as that claimed in the plaintiff's letter; and especially when by the *express terms of the contract*, it was to be *void* "in case the lumber," *contracted for*, "*from any cause* should not arrive?"

Shepley, C. J. — The suit is upon a sealed instrument. It is a commercial contract made, while the parties were ignorant of the exact condition of the property, and providing for a sale and purchase of part of a cargo of lumber shipped on a hazardous adventure from Gardiner to California.

The rights of the parties may depend upon its correct con-

struction. The circumstances, under which it was made, as disclosed by the testimony, may be considered in connection with it to ascertain the intention. The vessel had been upon her voyage about five months.

The principal objections to a recovery by the plaintiff, made in a very elaborate argument for the defendant, will be examined : —

1. The first is, that the contract contains a warranty, that the plaintiff, at the time of its inception, was the owner of one eighth part of the cargo of boards shipped at Gardiner.

The intention of the parties is to be ascertained from an examination of the whole contract, and if one part, upon a literal construction, be found at variance with another part, the part, which contributes more essentially to the contract and becomes the more material, will be entitled to more consideration, than that, which is less so. The clause, which recites the proportion of cargo owned by the plaintiff, will be of less importance, if a sale of it was not made, while a sale of a part of it, as yet unascertained, was made.

By an examination of the contract it becomes quite apparent, that the intention was to purchase and sell such portion only of the cargo of lumber owned by the plaintiff, as should arrive in California. And that there was no intention to make the plaintiff warrant, that any particular portion, or that any portion, of it should arrive there.

While the contract recites in the present tense, that the plaintiff "is owner of one eighth part of the cargo," it also says "now supposed to be on the way between Monte Video and California." A small part of the cargo of lumber had before been sold at Monte Video in the month of October, 1849. A construction, which would make the plaintiff warrant, that no part of it had been used in the vessel or sold, would be almost as much at variance with its general tenor and spirit, as a construction would be, that no part of it should be lost by the perils of the sea.

The real intention appears to have been to state, what part the plaintiff then owned, if no occurrence had happened to

deprive him of it. This is discoverable from the use of the phrase "now supposed to be on the way," and from the sale of all the plaintiff's "right, title and interest in the said boards," and not of one eighth part of them.

Upon this construction of the contract there will be no foundation for another objection, that the lumber sold never did arrive in California.

2. Another objection is, that the agreement is imperfect and cannot be enforced without extraneous aid; and that has not been and cannot be obtained or shown.

The particular defect pointed out is, that no port or place in California is named, where that part of the cargo sold should be discharged or delivered.

If it should in such case appear, that the vessel had been cleared for a particular port in that State, or that the master had signed bills of lading to deliver the cargo at a port named; or that he had been instructed to proceed to a certain port to unlade, and that this was known to the parties, these facts might be considered in connection with the contract to ascertain their intention. In the absence of all such proof it might be a fair conclusion, that the part sold was intended to be delivered at the port of general discharge of the cargo in that country. In this case such an inference is more clearly authorized from the language used in the contract providing for payment within a certain time after "the arrival of the lumber at California, at the port of discharge," without naming any particular port.

3. Another objection is, that the plaintiff has never performed on his part by delivering according to the contract that part of the cargo sold by him to the defendant.

The language of the contract having reference to this matter is, "the said Smith is to deliver the said lumber alongside at a reasonable time after its arrival. The said Davenport has the privilege of appointing an agent to receive and sell the said lumber and is to pay all expenses incident thereto."

From the facts proved in the case and exhibited by the

contract it becomes apparent, that neither party was expected to be personally present to deliver or to receive the lumber. The cargo appears to have been consigned to the master for sale. He thereby became the agent of the persons interested in it. The defendant was under no obligation to appoint an agent to receive the lumber. He merely secured to himself the privilege of appointing one to take delivery of it and sell it. If he did not elect to appoint one, he must at the time of making the contract have understood, that some person was to receive and sell it for him.

Both parties understanding the probable position of the vessel on her voyage; the difficulty, if not the impossibility that would prevent their being personally present; the uncertainty, whether any communication could be made by post before the arrival of the vessel, while their contract provided for a delivery by some one to some one without any further acts performed by them, unless the defendant should elect to appoint an agent, must have contemplated, that the agency of the master and consignee would be continued. That he would be the agent for each party to perform the duty for each required by the contract. The same person might be agent for the seller to deliver and for the purchaser to receive. When thus agent for both parties he would be considered as acting for each in the performance of the duties required of each. While making a discharge of the cargo alongside he would be acting for the plaintiff. While there receiving it himself or by those employed to assist him he would be acting for the defendant.

The only rational conclusion is, that the parties intended, that he should be their agent to perform all their duties there, unless the defendant should elect to appoint one. There is no proof of such an election; and when the master as consignee took charge of the lumber as delivered from the vessel he must be considered as having done it for the defendant. The fact, that he had not been informed of the sale or change of ownership, and that he had thereby become the agent of another person can make no difference in this case. It is

not unusual, that a master of a vessel or a consignee of a cargo becomes without his knowledge agent for new owners by virtue of his character as master or consignee. His agency in such cases arises out of his being the agent for all persons interested. While the property is in his custody as agent the owners of it may be changed many times.

No severance of the eighth part from the other part of the lumber could have been contemplated without the appointment of an agent by the defendant or any communication made to the master, that there had been a change of ownership. There is no difficulty or inconsistency in coming to a conclusion, that the intention of the parties as well as their duties were and would have been different, if the defendant had elected to do it and had appointed an agent to receive and sell his lumber.

The intention appears to have been to permit the master and consignee to continue to act as the agent of all parties and to do the duties incumbent upon each, unless the defendant should appoint his own agent, and in such case to have him take the delivery of the share purchased as separated from the remainder and dispose of it according to his own instructions.

The only delivery contemplated by the parties, unless the defendant should appoint an agent to receive it, having taken place, the plaintiff must be considered with respect to a delivery as having performed the contract on his part.

4. A further objection is made, that the arrival and delivery of the lumber had not been ascertained before the suit was commenced.

The provision of the contract is, that the defendant "is to give his note in payment of said lumber as soon as its arrival and delivery can be ascertained."

The parties must have expected, that these facts would be ascertained in the usual course of mercantile business.

It would become the duty of the master and consignee to communicate to his known principals, what he had done for them. His letter bearing date on May 29, 1850, addressed

to the plaintiff and communicating the facts of the arrival and disposition of the lumber was placed in the hands of the defendant several weeks before the commencement of the suit.

The day of its arrival was not stated. The obligation to give a note was not made to depend upon the ascertainment of the day or time but upon the fact of its arrival. It might have been given on the ascertainment of the fact of its arrival and delivery, payable in six months from the date or time of the arrival of the lumber at California, leaving the time of payment to be subsequently ascertained. Although the defendant was informed on July 16, 1850, of the day, when the plaintiff alleged, that it had arrived, that did not prove, that it had arrived on that day. The contract did not impose upon the plaintiff the duty to ascertain and make known to the defendant the date of its arrival. The suit was not commenced, until many months had elapsed after the defendant had been informed of the day of its alleged arrival.

The defendant must be held liable to pay according to the terms of his contract for so much of the cargo of lumber as the plaintiff owned and caused to be delivered from the vessel in California. *Defendant defaulted.*

TENNEY, HOWARD, RICE and APPLETON, J. J., concurred.

NORTH, *Petitioner for partition, versus* PHILBROOK *& als.*

A deed of land in trust, though it contain no words granting an inheritance, will be construed to convey a fee, if such construction be necessary for effectuating the purposes of the trust.

Thus, a conveyance in trust, for the purpose of making sales, though it contain no words of inheritance, will convey a fee.

Land was conveyed *in trust*, to the use of G. one of the grantor's sons, for *his* life, and then "to descend and vest in the heirs" of the grantor. G. died subsequently to the death of the grantor, leaving one child. — *Held*, that, if it was at the death of the *grantor*, that the remainder, subject to the life estate, became vested in his heirs, G., being one of them, might effectually convey his vested remainder, thus leaving to his child no inheritance in the land. —

Also, *Held*, that, if the remainder was contingent until the death of G., and *then* vested in the heirs of the grantor, G., not being then in life, could not inherit, and his child could take nothing in the land, as she would not be among the heirs of the grantor.

Whether it was at the death of the grantor or at the death of G., that the remainder vested, was a point controverted, but not decided.

PETITION FOR PARTITION. The case appeared to be as follows: —

Joseph North and Hannah, his wife, were seized in her right of a valuable tract of land in Augusta. On the 7th of Jan'y, 1814, they conveyed it by deed of warranty to H. W. Fuller, "to have and to hold the same to said Fuller in trust to and for the uses" following, viz: — First, to and for the use of said Joseph and Hannah, and each of them, during their natural lives, excepting a small piece, called A, "which piece A is to go into the immediate possession of the said Fuller, for the use and benefit of our son Gershom North and Ann North, his wife, during their natural lives. And the said Fuller is hereby authorized to sell so much of the above granted premises, and to execute a good and sufficient deed thereof, as shall amount to the sum of eight hundred dollars, to be sold under the direction of the said Joseph North, for the purpose of erecting a dwellinghouse."

"Secondly, after the decease of the said Joseph North and Hannah North, the grantors, the income of said premises, above granted to the said Fuller, is to be appropriated by him, the said Fuller, to the maintenance and support of the said Gershom and Ann North during their natural lives; and, provided the said land shall not have been sold, nor the said building erected, in the lifetime of said Joseph, the said Fuller is hereby authorized, after the decease of said Joseph, to sell so much of the above granted premises, as shall amount to the above sum, and for the purposes aforesaid, out of such part of the premises as he shall think proper, and to erect the said building in any place on the premises, where he shall think it to be the most beneficial.

"And lastly, after the decease of Gershom North and Ann North, his wife, the above granted premises, excepting such

part thereof, as shall have been sold by the said Fuller, for the purposes aforesaid, are to descend to, and vest in the heirs of the said Joseph North and Hannah North, his wife."

On said 7th of Jan'y, 1814, there were five children, presumptive heirs of said Joseph and Hannah. The said Gershom was one of them.

The said Hannah North died in 1819, at which time all of her said five children were living. Her husband, Joseph North, died in 1825, at which time four of the children were living.

The trustee sold, under said power of sale and in the lifetime of Joseph North, a portion of the premises, not including any of the lot A, and appropriated the proceeds to the erection of a house on lot A, for the use of said Gershom and Ann. The residue of the lands conveyed to Fuller was set off on a petition for partition in 1826, among the heirs of said Joseph and Hannah North.

Said Ann North, the wife of Gershom, died without issue after the deaths of Joseph and Hannah, and in the lifetime of her husband. He married again, and died in 1849, leaving a minor daughter, his only heir, who is the petitioner in this case.

Her father, the said Gershom, in 1846, conveyed one fifth of the land in question to Philbrook, one of these respondents, by deed of warranty.

The trusts created for the benefit of Gershom and his wife Ann, were all fulfilled by the trustee.

The petitioner prays that one fifth of lot A, may be set off to her.

"The Court are to render such judgment in the case, as to law and justice may appertain."

May, for the petitioner.

The deed of trust clearly shows the intention of the grantors, that no inheritable estate should vest in Gershom North. All power over it was withheld from him, even during his life, and it was but a life estate that was intended for him. His insolvency and his vagrancy doubtless had much to do in the creation of the trust. At his decease, (for he survived

his wife, Ann,) the estate vested wholly in those "heirs" of Joseph and Hannah North, who were then in life.

The estate of Gershom was but for his life. He could have conveyed nothing beyond that. At his death, the deed to Philbrook was of no effect. Upon his death, and not till then, the estate was to descend and vest in the *then* surviving heirs of the grantor. *Childs* v. *Russell*, 11 Metc. 24. As he would then be no longer in life to inherit, he would not be one of the heirs.

There was, then, no remainder in which he could have had any rights, none which his deed to Philbrook could convey.

Though Gershom was thus cut off, his child, this petitioner, was not, for she comes in as one of the heirs of the grantors, and is therefore entitled to recover.

Upon the death of H. W. Fuller, the legal estate vested in *his* heirs, subject to the trusts, Gershom then being alive.

It was while the estate was thus vested, that Gershom undertook to *convey* to Philbrook. His deed therefore could convey nothing.

North & Mills, for the respondents.

1. The trustee having duties to perform requiring possession of the estate, the conveyance is a trust and not a use executed. 4 Kent, 304; 1 Hilliard's Real Property, 299, c. 22, § 11, 12, 13 & 14; *Norton* v. *Leonard*, 12 Pick. 155; *Ayer* v. *Ayer*, 16 Pick. 330.

2. The remainder in fee during the lives of the grantors was contingent; at the death of the survivor, the persons who could take, became known, and the remainder then vested. 4 Kent, 205; *Dagett* v. *Slack*, 8 Metc. 453; *Childs* v. *Russell*, 11 Metc. 16; *Brown* v. *Lawrence*, 3 Cush. 350.

3. Gershom North being alive at the decease of the grantors was an heir, and had an interest in the remainder, which he passed to Philbrook by his deed of 1846, and nothing descended to his heir, the petitioner. *Dagett* v. *Slack*, 8 Metc. 453; *Childs* v. *Russell*, 11 Metc. 16; *Brown* v. *Lawrence*, 3 Cush. 350.

Emmons, in reply. —

1. Henry W. Fuller took under the deed of Jan'y 7, 1814, an estate of inheritance. He must have taken such an estate, to enable him to execute the trust.

It is a settled principle, that the estate which a trustee takes, without regard to expressions of the trust, will be measured by the principles of the trust and coëxtensive therewith. Powell on Devises, in notes and cases there cited; Law Library, vol. 21, p. 129, 130, 131; Worthington on Wills; Law Library, May, 1848, p. 240; 2 Hilliard's Abr. p. 13 & 14; Lewin on Trusts and Trustees, Law Library, April, 1839, p. 119; Crabb on Real Property, Law Library, Feb. 1847, p. 595, § 1831.

2. The remainder was not vested till the death of Gershom. The petitioner took the estate which her father would have taken if the legal estate had vested at the death of Joseph North. She takes it by the form of the gift or deed of trust. Powell on Devises, in notes; Law Library, 168, 165, 169, 170.

Rice, J. — This is a petition for partition. The rights of the petitioner depend upon the provisions of a deed from Joseph North and Hannah North to Henry W. Fuller, dated Jan'y 7, 1814, and a deed from Gershom North to James P. Philbrook, dated Nov. 17, 1846.

The original estate was in Joseph North and Hannah North, his wife, in right of the wife. Gershom North was a son of Joseph and Hannah, who also had other children and heirs, and the petitioner is a daughter of Gershom.

Hannah North, one of the grantors to Fuller, died in Feb. 1819, and Joseph North, the other grantor to Fuller, died April 17, 1825. Ann North, wife of Gershom, deceased before her husband, but after the decease of both Hannah and Joseph. Subsequent to the death of Ann, Gershom married again, and died March 4, 1849, leaving the petitioner, a minor daughter by his second wife, his only heir.

The deed of trust from Joseph and Hannah North to Fuller

contains no words of inheritance. The first point raised at the argument was as to the character of the estate which passed to the trustee by that deed. The petitioner contended that it was an estate of inheritance, because nothing short of such an estate would enable the grantee in that deed to perform the trusts, provided in the deed, and carry out the manifest intention of the grantors.

As a general rule, such a quantity of estate will be held to be vested in trustees as is required for the performance of the trust; and therefore if land be given to a man, without the word heirs, and a trust be disclosed which can be satisfied in no other way but by the trustee's taking an inheritance, it has been held that a fee passes; so where there is a trust for sale, that is a purpose which it is impossible to serve unless the trustee have an inheritance, "for if they are to sell a fee, they must have a fee." Crabb on Real Property, § 1831, p. 594. So a trust to sell, even on a contingency, confers a fee simple as indispensable to the execution of the trust. Lewin on Trust and Trustees, 235.

Trustees must in all cases be presumed to take an estate commensurate with the charges imposed on them. 7 East, 99. Therefore, where lands are devised for a particular purpose, without words of inheritance, and the death of the devisee may defeat the object of the devise, he will take a fee. This doctrine is frequently applied to trusts created to support estates of inheritance. 8 Vin. Abr. 262, pl. 18.

When lands are granted to a trustee without words of perpetuity, he will by implication of law take a fee, if such estate be necessary to fulfil the objects of the trust. *Welch* v. *Allen*, 21 Wend. 147.

The grant to Fuller not only authorized him to go into the immediate possession of a portion of the estate, but also to "sell so much of the above granted premises and execute a good and sufficient deed thereof, as shall amount to the sum of eight hundred dollars," for the purpose of building a house, but further stipulated that, "provided the said land shall not have been sold nor the said building erected, during

the lifetime of the said Joseph, the said Fuller is hereby authorised, after the decease of the said Joseph, to sell so much of the above granted premises as shall amount to the above sum and for the purposes aforesaid, out of such part of the premises as he shall think proper."

To comply with these provisions it would seem to be necessary that the trustee should have an estate in fee, and that such was the intention of the grantors is obvious when all the provisions of the deed are taken into consideration.

The estate of the trustee being thus enlarged, by operation of law, its operation upon the rights of other parties must be considered. The grantors reserved to themselves, during their natural lives, the use of the principal part of the estate, remainder over to Gershom and Ann North during their natural lives, and lastly, after the death of Gershom and Ann, so much of the estate as remained unsold "to descend to, and vest in, the heirs of Joseph North and Hannah North, his wife."

At what point of time did the estate vest in the heirs of the grantors? This question was much discussed at the argument. But from the view we take of the case it is wholly immaterial, so far as the rights of the petitioner are involved, how this question is determined, and it is therefore unnecessary at this time to enter upon a discussion of the distinctions, which exist between vested and contingent remainders. The rights of other parties, not now before the Court, may be found more involved in the consideration of that branch of the law.

If, as is contended by the respondents, the heirs of Joseph North and Hannah North became known at the death of Joseph, and the remainder then vested in those heirs, with the right of possession of the estate after the decease of Gershom and Ann, then as a legal consequence, Gershom, being one of the heirs of Joseph and Hannah, became seized of a vested remainder in fee, which being a transferable interest, passed by his deed, dated November 17, 1846, to Philbrook, leaving no interest to be inherited by his daughter, the petitioner.

If, on the other hand, as is contended, by the petitioner, the estate remained contingent until the death of Gershom, and then, according to the terms of the deed of trust, vested in the heirs of Joseph and Hannah, the petitioner is equally excluded. She being the heir of Gershom and not the heir of Joseph and Hannah, and the interest of Gershom according to this construction of the deed being an equitable life estate only.

But it is strenuously contended that the petitioner is the heir of her grand-parents, Joseph and Hannah North, and therefore entitled to recover.

In a recent case in Massachusetts, *Brown & al* v. *Lawrence & al.* 3 Cushing, 396, which in all material points is strictly analogous to the case at bar, this question was distinctly before the Court, and directly decided. The action in that case was brought by grandchildren of the grantor, claiming as heirs of the grantor after the termination of an intervening life estate in their father, who during his life, had aliened his interest in the estate.

In giving the opinion of the Court, SHAW, C. J., says; "they cannot make themselves heirs of the grandfather, because their father, through whom they must claim, was living at the time of their grandfather's decease; and it is only when a son or daughter dies before the father, leaving children, that such children are heirs of a grandfather, or other more remote ancestor. These children were not born when the testator died; their father was then his heir, and became a new stock of inheritance to these demandants. If the estate vested in him, he had a capacity to alienate it, and did alienate it, by his deed to the city; if the estate did not vest in him, then nothing came to these demandants, as his heirs."

The Court are unable to perceive any principle upon which the petitioner can recover, and according to the agreement of the parties a nonsuit must be entered.

SHEPLEY, C. J., and TENNEY, HOWARD and APPLETON, J. J., concurred.

RACHEL MOTLEY *versus* SAWYER.

Under the recent statutes, relating to the property of married women, the property in a negotiable note may pass from the husband to the wife during coverture, by his indorsement and delivery of it to her.

After a dissolution of the marriage, such indorsee may maintain suit upon the note in her own name.

ON EXCEPTIONS from *Nisi Prius*, WELLS, J. presiding

ASSUMPSIT upon a promissory note, given by the defendant, in March, 1847, to Nathaniel Motley and by him indorsed to the plaintiff.

The plaintiff was the wife of said Nathaniel until May, 1850, at which time there was a divorce *a vinculo*, for the reason (among other things,) that he had deserted her for many years. There was evidence tending to show that in 1848, the note was in her possession, unindorsed, and that it was also in her possession in 1850, prior to the divorce, with the payee's name, written by him upon the back of it.

The defendant contended, that if the plaintiff had no other title to the note than by the indorsement of the husband during coverture, the action could not be maintained.

The Judge instructed the jury, *that*, ordinarily, possession of a negotiable note, indorsed by the payee, was *prima facie* evidence of a title to it, and would enable the holder to maintain a suit thereon; *that* this evidence might be repelled; *that* if the note was given to the plaintiff by said Nathaniel *during her coverture*, and was indorsed by him before the dissolution of the marriage, no title passed to her; *that* the note still remained the property of said Nathaniel, and the plaintiff could not maintain this action, without the consent of said Nathaniel.

Other grounds of defence were also set up, but the jury were instructed that, if the plaintiff had no title to the note, their verdict must be for the defendant, and they need not examine the other grounds; and they were instructed to answer (if their verdict should be for the defendant,) whether or not, they found that the plaintiff had a title to the note,

upon the foregoing principles. The jury found a verdict for the defendant, and replied that the plaintiff had not a title to the note.

The plaintiff filed exceptions to the ruling.

Evans, for the plaintiff.

Morrell, for the defendant.

Possession alone of the note by the plaintiff is not sufficient to entitle her to maintain the suit. No consideration is shown, no sufficient ratification, no recognition of the title since the divorce. The indorsement did not change the title. The presumption, which ordinarily arises from possession, is repelled by the fact, that she was not of legal capacity to take title.

The husband could not transfer the note to her directly, they being in law but one person. *Martin* v. *Martin*, 1 Greenl. 395; 2 Kent's Com. 129.

The legal interest must be shown in the plaintiff. *Bradford* v. *Bucknam*, 12 Maine, 15. The jury found, in answer to a specific inquiry, that plaintiff *had no title to the note*, that is, the indorsement by the husband was made during coverture. There was abundant proof to authorize this finding, that the note was Motley's, and that he left it as worthless, or by accident.

Howard, J. — By the common law, a man could not convey an estate by deed to his wife, nor could she acquire or possess personal property independent of him. But in equity, a married woman may take, and hold property by devise, against her husband's creditors in bankruptcy. *Bennett* v. *Davis*, 2 P. Wms. 316; and may acquire separate property when he has deserted her, which will not be subject to his disposition, *Cecil* v. *Juxon*, 1 Atk. 278; so her separate interest in property by agreement with him, will be sustained. *Slanning* v. *Style*, 3 P. Wms. 338; and a gift from her husband to herself will be supported. *Lucas* v. *Lucas*, 1 Atk. 270.

These principles of equity are becoming more familiar to Courts of common law, by adoption, and by statute provisions. They may seem like invasions upon its ancient realm, yet they do no dishonor to the general character of the common law; but rather tend to soften and bend its honest and rigid rules to the demands of the present state of social and domestic relations. *Draper* v. *Jackson,* 16 Mass. 480; *Stanwood* v. *Stanwood,* 17 Mass. 57; *Phelps* v. *Phelps,* 20 Pick. 556; *Adams* v. *Brackett,* 5 Met. 280; Stat. 3 & 4, William 4, c. 74; 2 Kent. Com. 163.

By the statutes of this State, (1844, c. 117, and 1847, c. 27,) a married woman may become seized and possessed of property, real and personal, by direct bequest, demise, gift, purchase, or distribution, as her own property, exempt from the debts or contracts of her husband; and may take property from him by gift, directly, subject only to the claims of his creditors, with prior contracted debts, who might thereby be defrauded.

The husband of the plaintiff could have transferred the note in suit, to her by indorsement, during coverture, and thus have passed the title to her, as against the maker, the defendant. After the divorce she could maintain an action upon it in her own name. By the provision of the statute of February 23, 1852, a married woman "seized and possessed of property, real and personal, has power to lease, sell, convey and dispose of the same, and to execute all papers necessary thereto, in her own name, as if she were unmarried." But this act cannot apply to the case at bar, the suit having been commenced before its passage.

The instructions that if the note in suit was given to the plaintiff by her husband during coverture, and was indorsed by him before the dissolution of the marriage, no title passed to her, and that the note still remained his property, were in conflict with the statutes referred to, and cannot be sustained. But, aside from the statutes, and even if the old common law doctrines remained unqualified, her title to the note might have been confirmed by the husband, after the divorce,

although the indorsement and transfer had been made to her before, and thus she might have acquired the property, and might maintain the action. *Exceptions sustained.*

SHEPLEY, C. J., and TENNEY, RICE and APPLETON, J. J., concurred.

SAWTELLE *versus* JEWELL & LOWELL *& al.*

An arrest on mesne process, upon contract, is allowed only upon the taking of an oath as specified in R. S. c. 148, § 2.

The oath will not authorize an arrest, unless it show that the debtor was "about to depart *and reside beyond the limits of this State;*"—

nor unless it show, that he was about to "take with him property or means exceeding the amount required for his own immediate support;" —

nor unless it show, that the sum due to the plaintiff amounted to "at least ten dollars."

For want of a sufficient service upon one of two or more defendants, sued jointly on promise, the writ will be abated as to all.

If such defect in the service be apparent upon the record, advantage of it may be taken on motion without plea.

ON REPORT from the *District Court*, RICE, J.

ASSUMPSIT. At the date of the writ, the defendants all resided in this State. The service upon Lowell was made by arresting his body and holding him to bail. Upon the other defendants the service was admitted to have been legally made.

On the back of the writ is the following certificate of the oath, made by the creditor to authorize the arrest: —

"Kennebec, ss. Nov. 12, 1849.—Then personally appeared Hezekiah Sawtelle, the creditor within named, and made oath, *that* the amount or principal part of the debt claimed by him, the said Sawtelle, the creditor, as within said, is actually due and unpaid. And *that* he has sufficient reason to believe and does believe, that William Lowell, one of the debtors, within named, is about to *exchange his place of residence and go beyond the limits of the State*, with property or means exceeding the amount required for his immediate support."

On the return term, defendants appeared by attorney, and moved that the writ be quashed.

The motion was founded on alleged insufficiencies in the oath taken by the creditor: — 1st, that it did not show that the debtor was "about to depart and *reside* beyond the limits of the State;" 2d, that it did not show, that he was about to "take with him property or means, exceeding the amount required for his own immediate support;" and 3d that it did not show, that the "sum due to the plaintiff, amounted to at least ten dollars."

By consent of parties the case was reported to the S. J. Court for a legal decision.

J. S. Abbott, in support of the motion.

Morrell, *contra*.

Howard, J. — Arrests of persons on mesne process, on contracts, are authorized in this State, only when the creditor, his agent or attorney, shall have previously made oath for the purpose, according to the requirements of the Revised Statutes, c. 148, § 2. The oath of the creditor, in this case, is defective in not stating that the debtor, who was arrested, was "about to depart and reside beyond the limits of this State, and to take with him property or means, exceeding the amount required for his own immediate support." The arrest was, therefore, unauthorized, and unlawful.

For want of sufficient service on one of the defendants, as joint promisors, the writ must be abated as to all; and this may be done on the motion founded on matters apparent upon the record.

The second and third objections were well taken, and are conclusive. *Bramhall* v. *Seavy*, 28 Maine, 45.

Motion sustained, and the writ abated.

Shepley, C. J., and Tenney, Wells, Rice and Appleton, J. J., concurred.

COUNTY OF LINCOLN.

LITTLE *versus* FOSSETT.

A bailee of personal property, injured while in his possession, may, in his own name, recover the amount of the injury in an action against the wrongdoer.

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

The plaintiff was riding with a wagon and harness, which he had hired of Dr. Clark. The defendant, in traveling with another carriage, negligently drove against the wagon, and thereby injured the wagon and the harness.

To recover for that injury, this action of trespass was brought by the bailee.

The defendant requested instruction to the jury, that if Dr. Clark owned the articles, and if the plaintiff had but a temporary possession, the plaintiff cannot recover for any permanent injury done to them.

This request was denied, and the jury were instructed that the plaintiff, by having the possession, was entitled to recover the entire damage done to the articles. The defendant excepted.

Lowell, for the defendant.

An action for the permanent injury is maintainable by the *owner*. 1 Chit. Pl. 8 Am. Ed., 61; *Davis* v. *Nash*, 32 Maine, 411; *Hingham* v. *Sprague*, 15 Pick. 102.

The remedy for the bailee is only for the injury done to his possession and to his special property.

If the bailee can recover for the whole injury he may deprive the general owner of all redress.

The doctrine, sometimes advanced, that the bailee, by being answerable over to the general owner, is entitled to recover the entire damage, is unsound. The bailee may be insolvent. Such a rule therefore defeats the just rights of the owner.

Kennedy, for the plaintiff.

APPLETON, J. — The law seems to be well settled that the

bailee of personal property may recover compensation for any conversion of or any injury to the article bailed while in his possession. The longer or shorter period of such bailment, the greater or lesser amount of compensation — and whether such amount is a matter of special contract or is a legal implication from the beneficial enjoyment of the loan, do not seem to affect the question. "The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass against a wrongdoer." 2 Kent's Com. 574. "By the common law, in virtue of the bailment, the hirer acquires a special property in the thing during the continuance of the contract and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it or any injury to it during the existence of his right." Story on Bailments, § 394. In *Croft & al.* v. *Alison*, 4 B. & A. 590, the Court held that the plaintiffs, who had hired the chariot injured, for the day, and had appointed the coachman and furnished the horses, might be deemed the owners and proprietors of the chariot, and as such might recover of the defendant for the injury it had sustained from his negligent driving. In *Nicols* v. *Bastard*, 2 Cromp. Mus. & Ros. 659, it was decided that, in case of a simple bailment of a chattel without reward, its value might be recovered in trover either by the bailor or bailee, if taken out of the bailee's possession.

The bailee is entitled to damages commensurate with the value of the property taken or the injury it may have sustained, except in a suit against the general owner, in which case his damages are limited to his special interest. If, say the Court, in *White* v. *Webb*, 15 Conn. 305, "the suit is brought by a bailee or special property man against the general owner, then the plaintiff can recover the value of his special property, but if the writ is against a stranger then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest, in trust for the general owner." This view of the law seems fully confirmed by the uniform current of author-

ity. *Lyle* v. *Barker*, 5 Bin. 457; *Ingersol* v. *Van Bokkelin*, 7 Cow. 671; *Chesley* v. *St. Clair*, 1 N. H. 189; 2 Kent's Com. 585.

The instructions given were correct. The exceptions are overruled, and judgment is to be rendered on the verdict.

SHEPLEY, C. J., and TENNEY and HOWARD, J. J. concurred.

LIME ROCK BANK *versus* MALLETT.

When the holder of a promissory note, knowing that one of the makers is but a surety for the other, contracts with the principal, without the knowledge of the surety, and for a valuable consideration, to enlarge the time of payment, the surety's liability to the holder is discharged.

If such holder have, without the consent of the surety and for a valuable consideration, contracted with the principal to enlarge the time of payment, the surety's defence will not be defeated by proof, of an *earlier* contract of the same kind, made *with the consent of the surety.*

Upon such a note, the holder had made several successive indorsements of the words, "Received, Renewed." To each of these indorsements a date was prefixed, each date being of a day subsequent to the pay-day of the note; — *Held*, that each of the indorsements was equivalent, to the words, — "Received the interest for a renewal, and that the word "Renewed" might be properly regarded as an agreement to consider the note to be the same, as if made in the same terms, anew from that date.

The receiving of interest in advance is a valuable consideration to support a contract for enlarging the time of payment.

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

ASSUMPSIT upon a note, dated Jan'y 28, 1845, given to the plaintiffs and signed by H. McIntosh, J. Spofford and the defendant, to the plaintiffs, payable at 60 days.

The note was read to the jury. It had upon it indorsements as follows: —

	"May	28,	Received,	Renewed.
	Sept.	28,	"	"
	Nov.	28,	"	"
1846,	Jan'y	28,	"	"
	March	28,	"	"
	May	28,	"	"
	July	28,	"	"

"1847, Sept. received ten dollars and thirty-seven cents, interest till Aug. 28 last, by J. L. Mallett."

The defence was, *that* though it did not appear upon the note, yet the defendant was but a surety to McIntosh; *that* that fact was known to the plaintiffs; and *that*, without his knowledge or consent, the plaintiffs, on an agreement with McIntosh, for a valuable consideration, extended the pay-day and renewed the note many times.

Mr. Hewett, a witness for the plaintiffs, testified that, while he was a director of the bank, the defendant applied to him for a still further delay upon the note, saying *that* "it had already stood too long, *that* it should be taken care of; and *that* arrangements had been or would be made for its payment."

Other testimony was introduced on both sides.

The jury were instructed, *that* if McIntosh was principal in the note, and the defendant a surety for him, and if these facts were known to the plaintiffs, and if the bank made an agreement with McIntosh for a valuable consideration to renew the note or extend the time of payment, without the request or consent of the defendant, he would be entitled to their verdict; *that* if satisfied, that the *first* renewal, or extension of time for payment, was made at the request or with the consent of the defendant, the *plaintiffs* would be entitled to their verdict; — *that* if satisfied that the defendant stated to Hewett, that he knew the note had stood too long, they would consider whether he had not known it from the time of the first renewal or extension and assented to it; — *that* the words of the indorsement "Received, Renewed," might fairly be considered as meaning received the interest for a renewal; and "Renewed" might be properly regarded as an agreement to consider the note to be the same, as if made in the same terms anew from that date.

The jury found a verdict for the plaintiffs, and the defendant excepted to the instructions.

M. H. Smith and *Gould*, for the defendant.

Lowell and *Foster*, for the plaintiffs.

Rice, J. — This is an action on a joint and several promissory note, dated January 28, 1845, payable to the President, Directors and Company of the Lime Rock Bank or their order, and signed Henry McIntosh, John L. Mallett and John Spofford. The names of all the makers appear as principals on the face of the note.

It is contended by the defendant, that, notwithstanding his name thus appears on the note as a principal, still as matter of fact, he was only surety to McIntosh, and that this fact was well known to the bank at the time the note was made. He further insists that, in consideration of the payment of interest in advance by McIntosh, the note had been, at several different times, renewed, and the time of payment extended by the plaintiffs, without his knowledge or consent, and that in consequence thereof he is discharged from all liability to pay the same.

Though there formerly may have been some doubt whether a party, whose name appeared upon a note without any thing to indicate that he sustained any relation other than that of principal, could, at law, be permitted to prove *aliunde* that he was surety only, the rule is now well established that, whenever it is material, a defendant may show by extrinsic evidence, that he made the note as a surety only, and that it was known to the plaintiff that he was only surety. *Carpenter* v. *King*, 9 Met. 511; *Grafton Bank* v. *Kent*, 4 N. H. 221; *Archer* v. *Douglass*, 5 Denio, 307; *Branch Bank* v. *James*, 9 Alabama, 949; *Mariners' Bank* v. *Abbott*, 28 Maine, 280; *Bank of Steubenville* v. *Hoge*, 6 Hammond, 17.

The law is equally well settled that, when the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration, without the consent of the surety, the latter is discharged. *Bank* v. *Abbott*, 28 Maine, 280; *Leavitt* v. *Savage*, 16 Maine, 72; *Hutchinson* v. *Moody*, 18 Maine, 393.

The Judge instructed the jury that the words of the indorsement, "Received, Renewed," might fairly be considered

as meaning, received the interest for a renewal; and "Renewed" might be properly regarded as an agreement to consider the note to be the same as if made in the same terms anew from that date.

This would seem to be the only meaning that could be legitimately assigned to these words, and with that instruction there is no complaint from either party. The payment of interest in advance, though it has been held by this Court not to be, of itself, sufficient evidence of an agreement to give further credit, is undoubtedly a good consideration for such an agreement. *Bank* v. *Abbott*, before cited; *Grafton Bank* v. *Woodard*, 5 N. H. 99; *Bailey* v. *Adams*, 10 N. H. 162; *Bank* v. *Ela*, 11 N. H. 335.

If under the instructions given, the jury found that the defendant was only a surety on the note (and there was evidence tending to prove that such was the fact,) the only remaining facts to be determined by them was whether these renewals had been made at the request or with the consent of the defendant.

On this point the Judge instructed the jury, that if satisfied, that the first renewal or extension of time for payment was made at the request or with the consent of the defendant, the plaintiff would be entitled to the verdict.

To this instruction the defendant objects. The jury having been instructed as to the effect of the several indorsements, that they were to be treated as renewals of the subsisting note, at the times they were severally made, we are unable to perceive any reason why the same rule should not apply to each of the subsequent indorsements, that was applied to the *first*. Such would undoubtedly be the case.

It is contended, however, that there were subsequent instructions given by the Court, by which those objected to were so qualified and explained that the jury could not have been led into error. The language relied upon thus to qualify the objectionable instructions, immediately follows, and is in these words, "that if satisfied, that the defendant stated to Hewett, that he knew the note had stood too long, they would con-

sider whether he had not known it from the time of the first renewal or extension and assented to it."

In the first instance, the Judge lays down a distinct proposition to the jury, the finding of which by them in the affirmative, would entitle the plaintiffs to a verdict, to wit, if the defendant should have requested or consented to the *first* renewal.

Then follow instructions to the jury directing them to consider, whether the testimony of the witness, Hewett, would not justify them in drawing certain inferences of fact, to wit, whether the defendant had not known from the time of the first renewal or extension and assented to it. These last instructions were certainly appropriate, and had the Judge proceeded and instructed the jury, what would have been the *effect* of finding such request or consent on the part of the defendant, the jury would not have been liable to fall into error in consequence of the too great restriction in the instruction, to which objection was taken. This, so far as appears from the report of the case, he omitted to do. The jury might consistently with the instructions have rendered a verdict for the plaintiff, though satisfied that all the renewals subsequent to the first, were made without the request or consent of the defendant. Indeed, they could hardly have come to a different result. Such a conclusion, under such circumstances, would have been in violation of well settled principles of law. We think the jury were too much restricted in the application of the facts that they were authorized to find.

The exceptions are therefore sustained and a new trial granted.

TENNEY, HOWARD and APPLETON, J. J., concurred.

McLellan *versus* Longfellow.

In a suit for a share of the supplies, furnished to a vessel of which the plaintiff and defendant were part owners, an admission made by the defendant (after having alienated his part,) that the claim was justly due, in the absence of any evidence or pretence of other outstanding bills, is to be treated as an admission, that upon a final adjustment of all liabilities by the joint owners, such balance was due to the plaintiff.

Upon such an admission, therefore, the suit is maintainable.

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

Assumpsit upon two accounts annexed to the writ.

The parties owned a brig in equal shares. The plaintiff expended money and articles in the repairs and outfits, and charged the same to "the brig." The bill, as made up by the plaintiff, amounted to $406,81. Afterwards the defendant's half of the brig was sold on execution against him. Subsequently, the bill was shown to the defendant, who, after taking it home for examination, admitted it to be correct and justly due. The plaintiff claims that the defendant should pay one half; and that is one of the accounts sued in this action. The other account was between the parties as individuals, to which no objection was made.

The defendant resisted the account of the expenditures for the vessel, but consented to a default, subject to the opinion of the Court, whether upon these facts he is liable to the suit, and to what extent.

Gilbert, for the defendant.

We object to the account for the supplies furnished to the vessel. Such an action between part owners cannot be sustained. We wish to show, that *defendant's* claim against the brig was quite as great as that of the *plaintiff*. *Maguire* v. *Pingree*, 30 Maine, 508.

Merrill, for the plaintiff.

Howard, J. — The parties had owned a vessel in equal parts, and the defendant's share had been sold, when the claims included in this suit were presented to him, and he

admitted them to be correct and due. But the admission is now restricted to the personal claim, and the controversy is solely upon that portion of the account which embraces the bills against the owners of the vessel.

The defence rests mainly upon the decision in *Maguire* v. *Pingree*, 30 Maine, 508. The doctrines of that case have been repeatedly recognized by this Court, as sound, and we have no occasion to question them at this time. In that case, there was neither a settlement, nor an agreement in respect to the claims; but in this, there was a statement of the account with the owners, after the relation of part owners had been terminated, which the defendant, upon examination, deliberately admitted to be correct, and due from him as claimed.

This admission, in the absence of all evidence, or pretence of any other outstanding bills, under the circumstances, is equivalent to an agreement that, upon a final adjustment of all accounts and liabilities as joint owners, such balance was due to the plaintiff. Upon the payment of that account, it would seem that the entire business would be closed, and the obligations and duties arising from the relation of the parties, as part owners, would be fully discharged.

An express promise to pay the balance thus stated and admitted, is not necessary in order to bind the defendant. An obligation to pay arises from the admitted indebtedness, and a promise to pay is implied by law. *Fanning* v. *Chadwick*, 3 Pick. 420.

The default must stand, and the plaintiff is entitled to judgment for the amounts claimed, according to the accounts annexed to his writ.

SHEPLEY, C. J., and TENNEY, RICE and APPLETON, J. J., concurred.

O'Brien *versus* Gilchrist.

A bill of lading, in the usual form, is a receipt for the quantity of goods shipped, and also a promise to transport and deliver the same.

So far as such a bill is a receipt, it may, in a suit between the parties to it, be controlled by parol proof.

Thus, in a suit by the shipper, upon such a bill, for the non-delivery of the goods, it is competent for the defendant to prove that the quantity of goods received was less than that acknowledged in the bill.

A bill of lading stated the shipping of a specified number of sticks of timber, containing a specified number of tons "more or less." In a suit upon the bill, the defendant offered parol evidence of an agreement by the shipper that the words "more or less" should apply equally to the number of sticks as to the number of tons. — *Held,* such evidence was inadmissible.

On Exceptions from the *District Court,* Rich, J.

The defendant was master of the schooner Grecian. She was lying at the port of King William in Virginia. The plaintiff shipped on board of her a quantity of oak timber to go on freight to East Thomaston in Maine. The bill of lading, signed by the defendant, contained the following expressions: —

"Shipped in good order and condition, by Seth O'Brien, in and upon the good schooner called the Grecian, whereof Cornelius Gilchrist is master for the present voyage, and now lying in the port of King William, and bound for East Thomaston, viz: —

"Three hundred seventy-eight pieces of white oak ship timber, amounting to one hundred and thirty-four tons and thirty-two feet, more or less, and are to be delivered in the like good order and condition, at the said port of East Thomaston," &c.

The timber delivered at East Thomaston was but 351 pieces amounting to one hundred and twenty-three tons, making a deficit from the bill of lading of eleven tons and thirty-two feet. This controversy relates to that deficiency.

The defendant at the trial offered several witnesses to prove that there were not so many pieces nor so many tons received on board as is described in the bill of lading. The plaintiff objected to contradicting the bill of lading by parol, but the

Court held that, so far as the bill of lading was in the nature of a receipt, it was very strong *prima facie* evidence of the truth of its recitals, but not conclusive; and it was therefore, as to the numbers and quantity, liable to be contradicted and overcome by oral testimony, and that as between the parties, all relevant evidence tending to show that the defendant was induced by misrepresentation or mutual mistake, to sign a bill of lading reciting a larger quantity than had in fact been delivered and received, would be proper for the consideration of the jury.

The Judge therefore admitted the witnesses. Some of them testified, *that* all the timber received at Virginia was delivered at East Thomaston; *that* the plaintiff, after the timber had been taken on board, brought the bill of lading to the defendant for signature; *that* the defendant objected to it, because it did not agree with the account which he had taken as to the amount, and because it contained more timber than had been delivered;—*that* thereupon the plaintiff inserted the words "more or less;" *that* the defendant then further objected that these words would be held to apply, not to the number of pieces of timber, but only to the number of tons; *that* the plaintiff then agreed that they should apply as well to the number of pieces as to the number of tons, and *that* thereupon the plaintiff signed the bill and immediately sailed upon the voyage.

This testimony was objected to. There was other evidence relative to the same matters.

The Judge instructed the jury,—1*st*, *that* the bill of lading was an instrument possessing the characteristics of a *contract* and of a receipt; *that*, so far as it acknowledges the receipt of a certain number of sticks, amounting to a certain number of tons, it is in the nature of a *receipt*, and, though evidence of a high character of the truth of its recitals, yet is not conclusive on those points, but, like other receipts, is open to explanation or contradiction by other testimony;—2*d*, *that*, while, so far as it was an agreement to transport and deliver the timber actually received, it was in the nature of a contract, and

being in writing, could not be explained or controlled by oral testimony; — *3d, that* if the jury were satisfied that, by the mutual mistake of the parties, the bill of lading recites a larger number of sticks of timber than was actually delivered to the defendant in Virginia, he would not be liable for that excess, but only liable for the safe carriage and delivery of so much timber as was actually delivered to him by the plaintiff; — *4th, that* the words "more or less," by legal construction of the instrument, applied only to the number of tons and not to the number of sticks, and *that* the evidence, as to what was said between the parties relative to the meaning that should attach to those words ("more or less,") should be entirely disregarded by the jury, so far as it was designed to control the legal construction of the instrument, and could only be considered by them, as it should bear upon the question, whether the recitals as to the number of sticks of timber were or not erroneous.

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

Gould, for the plaintiff.

Parol testimony is admissible to explain or contradict receipts *only* where a mistake or misapprehension of fact is to be corrected. *Alner* v. *George*, 1 Camp. 393; *Stackpole* v. *Arnold*, 11 Mass. 32; *Johnson* v. *Johnson*, 11 Mass. 363; *Rollins* v. *Doyle*, 16 Maine, 475.

If, when a receipt be given, one party computes the amount receipted for at one sum, and the other at another sum, and they finally agree to a definite sum, and reduce that agreement to writing, parol testimony cannot be introduced to show which party was in the right at the time of the computation.

The amount agreed upon in such a receipt is to be regarded as a *compromise* between the parties. 1 Greenl. Ev. 4th Ed. 305, note; 9 Conn. 406.

Bills of lading are written instruments of a nature to command great regard, and are to be contradicted by parol testimony, *only* when a party is deceived by *external* appearances, or where the facts could not have been ascertained by reason-

able diligence;—*Barrett* v. *Rogers*, 7 Mass. 297, 300; Abbott on Ship., by Story, 4th Ed., 216 and 217, and authorities there cited;—Or where *fraud* or *imposition* is *clearly proved.* Angel on Carriers, § 232.

Parol evidence is not admissible to change or enlarge the language of a written instrument, nor are other words to be added or substituted instead of those of the writing. The duty of the Court is merely to ascertain the meaning and construction of the language *from the instrument itself* and the surrounding circumstances. 1 Greenl Ev. (4th Ed.) 277, 278, 279, 281.

Where there is no fraud indicated by the facts, which have been legitimately proved, it is not competent for the Court to admit irrelevant and injurious testimony, upon a mere suggestion of counsel. Vide *Paysant* v. *Ware*, 1 Ala. 160; 5th vol. U. S. Dig., Tit. Evi., par. 1696. Instructions to the jury to disregard such testimony in the final charge, when it had made all its impression upon the minds of the jury, do not cure the error.

Apply these principles to this case, and it will appear that much of the testimony should have been excluded.

1st. Neither *fraud* or *mistake* is indicated by the proof in the case. It appears by the defendant's own showing, that he took an account of the timber, as it came on board, and that his account did not agree with that of the plaintiff's. These differences were finally reduced to an agreement in writing.

2d. Every thing was open to the inspection of the defendant; he could easily ascertain the amount of timber. There was no fault in this respect on the part of the plaintiff, and no opportunity for fraud or mistake. Under such circumstances the written agreement is the only competent evidence of the amount.

3d. The Judge permitted the defendant to substitute by parol a different undertaking from that of the bill of lading.

4th. The testimony in regard to the words, "more or less," was inadmissible for *any purpose. Russell* v. *Doyle*, 15 Maine, 112.

Ruggles, on the same side.

This case furnishes the strongest illustration of the absurdity of admitting parol evidence to contradict that which is written. It makes the defendant, while in the very act of saying *by writing*, that there were so many sticks of timber, also to say *in words* that there were not so many.

It also attempts to control the writing, by a certain supposed verbal agreement, made at the very time of signing it, that certain words in the writing, shall be construed differently from their legal and natural meaning, instead of making the writing to conform to the intention of the parties, which it was so easy to have done. Whether it be a *receipt* or not, it would be the most mischievous to allow a party to have his witness standing by to swear, that the parties did not mean what they deliberately reduced to writing and put their hands to. The ground of objection to parol testimony is that, in such case, the written agreement cannot be a mistake as to what the parties understood and meant at the time of executing it, though a witness may have misunderstood or forgotten.

Such testimony is as mischievous in relation to a *receipt* as to a note of hand, and the same objection would apply to its admission.

Lowell and *Foster*, for the defendant.

Appleton, J. — That a receipt may be contradicted by parol evidence, has long been considered well settled law. The bill of lading, so far as regards the condition of the goods shipped, is *prima facie* evidence of a high nature, but not conclusive. *Barrett* v. *Rogers*, 7 Mass. 297. The master of a vessel is not authorized to open the packages to ascertain their condition. The principles of public policy and the convenience of transportation forbid that boxes, bales, &c. should be opened and inspected before receipted for by carriers. They therefore, may show that they were damaged before coming into their possession. *Gowdy* v. *Lyon*, 9 B. Mun. 113. The same rule of law has been applied to the quantity of goods therein stated as having been received for transporta-

tion. In *Bates* v. *Todd*, 1 M. & R. 106, TINDAL, C. J. said, that he was of opinion that, as between the original parties, the bill of lading is merely a receipt liable to be opened by the evidence of the real facts and left the question for the jury to determine what number of bags of coffee had been shipped. In *Berkely* v. *Watting*, 34 E. C. L. 22, it was held, that the defendants were not estopped by the bill of lading to show that goods purporting to be, were not in fact, shipped. In *Dickerson* v. *Seelye*, 12 Barb. 102, EDMONDS, J., in delivering the opinion of the Court, says, "as between the shipper of the goods and the owner of the vessel, a bill of lading may be explained so far as it is a receipt; that is, as to the quantity of goods shipped and the like; but as between the owner of the vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may not be explained." What may be the rights of an assignee under such circumstances it is not necessary to consider or determine here, as that question does not arise in the present case.

In *Wayland* v. *Mosely*, 5 Ala. 430, the Court say, "that a bill of lading in its character is twofold, viz; a receipt and a contract to carry and deliver goods. So far as it acknowledges the receipt of goods and states their condition, &c. it may be contradicted, but in other respects it is treated like other written contracts." In *May* v. *Babcock*, 4 Ohio, 334, the language of the Court is, that "a bill of lading is a contract including a receipt." The same doctrine in New York is likewise fully affirmed in *Walfe* v. *Myers*, 3 Sand. 7. The best elementary writers also concur in this view of the law. 1 Greenl. Ev. § 305; Abbott on Shipping, 324. The evidence, so far as relates to this question, was legally admissible and the instructions of the Court in relation thereto were in conformity with well established principles.

The evidence offered by way of giving a construction to the meaning of the words "more or less" in the bill of lading, was most clearly inadmissible. The Court however directed the jury entirely to disregard all evidence, which

was designed to control the legal construction of the instrument, and it is to be presumed that the jury in rendering their verdict followed the instructions of the Court.

At the same time, the construction of these words, as given in the charge of the Judge, was most favorable to the plaintiff.

Exceptions overruled. Judgment on the verdict.

SHEPLEY, C. J., and TENNEY and HOWARD, J. J., concurred.

SHUMWAY *& al. versus* REED *& al.*

The giving of a negotiable note for a simple contract debt, raises a presumption of payment.

That presumption may be overcome by testimony.

Of the evidence which the Court, sitting as a jury, will deem sufficient to overcome that presumption.

ON REPORT, from *Nisi Prius*, SHEPLEY, C. J. presiding.

DEBT ON BOND. The plaintiffs were merchants, resident in Boston. One Reed, a trader in Bath, was indebted to them. They sent their demand to an attorney to be collected or secured. The attorney took a bond to the plaintiffs signed by said Reed and by one Tallman, in the penal sum of $5000. It was dated Jan. 25, 1847, and it was upon the condition that, "whereas said Reed and Tallman, either jointly or severally, are indebted to said Shumway & Snow, and contemplate becoming further indebted to them for goods and cash.—Now if said Reed and Tallman, or either of them shall pay to said Shumway & Snow, all sums of money which are now due from them or either of them, to said Shumway & Snow, or which may hereafter become due from them or either of them, at the several times when they shall become due and payable, then this obligation to be void, otherwise to remain in full force and virtue. Said indebtedness not to exceed three thousand dollars."

This action is upon that bond.

The plaintiffs introduced several negotiable notes, made to

them by Reed, each one payable on time. Five of them, amounting to about $1200, were dated before the giving of the bond, and three of them, amounting to about $1290, were given after the date of the bond; also three orders, drawn, after date of the bond, by Reed upon the plaintiffs, amounting to about $530, which they had paid and taken up. The plaintiffs, against the defendants' objection, introduced evidence to show that the notes were given for goods sold to Reed. The introduction of the notes and drafts was objected to. Certain letters were introduced by the respective parties.

The case was then submitted to the Court upon the evidence.

Paine, for the plaintiffs.

Tallman, for the defendants.

I. The bond gives protection to the obligees only for "goods or cash," by them sold or advanced.

There is no legal evidence that the notes were given by Reed, either for goods or cash. The evidence was inadmissible to show what was the consideration of the notes, thereby to convert them into mere evidences of goods sold. Could the account for the goods be sued, and the action maintained upon the evidence furnished by the negotiable notes? Surely not.

II. If the evidence, as to what was the consideration of the notes, was admissible, we say —

1. That the taking of the notes on time from Reed, was such an extension of the credit as discharged Tallman, the guarantor, for the plaintiffs' letter admits that he was but a guarantor. That guaranty was only for goods and cash, not for other classes of contracts.

2. The notes given by Reed for the goods were negotiable, and therefore constituted a payment at the moment they were taken. True this presumption is repellable by testimony. But the evidence, instead of repelling, very strongly sustains the presumption that they were taken in payment.

III. As to the drafts; they were drawn by Reed upon the plaintiffs and they paid them. The legal presumption is, that Reed had funds in the hands of the drawees, with which the payments were made. That presumption is yet unremoved.

RICE, J. — The bond was given as collateral security for a debt which was due from the defendant Reed, to the plaintiffs, and also as security for other debts which the defendants contemplated contracting with the plaintiffs.

So far as the preëxisting indebtedness of Reed is concerned, there is no reason suggested why it should not be secured by the bond. The case finds that the plaintiffs' claim had been forwarded to an attorney for collection, and by him the bond in suit was taken, and in its terms covers that indebtedness.

As to the claims which originated subsequent to the execution of the bond, the defendants contend, that they are not liable in this action, because the bond was given only as security for "goods and cash," to be delivered in the future, and because they affirm, for all the goods delivered subsequent to the date of the bond, payment was made by the negotiable promissory notes of Reed.

The rule of law in this State and in Massachusetts, is that the giving of a negotiable note is *prima facie* evidence of the payment and satisfaction of a simple contract debt. But this legal presumption is by no means conclusive, but may be rebutted by proof that such was not the intent of the parties.

The simple question for the consideration of the Court, is whether the facts in the case overcame this presumption. To determine this question, the situation and acts of the parties must be considered. Reed was indebted to the plaintiffs, they were seeking to enforce payment or obtain security, he desired extension of time for payment, and additional credits for goods and cash. For this purpose the bond was given. Now is it credible that those plaintiffs having thus obtained security not only for past indebtedness, but for future advances, should immediately thereafter voluntarily and intention-

ally disregard that security, and rely solely upon the note of the man whose ability to pay they manifestly distrusted? Such a proposition carries improbability on its face. And that improbability is increased by the letters of the parties in the case.

So too as to the drafts; we are of opinion that the situation of the parties and the evidence in the case authorizes the inference, that they were paid by the plaintiffs out of their own funds, and not from the funds of the defendants or either of them.

Whether the conditions of the bond are such as to restrict the credits to be covered by it to "goods and cash" only, is not certain. But as on the other branch of the case we think the plaintiffs entitled to recover, it becomes unnecessary to express an opinion upon that point.

According to agreement a default is to be entered for the several sums due, as specified in the report, with interest thereon from the time they severally became payable, or by their terms were to draw interest.

SHEPLEY, C. J., and HOWARD and APPLETON, J. J., concurred.

MOODY *versus* WHITNEY, KIMBALL AND FARNSWORTH.

Trees, so soon as severed from the soil, become personal property.

So soon as trees are fallen and severed from the soil, a wrongful assumption of dominion over them, is a conversion.

A tortious taking is conversion.

Where one, having tortiously cut and carried away trees from the land of another, sells a part of them to a person, who had no knowledge of the wrong; the owner, even if he can maintain an action of trover against them jointly, will be entitled, in such action, to recover of the *vendee* only to the value of the part which he purchased.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

TROVER, to recover the value of timber trees, cut upon the land of the plaintiff. The title to the land was claimed

by both parties, and at the trial, the principal controversy related to that point. The evidence and the rulings upon it, it is not necessary here to present. In relation to the trees, which are the subject of the controversy, the testimony tended to prove that they were cut and carried away from the land which the plaintiff claims, by two of the defendants, Whitney and Kimball, from whom the defendant, Farnsworth, with others, purchased a part of them, which he sawed into boards and converted to his own use, at the mill.

The jury were instructed that, "if satisfied that the trees grew upon the plaintiff's land, and were thus cut, carried away, sawed and converted, the action could be maintained for their value, where they first became personal property, at the time of their first conversion after they were cut and fallen." If this instruction was erroneous, the verdict, which was for the plaintiff, is to be set aside, and a new trial granted.

Gould, for the plaintiff.

There was a joint conversion by all the defendants.

One act proved, which was clearly an act of conversion, was a *sale* by two of the defendants to the third.

In the sale and purchase, *all* the defendants, vendors and vendee, must of course, have participated.

The act of *sale* is a conversion, and the act of *purchase*, with the view of making the property one's own, is also a conversion. In this act, the seller and buyer joined.

But whether there was a joint conversion or not, is not presented by the report, and the testimony is not fully reported on that part of the case. It is not therefore a question for determination.

Lowell, for the defendants.

RICE, J. — This is an action of trover for the joint conversion, by the defendants, of certain timber trees, the alleged property of the plaintiff.

The title to the land from which the trees were taken was in dispute, and claimed both by the plaintiff and by Whitney and Kimball, two of the defendants. The title deeds of

the parties were introduced and also a plan of the premises made by a surveyor appointed by order of the Court. Upon that plan was delineated the lines as claimed by the different parties.

Instructions were given by the Court with reference to those conflicting claims.

With respect to the trees cut and carried away, there was testimony tending to prove that they were cut and carried away by two of the defendants, Whitney and Kimball, from the land of the plaintiff upon his construction of the deeds, and that the other defendant purchased a part of them with others, and caused them to be sawed and converted to his own use at the mill.

Upon this point the jury were instructed, that if satisfied that the trees were thus cut, carried away, sawed and converted, the action could be maintained for their value, where they first became personal property, at the time of their first conversion after they were cut and fallen.

The trees became personal property as soon as they were severed from the soil, and the wrongful assumption of dominion over them after they were thus cut and fallen, would be a conversion on the part of Whitney and Kimball. A tortious taking is conversion. *Salisbury* v. *Gourgas*, 10 Met. 442.

Farnsworth, the other defendant, subsequently purchased *part* of the trees. He does not appear to have been in any way connected with the original cutting and carrying away, or even to have known from whence the trees came. His liability could not, under such circumstances, be extended beyond the value of the trees purchased and converted by himself, in case he is held liable with the other defendants for a joint conversion. There may have been very many trees taken from the land by Whitney and Kimball, and those trees may have been of great value, and for which they may be liable. Of those taken by them the case finds that Farnsworth purchased a part only, it may have been a small part, both in quantity and value.

The instructions given would have authorized, if not required, the jury to hold Farnsworth liable for the value of all the trees cut and carried away by Whitney and Kimball, whether they ever came into his possession or not. Indeed, such would seem to have been their necessary effect.

This will entitle the parties to a new trial. There were several other points taken by the defendants, upon which the Court do not deem it important at this time to express an opinion. *The verdict is to be set aside and a new trial granted.*

TENNEY, HOWARD and APPLETON, J. J., concurred.

HOWE & *al. versus* WILDES & *ux.*

The promissory note of a married woman, being uncollectable at law, has long been held, in legal contemplation, to be of no value.

That rule was not changed by the statute of 1844, authorizing married women to "become seized and possessed of any property, real or personal, *by purchase.*"

A conveyance of land, made to a married woman in consideration of her promissory note for the purchase money, is without valid consideration, and therefore void, as to the then existing creditors of the grantor.

As against such creditors, the punctual payment of the note cannot impart any new vitality or strength to the conveyance.

In a writ of entry for land in fee, the declaration may be so amended as to claim merely a life estate, either in the whole or in a part of the land.

In the levy of land upon execution, it is the duty of the officer to notify the debtor and allow him a reasonable specified time, in which to appoint an appraiser.

It is not requisite that the officer, in his return upon the execution, should state what length of time was allowed, nor in what mode the notice was given.

The R. S. c. 94, § 11, prescribing that, when the debtor's estate is held in joint tenancy or in common with others, the debtor's part must be stated by the appraisers, applies when his apparent or known title extends only to an undivided part of the estate.

When the record shows that the debtor's title covers the whole land in fee, a levy of the whole will transfer whatever title he may have, though it be but a life estate in an undivided part.

ON REPORT, from *Nisi Prius*, SHEPLEY, C. J. presiding.

Writ of Entry. The land in controversy was a farm in Phipsburg.

Mary Wildes, one of the tenants, was, by the assignment to her of a mortgage, seized of one half of it, and was also, by inheritance, seized of one sixth of the other half, making in the whole seven twelfths of the farm. In these seven twelfths therefore, her husband, the other tenant, was seized of a life estate.

Samuel Wildes, the husband, executed a deed purporting to convey the farm to one Hill, by whom it was deeded to William H. Wildes, a son of the tenants. This son afterwards, in August, 1848, deeded the same to his mother, one of the tenants. The deed was duly executed and recorded. Though purporting to convey the whole, it really conveyed but a life estate in seven twelfths, that being all the interest he had. In the following month of Sept. 1848, the farm was attached on a writ in favor of these demandants against said William H. Wildes. In that action, the demandants recovered judgment, and on the execution levied and set off the farm to themselves in Dec. 1848, the tenants then and still being in possession.

This suit was brought to recover the possession. The demandants now move to amend by reducing their claim to a life estate in said seven twelfths. This amendment was resisted by the tenants.

The demandants thus claimed under William H. Wildes, but the record shows that, prior to their attachment, he had conveyed to his mother. To avoid the effect of that conveyance, the demandants offered to prove that it was fraudulent as to themselves, who were his creditors at the time of the conveyance. They thereupon called said William H. Wildes, as a witness, who testified that the consideration of his said conveyance to his mother was $800, paid by her notes to him for that amount; that he had transferred one of them, and that all but one had been paid. The demandants thereupon contended that the notes given by Mrs. Wildes, then a married woman, were no legal consideration for the

conveyance, and that, therefore the conveyance was invalid as to them, they being creditors of the grantor.

The case was then withdrawn from the jury and submitted to the Court, to grant or to refuse the amendment and to render judgment according to legal rights; the writ, deeds and record to be referred to as a part of the case. It was agreed that the fair rent of the farm yearly was $40. From the record, it appeared that the officer in his return of the levy, states that "he gave notice to Wildes," the execution debtor, "who refused to appoint one of the appraisers," wherefore the officer appointed one, in addition to one whom he had appointed before.

Gilbert, for the demandants.

Tallman, for the tenants.

The demandants have moved to amend, so as to declare for a life estate in seven twelfths of the farm. Such an amendment is not allowable. The estate to be declared for is an estate during the life of some one; of whom? The proposal is too indefinite. Besides the substituted claim would be another and distinct cause of action, and of a different nature. The statute is express, that the nature of the estate should be *specified* in the declaration, and such specification being the basis of the suit, cannot be changed.

But if the amendment obtain, the levy cannot be supported, for, —

1st, the statute provides, § 11, that "when the estate is held in joint tenancy or in common with others, the whole estate must be described by the appraisers, and the debtor's part so held, be so stated by them."

In this levy the debtor's share was not stated.

2d. The levy was inoperative, because in making it, the officer did not give to the defendants a "reasonable specified time," as the statute requires, in which to appoint an appraiser. The time of the notice as well as the notice itself, should appear in the return. R. S. c. 94, § 5; *Leonard* v. *Bryant*, 2 Cush. 37; *Tyler* v. *Smith*, 8 Met. 599.

The deed from William H. Wildes to his mother was made

in good faith, and for a consideration of real value; that is, the payment was made in her own notes, all of which it was proved she had paid in full, except one, and that in part, and the balance, has since been paid.

Does the circumstance that, when giving notes, which proved to be perfectly good, she was a married woman, show that the conveyance was without consideration, and therefore void as to creditors?

The notes were paid, and therefore the question does not arise whether they were collectable in law. They have had all the beneficial offices of collectable notes, for they have been paid. Is not a voluntary, as useful as a compulsory payment? Is it the payment, or the legal power to compel payment, which gives the value?

But the rigid rule of ancient law, that a married woman can make no valid contract, has yielded much to the higher and more expanded views of this age, in regard to female rights. True, even in this land and at this day, the barbarism of feudal times, as to married women, finds too much sanction in the law. But that barbarism is fading out and disappearing, though too slowly. The enlightenments and the humanities of the age have demanded redress. That demand *will* be heard and regarded, *even in courts of law*, and among the most bigoted devotees of the black letter code. Bracton's days are not these days.

In the case of *Deane* v. *Richmond*, 5 Pick. 462, the Court, on account of its manifest injustice, expressly abrogate the rule of the common law, and decide that a married woman may maintain an action for her own property, when otherwise manifest wrong would be done.

By the statute of this State of 1844, c. 117, § 1, "any married woman may become seized or possessed of any property, &c. by purchase," &c.

This statute makes the wife a new creature; it gives her a separate existence. For if her existence is merged in that of the husband, her property must necessarily become his property.

The statute confers the right of obtaining property by purchase. How can this be accomplished without the ability to make a valid contract? 4 Kent's Com. 440, 441. If there be ability to purchase, there must be ability to pay. If so, there is no restriction, which excludes the paying in one's own notes. If she take a note, can she not enforce it? If she should bring a suit, might she not give a bond, or other contract concerning the suit?

These views, we respectfully submit, lead to the conclusion that the conveyance from W. H. Wildes to his mother was effectual, and that these demandants took nothing by their levy.

Rice, J. — This is a writ of entry in which the demandants claimed to recover the demanded premises in fee simple. They now ask leave to amend their declaration by reducing their claim to a life estate in seven-twelfths of the farm demanded in their original writ. To this amendment the respondents object.

By the proposed amendment the claim of the demandants will be materially diminished and cannot therefore be prejudicial to the respondents. Such amendments are allowable. *Plummer* v. *Walker*, 24 Maine, 14; *Dewey* v. *Brown*, 2 Pick. 387; *Lounsbury* v. *Ball*, 12 Wend. 247; *Baker* v. *Daniel*, 1 Marsh, 537; 6 Taunt. 193.

The demandants claim title by virtue of a levy upon the premises as the estate of Wm. H. Wildes, who, prior to the levy, had conveyed to his mother, Mary Wildes, wife of the tenant, and had received as a consideration, the promissory notes of said Mary, amounting to eight hundred dollars.

From the facts in the case the Court finds that Wm. H. Wildes at the date of his deed to Mary Wildes was seized of a life estate in seven twelfths of the demanded premises, to hold during the natural life of Samuel Wildes, the tenant, which seven twelfths the demandants are entitled to recover, if this action can be maintained.

By the demandants it is contended, that the notes of Mary

Wildes, which were given as a consideration for the deed from Wm. H. Wildes to her, were of no legal validity, and that consequently there was no sufficient consideration for that deed, which is therefore fraudulent and void as to them, they being at the time, creditors of William H. as whose property the estate had been levied upon by them.

To this the tenants reply, that the consideration should be held sufficient, as the case finds that all these notes, but one, have been paid, and that by the rules of the common law, as they should be construed by modern courts of justice, and as they are modified by statutes, Mary Wildes, though a married woman, was fully authorized to enter into and bind herself by contract.

It is the legitimate province of courts to declare the law. They possess no legislative powers. They are required to determine what the law is, not what it should be. If existing laws are defective, or erroneous in principle it is for the legislature to correct or modify them.

By the common law as well as by statute provision the rights and powers of married women are too well defined to admit of doubt, or to be subject to material modification by mere judicial construction. A married woman has, in general, no power or capacity to contract so as to sue or be sued, either with, or without her husband, on her contracts made during coverture. She has in legal contemplation no separate existence, her husband and herself being in contemplation of law one person. Chitty on Contracts, 167; 1 Black. Com. 442; Com. Dig. Baron & Feme, W. Pleader, 2 A; Story on Con. § 94; Story's Eq. Juris. § 1367.

A married woman cannot be a party to a bill of exchange, promissory note, or other contract so as to charge herself to liability in a court of law, although she may be living apart from her husband, and have a separate maintenance secured to her. Chitty on Bills, 33; Story on Promissory notes, § 85; Baily on Bills, c. 2, § 3; *Edwards* v. *Davis*, 16 Johns. 281; Com. Dig. Baron & Feme.

To these general rules of the common law there are cer-

tain exceptions, none of which however affect the case at bar.

It is entirely certain that at common law the promissory note of a married woman, as a general proposition, was absolutely void, and being void could not constitute a legal consideration to uphold a deed for the conveyance of valuable real estate.

Nor can the fact that some of those notes were subsequently paid, change the rights of the parties in this case. These rights were fixed by the condition of things existing at the time of the transaction.

The statute of 1844, c. 117, § 1, provides that "any married woman may become seized and possessed of any property real or personal, by direct bequest, demise, gift, purchase or distribution in her own name and as of her own property;" and to this provision the statute of 1847, c. 27, adds, "exempt from the contracts or debts of the husband." These provisions are subject to certain qualifications contained in the statutes referred to, and modified by subsequent statutes.

It is contended that inasmuch as the statute thus authorizes married women to become seized and possessed of real estate by *purchase*, it must by necessary implication authorize such women to enter into contracts of bargain and sale, and must also carry with it all the rights usually exercised by those making such contracts including the right to make and execute promissory notes in payment of estate thus purchased.

Such a construction would manifestly extend these statutory provisions much beyond the limits contemplated by the Legislature and would overturn well established rules of law defining the rights of married women.

"Purchase, in its most enlarged and technical sense, signifies the lawful acquisition of real estate by any means whatever, except by descent." Bouv. Law Dict. 311. "There are six ways of acquiring title by purchase; 1, by deed; 2, by devise; 3, by execution; 4, by prescription; 5, by possession or occupancy; 6, by escheat." *Ib.* It therefore

by no means follows that because the statute authorizes a married woman to hold real estate by purchase, that she must be authorized to acquire title thereto by bargain and sale, or to pay the consideration therefor by her promissory notes.

The intention of the legislature appears to have been to annul that rule of the common law by which the husband, by marriage, became the owner of the personal property of the wife, and entitled to receive the income of her real estate; and to protect her property by declaring it to be exempt from any liability for the debts and contracts of the husband. There does not appear to have been any language used in the Act, with a design to remove the disabilities imposed by the common law upon a *feme covert*, and to enable her, contrary to its rules, to make sales and purchases of property. *Swift* v. *Luce*, 27 Maine, 285.

These statutes being in derogation of the common law, are not to be extended by implication beyond their express provisions. The notes referred to were therefore given by a person having no power to bind herself by such contracts and are consequently void, and could constitute no legal consideration for the deed of William H. Wildes to Mary Wildes.

But it is further contended, that should the Court come to the conclusion that the deed from William H. Wildes to his mother was without consideration, still the demandants should not prevail. This being a writ of entry, if they prevail, it must be upon the strength of their own title, and not upon defects in the title of the tenants. And it is objected that the levy under which the demandants claim is defective in that the appraisers do not state the debtor's share or part of the estate levied upon, and because the officer does not, in his return, state that he allowed the debtor a reasonable *specified time*, within which to appoint an appraiser before proceeding to appoint one in his behalf.

So far as the records exhibited the title of William H. Wildes, that title extended to and covered the whole estate, and the levy was made upon the whole in conformity with his recorded title. With this he could not complain. R. S. c. 94,

§ 10, provides that "all the debtor's interest shall pass by the levy, unless it be greater than the estate mentioned in the appraiser's description." Here the debtor's interest was less both in quantity and quality than described by the appraisers.

The provisions of § 11, c. 94, apply when the debtor's apparent or known title extends only to an undivided part or portion of the estate. In such cases it is necessary that the whole estate should be described by the appraisers, and the debtor's share or part thereof stated by them. The construction contended for by the tenants would subject creditors to unreasonable hazard, and liability to loss.

The officer states in his return that before he proceeded to appoint an appraiser to act in behalf of the debtor, he "gave notice to the said Wildes, one of the said debtors, and he refused to appoint one of the appraisers." By the provisions of the statute, the debtor had a right to appoint one of the appraisers and was entitled to a reasonable specified time within which to make the appointment. This was a right, however, which he was not obliged to exercise, and which he might waive. By refusing to appoint, when notified by the officer, he must be deemed to have waived the right the law gave him, and after such refusal the officer might well proceed, without unnecessary delay, to have the estate appraised and the levy completed. According to the stipulations in the report, the demandants may amend the declaration so as to demand seven undivided twelfth parts of the premises described, to hold the same during the natural life of Samuel Wildes, and they are entitled to receive for rents and profits at the rate of twenty-three dollars and thirty-four cents per year, since the title accrued to them, and upon these principles the demandants are to have judgment.

SHEPLEY, C. J., and TENNEY and HOWARD, J. J., concurred.

BEARCE *versus* FOSSETT *& als.*

Generally, the notice for calling a town meeting is to be given by posting a copy of the selectmen's warrant "in some public and conspicuous place" in the town.

An officer's return showing that he posted the notice in a "*public*" place, without saying in a "*public and conspicuous*" place, is insufficient.

At a meeting, thus insufficiently called, no officer can be legally chosen.

A person elected at such a meeting, though sworn into his office, can draw, from such an election, no justification for acts done under color of the office.

Where one, justifying as a town officer, has read the record of his election at a meeting of the town, it is competent for the other party to show the illegality of the election, by reading from the record a copy of the officer's return upon the selectmen's warrant ordering the meeting to be called.

The Act of 1826, regulating the alewive fishery in Bristol, repealed all the acts then in force on the same subject, so far as operative in that town.

Under that Act, the town was annually to choose a fish committee, whose right and duty it should be to keep open, in the dams upon the stream, proper and sufficient sluice-ways for the passage of alewives.

Since that Act no power can reside in any persons, except the fish committee, to adjudicate upon the sufficiency of any sluice-way, or to open any sluice-way in another person's dam, or to abate any dam as a nuisance for the absence or the insufficiency of a sluice-way in that town.

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

TRESPASS against seven defendants for an injury done to the plaintiff's dam across a stream in Bristol, by making an opening in it, through which fish might pass.

The defendants, under appropriate brief statements, justified, alleging that three of their number had been duly chosen by the town of Bristol, a fish committee, and that the acts, done by them, and the other defendants acting under them, in opening the plaintiff's dam, were done in the rightful discharge of the duties of such fish committee.

The defendants showed from the records of the town the choice of said three persons as a fish committee, on March 3, 1845, and that they accepted the office, and took the requisite oath.

They were chosen under the Act of 1826, "regulating the alewive fishery in Bristol."

To show that the town meeting, at which said choice was made, was not duly notified, the plaintiff read from the same records, a copy of the return, made by the constable upon the warrant calling the meeting, which was as follows; "Bristol, March 3, 1845. By virtue of the within warrant, I have notified the inhabitants as within directed, *by posting up copies of the same in three public places* in said town, seven days before the meeting. Elisha Hatch, Constable of Bristol." The defendants objected to the reading of the copy, and called for the original return.

[The R. S. c. 5, § 6, provides that town meetings shall be notified by posting up an attested copy of the warrant *in some public and conspicuous place* in the town, seven days before the meeting, unless the town appoint, by vote in legal meeting, a different mode.]

The Judge ruled that the meeting was not legally called or legally holden, and that the said three defendants were not a legal fish committee.

The defendants called the attention of the Court to the Provincial Statute of 8 Ann, c. 4; and also to the provisions of an Act passed May 1, 1798, "for the preservation of fish in the counties of Cumberland and Lincoln and for repealing all other laws for that purpose in said counties." 2 Mass. Spec. Laws, 216.

It was proved that the plaintiff's dam was built in 1836, and that "from time whereof the memory of man runneth not to the contrary, alewives had been used and wont to pass up said stream annually to the upper ponds," &c.

The defendants introduced evidence tending to prove that the fish way in the plaintiff's dam was not a sufficient passage way for the alewives.

Whereupon they contended that the dam was a nuisance, which any inhabitant of Bristol, and especially the committee, intrusted with the fishery interest, had a right to alter, by opening in it a suitable passage way for the fish.

The Judge ruled that, if the Act of Anne and that of 1798 had been in force up to 1826, they were repealed by the statute of that year, so far as relates to the town of Bristol, and that the only question for the jury was, whether the defendants had committed the acts complained of, and if so, what was the amount of damage. The verdict was for the plaintiff.

To the foregoing ruling the defendants excepted.

M. H. Smith, for the defendants.

The plaintiff should not have been permitted to read as evidence the *copy* of the constable's return from the town books, the defendants objecting. The records are made by the clerk, his duty is to record *votes*. R. S. c. 5, § 12.

It is not his duty to record the constable's return, and if he does so, it does not make it a part of the record, any more than his copying any other writing into the town record, would make such copy evidence as a part of the record. If the plaintiff wished to put in the constable's return as evidence, he should have produced the best evidence, which was the original, unless it was lost, and such loss is not pretended.

The dam was a "common nuisance" by the provisions of Provincial statute 8 Anne, c. 4.

This statute is yet in force, and an indictment will lie on it, the special remedy provided by the statute being cumulative. *Commonwealth* v. *Ruggles*, 10 Mass. 391.

The dam was also a nuisance by the provisions of the statute of 1798, for the preservation of fish in Lincoln and Cumberland counties.

The dam being a nuisance, the defendants, citizens of Bristol, and interested in the fishery, had a right to open in it a passage for fish. The Judge erred in ruling that the Act of 1826, regulating the alewive fishery in Bristol, repealed those Acts. That Act only repeals Acts inconsistent with itself, which these Acts are not. But if this ruling be correct, and if the rights of the parties in the case at bar, are to be determined by the provisions of the Act of 1826, the defendants

contend that, by the provisions of that Act, they being citizens of Bristol, and interested in the fishery, had a right to open in the dam, a suitable passage way for alewives at the time it was opened, provided it was proved, that said dam had been erected after the passage of said Act, without leaving a sufficient sluice or passage way for alewives through the same as prescribed in said Act, and these facts we offered to prove.

By the provisions of said Act, no person shall, after the passage thereof, erect any dam on the said river, without leaving such a sluice or passage way under *penalty* of fifty dollars. "*A penalty implies a prohibition, although there are no prohibiting words in the statute.*" HOLT, C. J., in *Bartlett* v. *Vinor*, as quoted in *Wheeler* v. *Russell*, 17 Mass. 262. And besides this, the language of the statute of 1826 is prohibitory.

The plaintiff, having built his dam in violation of the statute, cannot sustain this action for the acts done to it, any more than he could sustain an action on a contract made in violation of a statute. *Wheeler* v. *Russell*, 17 Mass. 258, and cases there cited; *Langton* v. *Haynes*, 1 Maule & Selwyn, 593; *Towle* v. *Larrabee*, 26 Maine, 464; *Marck* v. *Abel*, 3 B. & P. 35; *Holman* v. *Johnson*, Cowper, 343; *Wales* v. *Stetson*, 2 Mass. 148.

Ruggles & Gould, for the defendants.

APPLETON, J. — A warrant for a town meeting, duly issued by the competent authorities, and a return showing that the inhabitants have been notified in conformity with the provisions of law, by one duly authorized, are essential preliminaries to a legal town meeting. They are to be returned and preserved among the archives of the town. It is the duty of the town clerk to record the doings of the town at its regular meetings, and proof of these prerequisites is indispensable to the validity of its proceedings. Their removal would be inconvenient, and they would seem to fall within the rule, "that every document of a public nature, which there would

be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy." 1 Greenl. Ev. § 484. The clerk is made by statute a certifying officer.

But however that may be, the defendants claiming to act as officers of the town, were bound to show the legality of the meeting at which they were elected, as, if that was not a legal meeting, they hold no official position. If then the warrant and return were not in the case, no authority whatever would appear for holding the meeting. The record being received, shows the notice which was given. The defendants therefore were chosen at a meeting either not notified, or it was notified in the manner proved. If there was no notice, there could have been no legal choice. If there was such notice as is shown to have been given, then it is decided in *Bearce* v. *Fossett*, 29 Maine, 523, that the meeting at which the alleged choice of the defendants was made, was not legally notified. The defendants could then in no way have been injured by the admission of the copy of the officer's return.

The defendants consequently are to be regarded only as citizens of Bristol, and can have no greater rights than the other inhabitants of that town, and their justification must entirely depend upon their rights as such.

It is insisted in the defence that the dam for an injury to which, this action is brought, is a nuisance by the provisions of the Provincial statute, 8 Anne, c. 4, and that the defendants might rightfully abate it. The abatement of public nuisances by individuals is not to be encouraged. The rights of citizens are best protected and those of the public best preserved through the ordinary action of judicial tribunals and that of the constituted authorities. In *Commonwealth* v. *Ruggles,* 10 Mass. 391, this statute of Anne is said to be in force. But the offence in that case was committed in the county of Middlesex. The authority of that case cannot apply. The special Act of March 1, 1798, is entitled "an Act for the preservation of the fish called salmon, &c. within the counties of Lincoln and Cumberland and for repealing all other laws heretofore

made for that purpose so far as respects their operation in said counties." By § 14 of the same Act, it is enacted "that all laws heretofore made for the preservation of said fish, so far as respects the counties of Lincoln and Cumberland, be and hereby are repealed." It is immaterial to consider the effect of the statute of Anne, as in those counties its operation has long since ceased.

A more material question is, whether the Act of March 1, 1798, is still in force, or whether it has been repealed by the Act of March 4, 1826, entitled "an Act to regulate the alewive fishery in the town of Bristol." The Act of 1798 was more extensive in its territorial jurisdiction than that of 1826. The general object of both was for the preservation of fish, but the penalties attached to violations of these statutes and the modes of procedure to enforce obedience, differ most essentially. The penalty in the first Act was from fifty to two hundred dollars. It is provided that "the dam or obstruction shall be considered and adjudged a nuisance and be abated as such." The fishwardens are to have no active agency except as prosecuting officers. They can only examine, inspect and give information of such breaches of the Act as may occur, and enforce the statute requirements by information or action of debt. The statute of 1826 limits the penalty to fifty dollars, gives no authority for the abatement of the dam or obstruction, and provides for the appointment of a committee, whose duty it shall be "to cause to be kept open" good and sufficient sluice-ways for the passage of fish through the same. By the eighth section of the latter Act "all Acts or parts of Acts inconsistent with the provisions of this Act" are repealed. Both Acts relate to the same subject matter, and the latter must be regarded as a repeal of all prior legislation inconsistent with its provisions. The town of Bristol is withdrawn from the operation of the Act of 1798.

The rights of the parties depend upon the general laws of the State as to mills and the special Act of 1826. The rights of mill owners are to be regarded, and the fisheries are to be protected. Existing laws are to be so construed, if possible,

that the rights of both may coëxist, without giving precedence to either. The rights given to mill owners are not to be considered as repealed by construction, unless such construction be necessary and unavoidable. Indeed, by necessary implication, the special Act of 1826 authorizes the erection of mills.

In determining the construction of this Act, a comparison of its provisions with preceding Acts may be of importance so far as, by its omissions or additions, it may afford indications of legislative purpose. In 1798 the fisheries were a paramount interest. Not merely were heavy penalties imposed, but the right to abate was specially given. No power to act upon the premises by any change or alteration is granted. In the latter Act individuals are appointed whose duty it is to cause to be kept open proper and sufficient sluice-ways. A quasi judicial power is given to the committee appointed under the Act to determine when the sluice-ways are insufficient, and if not sufficient, executive power is conferred to cause them to be kept open, and for that purpose they may pass over the lands of any individuals in any part of said town without being deemed trespassers. "The whole subject is entrusted to their judgment and discretion, excepting where the town by a corporate vote limit or restrain their exercise. It is for them to determine whether the sluice-ways are good and sufficient. The statute does not contemplate that the question of their goodness and sufficiency shall be settled by any other." *Fossett* v. *Bearce*, 27 Maine, 117. The dam was to remain, but the public had the power of enforcing good and sufficient sluice-ways by the punitive force of penal suits or through the action of the committee, if the desired object could in no other way be obtained. All this is entirely inconsistent with the right set up, that individuals may with a strong hand, and without the intervention of the committee, abate all such erections as may in any way interfere with the free passage of fish, regardless of the rights of their owners.

"It is plain," says Parker, C. J., in *Commonwealth* v.

Chapin, 5 Pick. 199, "that the mere erecting or continuing a dam whereby fish may be obstructed, is no longer an offence, for that would be committed by any erection however necessary for the profitable use of the fishery. The offence consists only in having a dam without providing a convenient passage for the fish during two or three months in the year, and the remedy, when this requisition is not observed, is totally different from that which exists at common law for a nuisance. Instead of abating a dam, which is found to be deficient, the statute provides a pecuniary mulct and gives power to certain municipal officers to supervise the public interests and see to the execution of the law. It follows, we think, clearly, that an indictment as at common law for a nuisance cannot be maintained."

Exceptions overruled and judgment on the verdict.

TENNEY, HOWARD and RICE, J. J., concurred.

SEWALL *versus* NICHOLS.

A commission merchant, who has sold a part of the goods left with him for sale, is entitled to a lien upon the residue for his commissions and for freight paid and for other advances.

To secure his lien, he may maintain replevin for the goods, even against an officer who has attached them on precept against the general owner.

His consent to become keeper of the goods for the attaching officer, does not defeat his right to maintain such action of replevin.

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

REPLEVIN for 180 hackmatack knees.

One Wilson shipped four cargoes of hackmatack knees from East Machias to Bath, to be delivered to this plaintiff upon payment of the freight. The plaintiff paid the freight and received the knees at Bath, and sent back to Wilson at East Machias some articles of goods.

He sold a part of the knees according to his directions, and while the residue were in his possession upon the wharf in Bath, they were attached upon a writ in a suit against Wil-

son, by this defendant, who was a deputy sheriff. It was for making that attachment that this action of replevin is brought.

The defendant by brief statement pleaded his justification under the writ, and set forth that he has kept the knees in possession, and prays for a return, in order that they may be taken on the execution against Wilson, recovered in the said suit.

He introduced evidence tending to prove that he never removed the knees, but that the possession of them had been kept for him by the plaintiff himself, whom he employed for that purpose.

The plaintiff does not claim to be absolute owner of the knees, but he claims a lien upon them for freight, commissions and advances.

The defendant contended, that if the knees were in the possession of the plaintiff at the time of the attachment, and so remained in his possession up to the time of the commencement of this replevin suit, he is not entitled to recover.

The jury were instructed, that as the officer appeared to have made an attachment, if they were satisfied that he insisted upon preserving it, and that he put in the plaintiff as keeper to preserve it, the objection that the officer had no such possession of the goods, as can support this action, could not prevail; that if satisfied that the plaintiff had a lien upon the property for freight, commissions or advances unpaid, he might maintain the action, and if not satisfied of these facts, their verdict should be for the defendant.

The jury found a verdict for the plaintiff, and the defendant excepted.

Ingalls and *F. D. Sewall*, for the defendant, contended for the position that the action is unmaintainable, if the knees were in the plaintiff's own possession at the time of the attachment, and if they so remained till the commencement of this suit. In support of this view, they cited *Lothrop* v. *Cook*, 14 Maine, 414; *Sawyer* v. *Huff*, 25 Maine, 464; *Boynton* v. *Willard*, 10 Pick. 166; 2 Greenl. Ev. § 561.

There was also a motion by the defendant for a new trial. In the course of the trial, he had introduced testimony, *that* an order had been drawn by Wilson upon the plaintiff in favor of Curtis, Preston & Co., which the plaintiff had accepted before the attachment; *that* the order was for the proceeds of the cargoes of knees, subject to the plaintiff's "charges for commissions, freight," &c.; *that*, when first apprized of the attachment, he asserted to the defendant's attorney that the knees were not his, but were the property of Curtis, Preston & Co.; and in support of that assertion, exhibited the said acceptance in their favor.

There was other testimony, from which the defendant contended it to be proved or at least strongly inferrable that there was no indebtment by Wilson to the plaintiff, but that there had been received on sales by the plaintiff more than enough for his advances and commissions.

Upon this motion, the defendant's counsel contended: —

1. That the plaintiff had no lien, for he had been paid more than to the amount of all his charges.

2. That the plaintiff's assertion of the ownership in Curtis, Preston & Co. ought to defeat this action; especially as that assertion also proved that all his charges had been paid.

3. That the plaintiff by consenting to become the defendant's keeper of the property, waived all his claims. 8 Pick. 73; 15 Mass. 397; 12 Pick. 76.

Tallman, for the plaintiff.

Tenney, J. — The question presented by the exceptions is whether, after the defendant made the plaintiff keeper of the property attached, for the purpose of preserving the attachment, and he insisted upon preserving it, the defendant is so out of possession, that this action cannot be maintained.

The only claim, which the plaintiff had upon the property against the general owner was by virtue of a lien for freight, which he had paid thereon, commissions, &c. He could contest the right of the defendant to hold the property on no other ground; but as long as the lien existed he was entitled

to the possession. His lien was not relinquished by simply consenting to be the keeper of the defendant's appointment, without giving a written receipt, when he could not legally resist the officer's right to make the attachment, and take away the property. The plaintiff's former possession was divested by the attachment, and the property was in the custody of the law, and the defendant acquired therein a special property, as an officer. *Small* v. *Hutchins*, 19 Maine, 255. And the plaintiff was not restored to his former possession, by taking charge of the property as its keeper, under the officer. In taking this trust, there was no contract, which would authorize him to retain it beyond the pleasure of him, for whom he acted. As long as he was the keeper for the officer, the attachment was effectual, and the latter could remove him at any time, and the officer held the property as he would have done, if his keeper had been a stranger to it. The plaintiff's rights in the property may be properly settled in this action. The case of *Lathrop* v. *Cook*, 14 Maine, 414, relied upon in defence, is essentially unlike the present. In that, it was fully proved that the property was that of the plaintiff; it had always been in his hands before the attachment, and when attached, the defendant took the receipt of the plaintiff in such form, that he had not the legal right to obtain possession, and the plaintiff was not precluded from showing the property to be his.

The defendant relies upon a motion, that the verdict be set aside, as being against the evidence in the case. The question before the jury was, whether the plaintiff had at the time of the attachment an existing lien upon the property. It was in evidence, that he had paid freight, and was entitled to commissions, and consequently had a lien by the application of well established principles; and it does not appear conclusively, that the lien was discharged or relinquished. His statement, that the property belonged to Curtis, Preston & Co. might have been made in an honest belief, that it was so, in consequence of the order in their favor accepted by him to pay to them the avails "after deducting charges for

commissions, freight," &c.; and under this opinion, it would not be expected, that he would claim to hold the property himself by virtue of a lien, which he might legally have had.

Exceptions and motion overruled.

HOWARD, RICE and APPLETON, J. J., concurred.

HEAD *versus* MERRILL AND AGAINST THE LEWISTON WATER POWER COMPANY, AS HIS TRUSTEES.

In the process of foreign attachment, upon exceptions to the rulings as to the supposed trustees' chargability, this Court must examine the disclosures, in order to decide the preliminary statute question, whether "justice requires a revision."

A corporation, summoned as trustees, may disclose by attorney.

Such attorney need not be a member of the corporation or their general business agent.

The answers made by such attorney are to be considered true, until disproved.

When, (after due examination and inquiry,) he shall have answered all the interrogations, according to his best information and belief, if his statements show that the corporation had no goods, effects or credits of the defendant, and if no opposing proof is introduced, the supposed trustees are to be discharged, although he, the disclosing attorney, had no personal knowledge of the dealings between them and the defendant, but derived his information wholly from the books of the corporation and the statements of their officers.

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

The supposed trustee was a corporation. John Goodenow appeared as their attorney, authorized by their cashier to disclose, and he answered interrogations on oath in substance as follows: —

"The company had in their hands and possession no goods, effects or credits of the principal defendant; — I am not their general business agent; — I know nothing personally of their dealings with the defendants; — the cashier informs me that the company owed nothing to the defendant. According to my best information and belief, and after due inquiry made and personal examination of the company's accounts with the principal defendant, the company were not owing him at the time of the service of the writ on them; the defendant rendered services for the company, but the company had law-

ful claims and demands against him, sufficient to overbalance the price of said services. — I have been informed by the cashier that, (though he has no actual knowledge of the fact,) there was an informal submission by parol, of certain claims which the defendant had against the company, but not of all claims between the parties, and that there was stated to be a certain sum due the defendant, and that the company had demands against him exceeding the amount that said referees reported to be due to him in the matter referred, and I am informed and believe that, on all contracts between the company and the defendant, the claims of the company at all times exceeded that of the defendant against them.

The Judge ruled that the company were chargable as trustees, and they filed exceptions.

J. Goodenow, for the trustees.

The trustees, by their attorney, disclosed that they had no effects, &c. This was conclusive, unless contradicted or controlled by some other matters in the case. But there was nothing tending to contradict or control it. If the plaintiff had wished more exact or minute information, he could have elicited it by appropriate interrogatories.

Record, for the plaintiff.

The supposed trustees have made no proper and sufficient disclosure. They have not appeared and disclosed by an *agent*, or any *officer* or *member* of the company, by whom they could have shown whether they had any goods, effects or credits in their hands of the principal defendant's, or not.

§ 8 of c. 119 of the R. S. allowing corporations to disclose by "agent or attorney," contemplates that such agent or attorney be so connected with the corporation as to have a full and personal knowledge of all matters between the corporation and principal defendants, and be enabled to make a complete and satisfactory disclosure of such matters. This is due to the plaintiff. He has a right to know the transactions between the supposed trustees and principal defendants. In this case, the plaintiff has been deprived of such information. The answers are entirely unsatisfactory. They show

no reason why the company should not be charged. Trustees will be holden, unless sufficient matter appear in their answers to discharge them; and in all doubtful cases their answers will be construed most strongly against them. *Lamb* v. *Franklin Man. Co.* 18 Maine, 187; *Sebor* v. *Armstrong,* 4 Mass. 206; *Webster* v. *Gage,* 2 Mass. 503. The attorney, by his own showing, had not the necessary knowledge to enable him to disclose any facts pertinent to the matter in issue, but was able only to give the statements of some person whom he calls cashier of the company, an officer usually unknown in such companies. And it does not appear whether the person called cashier had any knowledge of the matters inquired of by plaintiff's counsel.

If the company had paid for the defendant's services, they could have shown it. And it was their duty to state the facts, not to draw conclusions.

Though the company have had sufficient opportunity, they have failed to make a full disclosure, and should therefore be charged as on default of an answer. *Shaw* v. *Bunker,* 2 Metc. 376.

The exceptions are indefinite, presenting no question for the Court. They point out no error in the ruling. They simply refer to the disclosure. But in order to be available, exceptions should be specifically taken at the trial. A reference in a bill of exceptions to papers and documents used at the trial, does not make them a part of the exceptions. *Wyman* v. *Wood,* 25 Maine, 436; *Kimball* v. *Irish,* 26 Maine, 444; *Irving* v. *Thomas,* 18 Maine, 418.

Nor does the statute of 1849, c. 117, § 2, conflict with those decisions. By that statute, a reëxamination of "the whole matter as to the liability of the supposed trustee, embracing the fact and the law," is left to the discretion of the Court. And how can the Court determine whether justice requires a reëxamination of the disclosures or not, unless the bill of exceptions shows wherein the Judge erred in his "ruling and adjudication"?

APPLETON, J. — The supposed trustees in this case were charged by the presiding Judge, before whom the question as to their liability arose, and to his ruling and adjudication exceptions have been duly alleged. It is insisted, that the exceptions are indefinite and present no question of law for the consideration of the Court, as they only refer anew the questions of law and fact upon the disclosure, upon which a decision has already been had for the determination of this Court. Whatever may have been the law before stat. 1849, c. 117, that Act provides, that in all cases under the trustee process, where exceptions are taken to the ruling and decision of a single Judge, "the whole matter as to the liability of the supposed trustee, embracing the fact and the law, may be reexamined and determined by the full Court when in the opinion of the Court justice shall require;" or, if the action was pending in the District Court, when in the discretion of the Supreme Judicial Court justice shall require. The duty is thus devolved on this Court to ascertain what may be the requirements of justice. To their judgment the matter is referred. The tribunal of ultimate resort cannot form an opinion whether or not justice has been done without reëxamining the disclosure to determine for itself both the law and the fact. To exercise a sound judicial discretion, a knowledge of the law and the facts, to which that discretion is to be applied, would seem to be indispensable. The disclosure, therefore, must in all cases be reëxamined and is properly before us for that purpose. The cases cited by the counsel for the plaintiff as to the conclusive effect of the judgment of the Court to whose decision exceptions have been taken as to any question of fact arising in the disclosure, would seem no longer applicable.

The disclosure is to be taken as a whole, and from an examination of its contents we are to determine whether or not the trustees are to be charged.

The disclosure in this case is made by the attorney of the corporation, who in his examination makes answer, that according to his best information and belief, and after due inquiry made and personal examination of said company's ac-

counts with said principal defendant, said company were not owing the said defendant at the time of the service of the plaintiff's writ on them; that said defendant had rendered services for the said company, but that said company had lawful and just demands against said defendant sufficient to overbalance said defendant's claim for said services; and in conclusion it is added, "that said attorney is informed and believes, that on all contracts between said company and said principal defendant, the claim of said company at all times exceeded those of the said defendant against them arising on said contracts."

The disclosure of a corporation, summoned as trustee, can only be made by their agent or attorney. The agent or attorney who may be appointed for that purpose is not necessarily a member of the corporation, and he must ordinarily rely to a great extent on the books of the company and on the contracts which purport to have been made between such company and other parties. In the disclosure here presented all interrogatories have been answered. No inquiries have been made as to the items, which constitute the mutual indebtedness between the defendant and the trustee. The books and contracts of the company have not been demanded. No inquiries have been made calculated to elicit all the material facts necessary to enable the Court to understand the true relations of the parties. By statute, 1842, c. 31, § 33, the answer of the trustee is to be considered as true in deciding how far he is chargable until the contrary is proved. No evidence has been offered to show any error or mistake in the conclusions set forth in the disclosure. The case of *Shaw* v. *Bunker*, 2 Metc. 376, is not in point. There the trustee refused to answer interrogatories deemed pertinent by the Court, though the case had been continued for years to enable him to do it, or to state an account of his dealings with the defendant so far as he kept an account of them. No such facts exist in this case.

The further objection is taken, that the disclosure was not made by an agent or attorney of the company.

The disclosure shows that it was not made by the general agent of the company. That however is not necessary. It may be made equally by a special as a general agent; by one not a member as by a member of the company, according to their discretion in the premises. If Mr. Goodenow was not duly authorized, as the plaintiff claims to be the case, the company should not be bound, as upon their disclosure, by one acting without authority. If he was authorized, then, as already has been seen, the company should not have been charged.

The exceptions are sustained. The cause is remanded to the county docket, and there such further inquiries may be made, as the plaintiff in the prosecution of his rights may deem advisable.

SHEPLEY, C. J., and TENNEY and HOWARD, J. J., concurred.

APPENDIX.

MISCELLANEOUS MATTERS.

INHABITANTS OF MADISON, *petitioners for certiorari*, *versus* COUNTY COMMISSIONERS.

THE R. S. c. 25, § 3, required the location, (by county commissioners,) of a public highway to be recorded at the next term of their Court. This is a petition for leave to issue a writ of *certiorari* for the purpose of quashing the proceedings in relation to a highway, for the alleged reason, that they had not been seasonably recorded. Pending the petition, the Legislature by an Act of 1852, c. 221, provided that "no record of any highway should be quashed for the reason that the return of the county commissioners shall not have been recorded before the close of the proceedings.

SHEPLEY, C. J. — The petition can be no further prosecuted. *Leave to discontinue without cost.*

SMITH *versus* CHASE *& al.*

ONE of several defendants, in a suit upon an alleged joint promise, was defaulted; *Held*, that the default did not render him a competent witness for the other defendants, who pleaded to the suit, and went to trial.

ANDERSON *versus* WHIPPLE.

ON EXCEPTIONS from the *District Court.*

After a party had referred to several pieces of documentary evidence, and to the plaintiff's account book, and to the testimony which

the plaintiff had given on the suppletory oath, and after he had detailed in *extenso*, what a witness, if present, would testify, this case was submitted to the District Court, " upon the legal rights of the parties, to be decided upon the proper rules of law and testimony, the Court to draw inferences of fact as a jury might, all questions and objections being reserved to be made at the Court."

The Judge of the District Court allowed some items of the plaintiff's claim, and the defendant excepted.

Shepley, C. J., orally. — This case is said to have been submitted upon a statement of facts. But no facts were agreed. It was submitted to the District Court on the evidence, to be decided on the rules of law and testimony, reserving all questions of law. It is merely a submission to that Court to find what the facts were, and then to apply the law. His adjudication upon the facts was to be conclusive, not examinable here. It does not appear what he found the facts to be; consequently we cannot know what rule of law he applied. No legal question, therefore, is presented by the exceptions.

Being irregularly here, the exceptions must be dismissed, with costs for the plaintiff.

Woodcock *versus* Parker.

In the District Court, an action had been defaulted. At a subsequent term, the Judge on motion ordered that the action should be brought forward on the docket, and that the default should be stricken off, and that the action stand for trial in that Court.

To that order, the plaintiff excepted.

Shepley, C. J., orally. — Exceptions cannot be rightfully in this Court, while the action itself is pending in the District Court. *Abbott* v. *Knowlton*, 31 Maine, 77. *Exceptions dismissed.*

Carnick *versus* Wilson.

Per Curiam. — In an action of replevin, objections taken in the Court below to the sufficiency of the replevin bond, are waived by pleading in this Court the general issue with brief statement justifying the taking.

YOUNG *versus* THURLO *& al.*

THE docket showing that this action had been continued "to be defaulted," the Court ordered a default to be entered, though against objection by the defendant, who therefore filed exceptions.

The exceptions being now withdrawn, the Court, on motion of the plaintiff, allowed "double cost," on the ground that the exceptions were frivolous.

STATE *versus* CROSS.

THIS is a criminal prosecution. It charges the sale of spirituous liquor in violation of the statute, and is brought before us for adjudication upon "*facts agreed.*"

PER CURIAM. — No person can be punished for crime, except upon the verdict of a jury, or upon a plea of guilty or of *nolo contendere.*

We could not pass sentence upon any person under a mere statement of facts agreed upon by counsel. The case must be remitted for trial.

WILLIAMS *versus* BROWN.

PER CURIAM. — AN exchange of property made by a minor, is voidable by him.

A sale or use of the property received, made by the minor after arriving at twenty-one years of age, is a valid ratification of the exchange.

INDEX.

ABATEMENT.

1. It is not irregular to refuse a motion for leave to summon in additional joint promisors, while an issue is pending upon a plea in abatement for the non-joinder. *Mahan* v. *Myers*, 34.

2. For want of a sufficient service upon one of two or more defendants, sued jointly on promise, the writ will be abated as to all. *Sawtelle* v. *Jewell*, 543.

3. If such defect in the service be apparent upon the record, advantage of it may be taken on motion without plea. *Ib.*

ACCEPTANCE OF DRAFTS.

See OFFICER, 10, 11.

ACTION.

1. For a party, who claims under a tender made after the agreed pay-day, and relies upon circumstances to justify the delay, *a suit at law* is not an available remedy, although the time of payment was not of the essence of the contract. *Hill* v. *Fisher*, 143.

2. Trover is a transitory action, and lies for a conversion of property, committed within the bounds of a foreign jurisdiction. *Robinson* v. *Armstrong*, 145.

3. Where one, holding lands subject to an outstanding mortgage, represents to his grantee, in negotiating for the sale of it, that a specified sum, and no more, is due upon the mortgage, and deducts that sum from the agreed price of the land, the grantee is entitled, in a suit against him upon the note given for the purchase money, to have a deduction of the excess which may be due upon the mortgage over and above that specified sum. *Stiles* v. *Sherman*, 344.

See BILLS AND PROMISSORY NOTES, 3, 4, 5, 6.

ACTION REAL.

See REAL ACTION.

ADMINISTRATION.

Letters of administration, granted in another State, give no power of administering the property of the deceased in this State. *Smith* v. *Guild*, 443.

ADMISSIONS.

See Evidence, 1, 17.

AFFIDAVIT.

See Evidence, 19, 20.

AMENDMENT.

In a writ of entry for land in fee, the declaration may be so amended as to claim merely a life estate, either in the whole or in a part of the land. *Howe* v. *Wildes*, 566.

See Levy of Real Estate, 13, 14. Pleading, 13. Execution, 3.

APPEAL.

See Probate Court, 1, 2, 3, 4.

APPROPRIATION OF PAYMENTS.

1. A debtor, when paying money, has the right to appropiate it to any one of the creditor's demands. *Treadwell* v. *Moore*, 112.
2. If he appropriate it, though to a claim arising for a violation of law, the Court cannot afterwards transfer its appropriation to a debt lawfully existing. *Ib.*
3. But, if no appropriation be made, the law will apply it to that one of the creditor's claims which is legal, in preference to one which is not collectable in law. *Ib.*

ARMY OF THE UNITED STATES.

1. A deserter from the army of the United States may be arrested and confined for trial by his appropriate officers, without warrant. *Hutchings* v. *Van Bokkelin*, 126.
2. It is no infraction of a deserter's rights, that the county jail is used, as the place of his confinement. *Ib.*
3. Such confinement for the space of ten days is not unjustifiable, unless it appear that a court martial could have been convened for his trial within that period. *Ib.*

ARREST.

1. An arrest on mesne process, upon contract, is allowed only upon the taking of an oath as specified in R. S. c. 148, § 2. *Sawtelle* v. *Jewell*, 543.
2. The oath will not authorize an arrest, unless it show that the debtor was "about to depart *and reside beyond the limits of this State;*" —
nor unless it show, that he was about to "take with him property or means exceeding the amount required for his own immediate support;" —
nor unless it show, that the sum due to the plaintiff amounted to "at least ten dollars." *Ib.*

ASSIGNMENT.

An assignment of a debtor's property, made for the benefit of his creditors *pro rata*, and containing a provision by which the subscribing creditors released all claims except under the assignment, and having been subscribed by a part only of the creditors, will not be defeated, as to other creditors, by a counter release, subsequently made by the debtor, discharging such subscribing creditors from the obligation of their release contained in the assignment. *Howe* v. *Newbegin*, 15.

See Officer, 3, 4, 5, 9, 10, 11.

ASSUMPSIT.

See Officer, 10, 11.

ATTACHMENT.

1. In determining what shall constitute an attachment, regard must be had to the nature of the property, its situation, the expenses of a removal, and to the kind of possession of which it is susceptible. *Bicknell* v. *Trickey*, 273.
2. Thus, to preserve an attachment of mill logs, found in a river or upon its banks, it is not necessary that there should be the same manual possession or the same constancy and extent of supervision, as would be requisite in case of many other sorts of property, less cumbrous and more easily moveable. *Ib.*
3. One having a lien upon goods, which are subsequently attached as the property of the general owner, does not, by retaining the possession of them as keeper for the attaching officer, cut off his right to maintain replevin for them against such officer. *Sewall* v. *Nichols*, 582.

ATTORNEY.

See Exceptions, 2.

ATTORNEY'S LIEN.

See Lien, 1, 2, 3, 8, 9.

AWARD.

1. In an action, referred by rule of Court to three referees, "*the award of whom to be final,*" an award signed by two of them only, cannot be accepted, although they certify that the other acted with them in the hearing of the parties. *Anderson* v. *Farnham*, 161.

2. In such a case, evidence is inadmissible to prove that the other referee agreed to sign the award. *Ib.*

3. The establishment of a divisional line between adjoining lands, resulting from the acceptance of an award made under a rule of Court, by which the referee was authorized to establish the line, is not in contravention of the Statute of Frauds or of any other principle of law, although, previous to the docket entry of the submission, no agreement had been made *in writing* to refer the matter. *Sweeney* v. *Miller*, 388.

4. To enforce the rights, resulting from such an acceptance and judgment thereon, the law will furnish adequate remedies. *Ib.*

BAILOR AND BAILEE.

A bailee of personal property, injured while in his possession, may, in his own name, recover the amount of the injury in an action against the wrongdoer. *Little* v. *Fossett*, 545.

BASTARDY.

See WITNESS, 2.

BETTERMENTS.

See MORTGAGE, 7.

BILL OF LADING.

1. A bill of lading, in the usual form, is a receipt for the quantity of goods shipped, and also a promise to transport and deliver the same. *O'Brien* v. *Gilchrist*, 554.

2. So far as such a bill is a receipt, it may, in a suit between the parties to it, be controlled by parol proof. *Ib.*

3. Thus, in a suit by the shipper, upon such a bill, for the non-delivery of the goods, it is competent for the defendant to prove that the quantity of goods received was less than that acknowledged in the bill. *Ib.*

4. A bill of lading admitted the shipping of a specified number of sticks of timber, containing a specified number of tons "more or less." In a suit upon the bill, the defendant offered parol evidence of an agreement by the shipper that the words "more or less" should apply equally to the number of sticks as to the number of tons. — *Held,* such evidence was inadmissible. *Ib.*

BILLS AND PROMISSORY NOTES.

1. The property in a negotiable note may pass by delivery, without indorsement. *Coombs* v. *Warren*, 89.

2. In an action by the payee of a draft against the drawer, it is not admissible to prove that, when taking the draft, the plaintiff admitted the debt, for which it was given, to have been contracted by the drawer as agent of the drawee, and *promised*, that the drawer should never be held accountable. *Fairfield* v. *Hancock*, 93.

3. Neither could the drawer, after judgment against him in such suit, succeed in a special action upon such *promise* against the payee. *Ib.*

4. The proof of such a promise would contradict the draft, which is the written contract, and would therefore be inadmissible. *Ib.*

5. A note for a sum certain and for another sum, the amount of which is contingent, though made payable to order, is not negotiable, and no action can be maintained upon it in the name of an indorsee. *Dodge* v. *Emerson*, 96.

6. In a suit upon such a note, in the name of the indorsee, it is not competent for the plaintiff to abandon the uncertain sum, and recover for that which is fixed. *Ib.*

7. A creditor of an intestate, who has received for his debt a negotiable note against a third person, of the same amount, secured by a mortgage of land, has no further interest in the estate, although the maker of the note became insolvent and the mortgage was valueless. *Ib.*

8. The assignee of such a note and mortgage can have, in the intestate estate, no higher interest than his assignor had. *Ib.*

9. To a note, given for land conveyed by a warranty deed, it is no defence, either in whole or in part, that the title to the land has *partially* failed. *Morrison* v. *Jewell*, 146.

10. But, after the death of the payee and insolvency of his estate, the maker of the note, in a suit against him by the administrator, is entitled, *under the insolvency laws*, to set off the breach of covenant against the note. *Ib.*

11. To this set-off he is entitled, although his claim may not have been filed before the commissioners of insolvency. *Ib.*

12. An indorsee, who purchases the note with knowledge of the partial failure of its consideration, takes it subject to the same right of set-off. *Ib.*

13. In an action against the indorser of a promissory note, proof that he had received property of the maker for security, will not excuse the indorsee from showing demand and notice, unless the property, so taken, was sufficient, or was all that the maker owned. *Marshall* v. *Mitchell*, 227.

14. A negotiable note, taken for a prior debt, is a payment. *Bangor* v. *Warren*, 324.

15. Upon a note, payable in such articles as the creditor shall select from those, which the debtor is manufacturing at a specified place, a *legal* inference arises that the payment is to be made *at that place*. *Dunn* v. *Marston*, 379.

16. Upon a note, payable on demand, in specific articles, the demand may be

made, at any reasonable hour, at the place of payment, though neither the debtor or any person in his behalf should be present. *Ib.*

17. If negotiable paper be received for an existing debt, the presumption is that it was taken as a *payment* of the debt. *Fowler* v. *Ludwig*, 455.

18. This presumption may be rebutted by proof of circumstances, showing that it was not the creditor's intention to receive it as a payment. *Ib.*

19. Such a misapprehension, by a creditor, of his rights, as would repel the presumption of payment, must be a misapprehension arising from a want of full knowledge, not of the law, but of the facts. *Ib.*

20. If the negotiable paper accepted is not binding upon all the parties under previous liability, the presumption of payment may be considered as repelled. *Ib.*

21. But this rule, *it seems*, extends only to cases of an *absolute* liability, and not to the case of a liability which is merely *contingent*. *Ib.*

22. Of a negotiable order accepted by the creditor of a corporation for a previous debt, the presumption is, that it was taken *as a payment*, although it was drawn merely by the prudential officers of the corporation upon its own treasurer. *Ib.*

23. A bill or note may be negotiated after it is paid, if no person would thereby be made liable upon it, who would otherwise be discharged. *Eaton* v. *McKown*, 510.

24. If the owner of paper negotiated in blank, deposit it for collection, and the depositary transfer it as his own property; the owner, after paying its amount to the transferee, may maintain suit upon it against the parties previously liable, such payment not being a discharge as to them. *Ib.*

25. If paper, which a person has negotiated, come again to his possession, he may, in the absence of controlling proof, be regarded as the owner, and as such may recover upon it, with or without striking out any special indorsement. *Ib.*

26. The giving of a negotiable note for a simple contract debt, raises a presumption of payment. *Shumway* v. *Reed*, 560.

27. That presumption may be overcome by testimony. *Ib.*

28. Of the evidence which the Court, sitting as a jury, will deem sufficient to overcome that presumption. *Ib.*

See Married Women, 8, 9, 10, 11. Surety, 1, 2, 3, 4.

BOND.

1. A bond given pursuant to the statute for a release of a debtor from arrest, is a substitute for the custody of the body. *Hobson* v. *Watson*, 20.

2. The property in such bond belongs to the owners of the judgment, and any such owner may use the name of the obligee for the collection of it. *Ib.*

3. A judgment upon such a bond operates, to the amount recovered, as a discharge of the original judgment. *Ib.*

4. The lien which the attorney had upon the original judgment attaches to the bond, and cannot be defeated by the creditor's discharge of it. *Ib.*

5. The bond to be taken by an officer, before replevying property, is to be in double its true value. *Kimball* v. *True*, 84.

6. For his failure to take *such* a bond, it is no defence, that, in the writ, the property is stated to be of a value, less than its true value; or that the writ prescribes, as to the amount of the bond to be taken, a sum less than double the true value. *Ib.*

7. The damage to be recovered against the officer, for such a failure, is the amount of injury thereby occasioned. *Ib.*

8. Suit upon an administration bond can be brought for the benefit of such persons only, as are interested in the estate. *Rawson, Judge*, v. *Piper*, 98.

9. An action upon a bond, brought in the name of the joint obligees, by an assignee of one of them, may be discharged by the other. *Shaw* v. *Keep*, 199.

See Lien, Probate Bonds. 9.

BOUNDARIES OF LAND.

See Conveyance of Land.

BUCKFIELD BRANCH RAIL ROAD.

See Constitutional Law, 12.

COMPLAINT.

1. In criminal prosecutions, it is essential that the indictment or complaint allege with certainty the time at which the offence was committed; although, at the trial, proof that it was committed at a different time is receivable. *State* v. *Baker*, 52.

2. A complaint will not be sustained, if in stating the time of the offence it merely allege, that it was committed "on or about" a specified day. *Ib.*

CONDITION.

See Contract, 6, 7, 8. Rail Roads, 6.

CONDITIONAL DEED.

See Right of Re-entry.

CONSIDERATION.

1. The inconvenience to a debtor of procuring security for a part of the debt is a sufficient consideration to support a promise by the creditor, that he would, therefor, relinquish the residue of the debt. *Little* v. *Hobbs*, 357.

2. If no time be stipulated within which to furnish such security, it is to be done in a reasonable time. *Ib.*

3. A deed conveying land may be valid between the parties to it without consideration. *Larrabee* v. *Larrabee*, 477.

4. The receiving of interest in advance upon a note is a valuable consideration to support a contract for enlarging the time of payment. *Lime Rock Bank* v. *Mallett*, 547.

See DEED OF CONVEYANCE, 2. FRAUDULENT CONVEYANCE, 1. MARRIED WOMEN, 10. RAIL ROADS, 1, 4, 5.

CONSIGNEE.

See SHIPPING, 2, 3.

CONSTITUTIONAL LAW.

1. An article of the Constitution provides, that "private property shall not be taken for public use, without just compensation." *Cushman* v. *Smith*, 247.

2. By the *taking* of property, within the scope of that provision, is meant such an appropriation of it as deprives the owner of his title or of a part of his title. *Ib.*

3. That provision, when applied to real estate, precludes the acquisition of any title or easement or permanent appropriation without the actual payment or tender of a just compensation. *Ib.*

4. It did not dislodge the paramount dominion, which the sovereignty has over the property-rights of each individual. It merely relaxed that dominion so far as to provide that property, *taken by the exercise of that dominion*, should be paid for. *Ib.*

5. It does not preclude the Legislature from authorizing acts, for the public benefit, though operating injuriously, and without compensation, upon private property, *unless* such property is *taken* and *appropriated*, or is *attempted* to be taken and appropriated from the owner. *Ib.*

6. It does not preclude the Legislature from authorizing an exclusive occupation, temporarily, of real estate, belonging to an individual, without previous compensation, as a proceeding incipient to the acquisition of a title or of an easement, for public use. *Ib.*

7. The right to such temporary occupation, as an incipient proceeding, will become extinct by an unreasonable delay to make actual payment or tender of compensation, and to complete the proceedings requisite for acquiring the intended title or easement. *Ib.*

8. An action of trespass, *quare clausum*, may be maintained to recover damages for the *continuance* of such occupation, unless within a reasonable time after its commencement, compensation be made or tendered. *Ib.*

9. Under such circumstances, an action of trespass or an action on the case, may be maintained to recover damages for *all the injuries*, occasioned by the prior occupation. *Ib.*

10. It is requisite that enactments, in order to justify the taking of private

property for public use, should designate the means to be pursued for obtaining the compensation. *Ib.*

11. *It seems*, that the distinction, which asserts that private property *may* be taken for public use, without previous compensation, when the payment is charged upon a *public* corporation, and that it may *not* be so taken, when the charge is attached to a mere *private* corporation, is untenable. *Ib.*

12. By the charter of the Buckfield Branch Rail Road Company, it was not the intention to require the compensation of land-owners to be paid, before a right should vest in the corporation to take exclusive occupation of land, for the purpose of making the road. *Ib.*

CONTRACT.

1. Where one has contracted to labor in the service of another during a given time, at a specified rate of wages, if he be discharged by his employer, before the expiration of the time, without justifiable cause, he is entitled to recover damages. *Miller* v. *Goddard*, 102.

2. But if he voluntarily quits the service before the expiration of the time, without justifiable cause, he can recover nothing for his previous labor. *Ib.*

3. G. contracted to drive the defendants' logs at a fixed price per thousand feet. The plaintiff, however, was compelled to drive a large part of them with his own, in consequence of their intermixture with his; and, after the driving was over, he stipulated with the defendants, that they should not be required to pay him, for the driving, more than two hundred dollars in addition to the price which G. was to have had. — *Held*, that this stipulation did not bind the plaintiff in order to recover for his services, to perform all the duties in driving, which G. had agreed to perform. *Dow & Foster* v. *Huckins & Dudley*, 110.

4. There are cases in which *the time* agreed upon for the payment of money, is not of the *essence* of the contract. *Hill* v. *Fisher*, 143.

5. Rights, claimed under this principle, can be enforced only by process in equity. *Ib.*

6. In a promise by a creditor to his debtor that he would relinquish a part of the debt, upon payment of the residue at a specified time, satisfactory security being furnished, there is a condition precedent to be performed by the debtor. *Little* v. *Hobbs*, 357.

7. Such a condition is not fulfilled by a tender, though seasonable, of the security, *as a payment*. *Ib.*

8. In such a case, a neglect by the debtor to *pay* the agreed part at the payday absolves the creditor from his promise to relinquish the residue. *Ib.*

9. If one part of a commercial contract, upon a literal construction, be found at variance with another part, the part which contributes more essentially to the contract and becomes the more material, will be entitled to more consideration than the part which is less so. *Smith* v. *Davenport*, 520.

See Consideration, 1, 3, 4. Legislative Grants and Contracts, 2, 3, 4. Lord's Day. Policy of Insurance, 1, 2, 3, 4. Rail Roads.

CONVERSION.

1. So soon as trees are fallen and severed from the soil, a wrongful assumption of dominion over them, is a conversion. *Moody* v. *Whitney*, 563.
2. A tortious taking is conversion. *Ib.*
3. Where one, having tortiously cut and carried away trees from the land of another, sells a part of them to a person, who had no knowledge of the wrong; the owner, even if he can maintain an action of trover against them jointly, will be entitled, in such action, to recover of the *vendee* only to the value of the part which he purchased. *Ib.*

CONVEYANCE OF LAND.

1. Words of doubtful import in a deed of conveyance, are to be construed most favorably to the grantee. *Winslow* v. *Patten*, 25.
2. One purchased land, as bounded on the East by land of L, and on the South by land of D. The land of L extended a part only of the distance to D's land, but the course of L's line, if continued, would strike the land of D; — *Held*, that the land purchased is bounded on that continuation-line. *Ricker* v. *Barry*, 116.
3. In a deed of land, if the boundary descriptions disagree, and one of them is expressed as being certain and the other as being uncertain, the former must prevail, in the absence of controlling circumstances. *Ib.*
4. In the construction of such a deed, however, a long occupation, pursuant to the uncertainly expressed boundary, would have much influence. *Ib.*
5. In the absence of controlling proof, the legal presumption is, that by a deed of conveyance duly executed and recorded, the title passes, and that the grantor had sufficient seizin to enable him to convey, and that the seizin and the title correspond with each other. *Blethen* v. *Dwinel*, 133.
6. A conveyance of "the use of land forever," is equivalent to a conveyance of the land. *Farrar* v. *Cooper*, 394.
7. When land is conveyed, to be afterwards located within specified limits, the first rightful location upon the earth, determines forever its bounds. *Ib.*
8. In a deed, granting part of a mill and of a mill site, within specified boundaries, an authorization to the grantee, that in concurrence with the other part owners, he might remove the mill and maintain it at any other spot within the boundaries, does not limit the grant to that of an easement only. *Ib.*

See Deeds of Conveyance, 1. Fraudulent Conveyance.
Married Women, 8, 9, 10, 11.

CO-PARTNERSHIP.

1. After the dissolution of a co-partnership, it is regarded as continuing for the settlement of its affairs, and each partner, for that purpose, retains his former powers, unless a different agreement be made. *Gannett* v. *Cunningham*, 56.
2. A conveyance of property to one member of a co-partnership firm, made

after the dissolution in payment of a debt due to the firm, will enure to the benefit of the firm. *Ib.*

3. For an invasion of such property, an action may be maintained in the name of all the members of the firm. *Ib.*

4. A note made payable to a partnership firm, for property belonging to the firm, is the property of the firm, though given after the death of one of the partners, upon a purchase from the survivor. *Thompson* v. *Lewis*, 167.

5. One, summoned as trustee and disclosing that he is indebted to a partnership firm, of which the principal defendant is the surviving partner, will be charged, unless some interposing claim be made, *in behalf of the firm*, either by some of its creditors or by the administrator of the deceased partner. *Ib.*

6. The share or aliquot part which a judgment debtor may have in the goods of a firm, of which he is the surviving partner, may be sold on execution against him; unless some interposing claim be made, *in behalf of the firm*, either by some of its creditors or by the administrator of the deceased partner. *Ib.*

7. Unless such interposition be made, the sale need not be confined to the mere surplus interest, which the surviving partner might have in the goods after payment of all the partnership debts. *Ib.*

8. Of the methods by which such interposition, in behalf of the firm, may be effectually made, to prevent the surviving partner's share of the estate from being held for his private debt, either upon trustee process or upon execution against him. *Ib.*

9. A suit by one, *as surviving partner*, for money paid upon a liability for the defendant, is not supported by proving, that the survivor paid the money, after the death of the other partner, without also proving, that he paid it *in behalf of the partnership*. *Stevens* v. *Rollins*, 226.

See Evidence, 1.

CORPORATIONS.

1. Private corporations exist by legislative grants, conferring rights and powers for special purposes. *Yarmouth* v. *North Yarmouth*, 411.

2. A company, incorporated as trustees of a fund, with the power and duty of investing it and appropriating its income to the public schools of a town, is a *private* and not a *public* corporation. *Ib.*

3. If a judgment be recovered against a corporation, the levy of the execution upon their property is not a trespass against them, though, both in the judgment and in the execution, their name is variant from that given them by their charter of incorporation. *Wilton Manufacturing Co.* v. *Butler*, 431.

4. Whether the corporation were in fact the party to the said judgment, recovered under a name variant from their corporate name, is, (*as it seems*,) a question of fact, upon which parol evidence may be introduced to the jury. *Ib.*

5. The by-laws of a corporation required that transfers of shares in its capital stock should be "noted and subscribed in a book, kept for the purpose;"

Held, that the sale of a stockholder's shares would not exonerate him from individual liability upon corporation debts, contracted *prior* to the time of noting and subscribing the sale upon the transfer-book.

Fowler v. *Ludwig,* 455.

See Legislative Grants and Contracts, 3. Rail Roads, 2, 3, 4, 5.

COST.

1. An unqualified repeal of a penal statute, upon which a pending action was founded, extinguishes the suit; and no costs are recoverable by either party. *Saco* v. *Gurney,* 14.
2. In an action appealed from the District Court, the plaintiff, if he recover in this Court more than twenty dollars, as damage, is entitled to full cost in the District Court, although the verdict there in his favor was for less than twenty dollars. *Moore* v. *Thompson,* 207.
3. When a creditor's demand is partly upon a lien claim, and partly upon a non-lien claim, he may maintain separate actions, with a recovery of cost in each, notwithstanding the general rule of allowing cost in one suit only when the matters sued might have all been united in one action.

Bicknell v. *Trickey,* 273.

See Mortgage, 19.

COURT AND JURY.

In a prosecution for the unlawful sale of spirituous or intoxicating liquors, it is the province, not of the Court, but of the jury, to determine whether the article sold was or was not of the prohibited class.

State v. *Wall,* 165.

COVENANT.

1. A covenant, in a deed of conveyance, which is broken at the moment of its execution, does not run with the land, and at the common law no action upon it can be maintained by an assignee. *Ballard* v. *Child,* 355.
2. The R. S. c. 115, §§ 16 and 17, giving to assignees the right of action upon such covenants, extends only to cases in which an eviction had occurred. *Ib.*
3. Where no seizin passes by the conveyance, and no possession is taken, there can be no eviction. *Ib.*
4. In a suit upon the covenant of freedom from incumbrance, contained in a deed conveying real estate, nominal damages only will be recovered, unless the incumbrance have been discharged, although the plaintiff has yielded to an entry and possession by the incumbrancer. *Stowell* v. *Bennett,* 422.

See Pleading, 4, 5, 6, 7, 8.

DEEDS OF CONVEYANCE.

1. A deed, "*demising and granting*" land to A. B. his *heirs and assigns,* with

habendum for his natural life, will be held to convey a life estate only, if, from other parts of the deed, it appears that such was the intent of the parties. *Higgins* v. *Wasgatt*, 305.

2. A deed of land for a valuable consideration, intended to be absolute, made and received with a fraudulent intent to hinder or delay creditors, is not, on that account, void as to *subsequent* creditors, *unless* some secret trust was reserved for the benefit of the grantor. *Bangor* v. *Warren*, 324.

3. The right of re-entry for a breach of condition in a conveyance of land, pertains only to the grantor and his legal representatives. It is not included among the rights mentioned in R. S. c. 94, § 1, and cannot be taken on execution. *Ib.*

4. In the absence of other evidence, a deed, conveying real estate, does, *of itself*, raise a presumption that the grantor had sufficient seizin to enable him to convey, and also operates to vest the legal seizin in the grantee. *Bolster* v. *Cushman*, 428.

5. A deed conveying land may be valid between the parties to it without consideration. *Larrabee* v. *Larrabee*, 477.

6. For a grant, by an heir at law, of a reversionary interest in land, authorizing the grantee to take possession at the termination of the life estate, a sufficient consideration, if it need any, is constituted by an agreement, (made by the devisee of the reversion,) that he would assent to the disallowance of the will by the Judge of Probate, and would withdraw the testimony already laid before the Judge in support of it. *Ib.*

See Conveyance of Land. Flats. Trustees, 3, 4, 5, 6, 7.

DEPOSITION.

1. The statute, requiring the caption of a deposition to certify that the deponent was sworn according to law, may be complied with by a statement of the language used in the administration of the oath, and if that language appears to have been what the law requires, it is sufficient. *Bachelder* v. *Merriman*, 69.

2. A certificate that "the deponent was first sworn and was examined according to law," is insufficient. *Ib.*

3. A deposition is not to be rejected, merely because its caption omits to state at whose request it was taken. *Knight* v. *Nichols*, 208.

4. The caption of a deposition sufficiently states the cause in which it is to be used, if it name the parties and the Court in which the trial is to be had. *Ib.*

5. A deposition, impeaching the general reputation of an opposing witness for truth, cannot be excluded, although it also shows that the reputation was founded upon the witness' neglect to perform his agreement. *Hapgood* v. *Fisher*, 407.

DESERTER.

See Army of the United States.

DISCHARGE.

See Release, 1.

DISCLAIMER.

Title in a third person cannot be proved under a plea of disclaimer.
Putnam F. School v. *Fisher*, 172.

DISSEIZIN.

See Seizin and Disseizin.

DOWER.

1. A widow has the right to redeem real estate, mortgaged by her husband during coverture, although the rights of the mortgagee and also of the mortgager have both come by assignments to the tenant, and although, in the mortgage deed, she relinquished her right of dower.
Simonton v. *Gray*, 50.
2. Of the mode of computing the entire value or the annual value of a widow's right of dower in mortgaged real estate. *Ib.*
3. An unsealed agreement by a dowress, (after having recovered judgment for her dower,) made with the warrantor of the judgment-tenant, that she would receive a specified sum yearly during life, in lieu of dower, will not, after a neglect of payment, bar her right to receive possession by writ of entry. *Sargeant* v. *Roberts*, 135.
4. Such an agreement is not to be viewed as a lease of the land, nor as a release of dower. *Ib.*
5. It creates no privity of estate betwixt her and the warrantee. *Ib.*
6. It reserves to her the right of rescinding when the payments fail. *Ib.*
7. Unless there be such a rescission, her right to recover mesne profits in a writ of entry does not arise. *Ib.*
8. It is only when a husband dies *seized* that the R. S. c. 95, § 6, secures to a wife, *prior to the assignment of dower*, a third of the rents and profits of his land. *Bolster* v. *Cushman*, 428.
9. A widow, though entitled to dower, has no claim to occupy *any part* of the estate, until her dower has been assigned. *Ib.*

EQUITY.

1. There are cases in which *the time* agreed upon for the payment of money, is not of the *essence* of the contract. *Hill* v. *Fisher*, 143.
2. Rights, claimed under this principle, can be enforced only by process in equity. *Ib.*
3. Thus, for a party who claims under a tender, made after the agreed pay-day, and relies upon circumstances to justify the delay, *a suit at law* is not an

available remedy, although the time of payment was not of the essence of the contract. *Ib.*

ESTATES IN TRUST.

See Trustees.

ESTOPPEL.

An estoppel is commensurate only with the covenant out of which it springs. *Kinnear* v. *Lowell*, 299.

See Pleading, 16, 17.

EVICTION.

See Covenant, 2, 3.

EVIDENCE.

1. The declarations of one co-partner, made after the dissolution of the co-partnership, concerning facts that had occurred prior to the dissolution, may be received in evidence to charge the partnership. *Hinkley* v. *Gilligan*, 101.
2. In an action upon a judgment, it is inadmissible to prove that, *prior to its rendition*, a part of the claim, upon which it was founded, had been paid. *Bird* v. *Smith*, 63.
3. In an action upon a security, given in satisfaction of a judgment, it is inadmissible to prove that, prior to the rendition of the judgment, a part of the claim, upon which it was founded, had been paid, whether to the nominal plaintiff or to any party having an equitable interest in it. *Ib.*
4. A judgment, to which a person was not a party or privy, cannot be introduced as evidence against him. *Putnam F. School* v. *Fisher*, 172.
5. Every position, respecting the admissibility of testimony, should be distinctly presented to the presiding Judge for decision, before it can be made the subject of exceptions. *Lee* v. *Oppenheimer*, 181.
6. Thus, where evidence had been introduced, from which the jury might perhaps have inferred, that H. was an agent of the defendant, and, in a subsequent stage of the case, the plaintiff offered to prove the declarations of H., though without calling the attention of the Judge to the previous testimony, and the Judge ruled, that the proof was inadmissible, unless it could be shown that H. made the declarations, as agent of the defendant or by his authority, it was *Held*, that exceptions to the exclusion of the testimony were unsustainable. *Ib.*
7. Where a witness had been restricted by the Judge to a statement of facts prior to a specified transaction, but he voluntarily stated some facts of subsequent occurrence, (no further instructions having been requested,) exceptions to the non-exclusion of the testimony will be overruled. *Ib.*

8. An officer's authority to receive the attorney's costs of a writ, may be inferred from their previous course of conduct. *Ib.*

9. In action of covenant broken, for not delivering articles according to the obligation, a traverse of the plea, "that the defendant *had not broken his covenant*," places the *onus* upon the *plaintiff* to prove *negatively*, that the articles had *not* been delivered. *Sawtelle* v. *Sawtelle*, 228.

10. Leading questions to a witness are such as suggest answers favorable to the party asking them. *Parsons* v. *Bridgham*, 240.

11. A Judge may, in some cases, allow leading questions to a witness. *Ib.*

12. Declarations, made by a third person, when in the performance of an act, and illustrative of its purpose, are admissible in evidence as a part of the act. *Corinth* v. *Lincoln*, 310.

13. In order to the admission of declarations in evidence as a part of an act, the act must have a tendency to establish the allegations which the party undertakes to sustain. *Ib.*

14. Evidence that a person, after performing various jobs of labor in the line of his business, in the same and in neighboring towns, occasionally returned to the house of a particular family, where he stayed while out of employment, has no tendency to prove that he had acquired a *residence* in that family. *Ib.*

15. His declarations, therefore, made when in the acts of such returnings, that he was going to that house as his home, are inadmissible. *Ib.*

16. In a suit by a corporation against a subscriber to its capital stock, to recover assessments made upon the shares subscribed for, it is not competent for the defendant to show, by parol evidence, that his subscription was upon a condition, not expressed in the writing. *K. & P. R. R.* v. *Waters*, 369.

17. Declarations by the vender of property, made in disparagement of his title, and while he was in possession of the property, are admissible in evidence to disprove such title. *Parker* v. *Marston*, 386.

18. In order to make such declarations admissible, it is not necessary that, at the time of making them, the property should be exhibited, or that any act should be done in relation to it. *Ib.*

19. There are cases, in which a party may, *by his own affidavit*, show to the *Court* that a paper has been lost, in order to the introduction of secondary evidence to prove its contents. *Mason* v. *Tallman*, 472.

20. In no case, however, is such an affidavit receivable as evidence of any fact for the consideration of the *jury*. *Ib.*

21. When a question, made by one party, has been but partly answered by the witness, the residue of the answer may be elicited on inquiries by the other party. *Ib.*

22. An inference founded upon hearsay is no more admissible in evidence, than a fact obtained in like manner would be. *Ib.*

23. A testator devised land. The heir at law resisted the probate of will alleging the insanity of the testator. Upon a promise by the legatee, that the evidence before the Judge of Probate in favor of the will should be withdrawn and that he would consent that the will should be disallowed, the heir conveyed a part

of the land to the devisee; *Held*, that in order to set aside the deed upon the allegation, that it was procured by fraud, proof of the insanity is not admissible, unless connected with evidence tending to prove, or with an offer to prove, that the insanity was known to the devisee or his agent, prior to the taking of the deed. *Larrabee* v. *Larrabee*, 477.

24. Upon such an investigation in this Court, evidence is admissible to show what testimony, prior to the execution of the deed, was given of the insanity, in the presence of the grantee, on the trial of the will in the probate court; because it affects him with knowledge that the insanity was set up. *Ib.*

25. But to authorize any effect to be given to such evidence respecting any fact, or state of facts, the *whole* of it should be produced. *Ib.*

26. If one party introduce a mutilated paper, the other party is not bound to explain the mutilation. *Boothby* v. *Stanley*, 515.

27. In a case submitted to the Court, upon the evidence, there appeared to have been a material alteration in a return made by the officer upon one of the legal precepts submitted for consideration. No suggestion was offered, that the alteration was not made by the officer, or that the return, in its altered state, did not conform to the facts; — *Held*, that the presumption was, not that a fraud had been committed, but that the alteration was rightfully made before the signing of the return. *Ib.*

28. If the ground of a judgment be not shown by the record, it may be proved by parol. *Dunlap* v. *Glidden*, 517.

See Bill of Lading, 1, 2, 3. Bills and Promissory Notes, 2, 4, 26, 27, 28. Deposition, 5. Exceptions, 6, 8. Fraud, 1, 2. Landlord and Tenant, 2, 3. Officer, 11, 12. Records. Will, 1, 2.

EXCEPTIONS.

1. In a case, presented on exceptions, it is the province of the Court to decide, not upon the general merits of the case, but merely upon the legal correctness of the proceedings excepted to. *Miller* v. *Goddard*, 102.

2. In this Court, when acting upon exceptions, it is too late to object to the appearance in the Court below, of the attorney who there filed the exceptions. *Wilson* v. *Wood*, 123.

3. After exceptions have been filed and overruled, the prevailing party is entitled to judgment. *Swett* v. *Stubbs*, 178.

4. In that stage, the case is no longer open to the introduction of testimony to prove a fact, upon a motion to prevent the judgment. *Ib.*

5. Neither would the *admission* of the fact put the motion in any more favorable position than *proof* of it would do. *Ib.*

6. Where one offered as a witness, would be inadmissible upon proof of an alleged fact, and evidence was introduced for the purpose of proving that fact, and the Judge excluded the witness, it not being stated, in the case, whether he considered the fact to have been proved or not; exceptions, reciting the evidence, impose upon this Court the duty of deciding the

question of fact, and of adjudging thereupon whether the exclusion of the witness was or was not rightful. *Murphy* v. *Glidden*, 196.

7. To the decisions of a Judge, in matters of discretion, exceptions do not lie. *Moody* v. *Hinkley*, 200.

8. If answers are rejected by a Judge, because given in answer to questions, which he may suppose to be leading, the rejection is ground of exception, if in fact the questions were not leading. *Parsons* v. *Bridgham*, 240.

9. Exceptions cannot be sustained for the wrongful admission of testimony explaining a written contract, if the explanation shows nothing different from the legal import of the contract itself. *Ladd* v. *Dillingham*, 316.

See Evidence, 5, 6, 7, 8.

EXECUTION.

1. The right of re-entry for condition broken in a deed of land, cannot be taken on execution. *Bangor* v. *Warren*, 324.

2. Personal property having been duly advertised for sale on execution at a time specified, and a postponement of the sale for two days having been made by proclamation, without the posting of advertisements, the officer would not be liable in trespass to the judgment debtor for selling the property at the postponed time, if the postponement, both as to the time and mode of it, was made at the request of such debtor. *Wilton Manf. Co.* v. *Butler*, 431.

3. An omission by the officer, to affix his signature to the return of a sale of property on execution, may be amended on proof to the Court, that the return was according to the truth of the case. *Ib.*

See Exempted Property, 1. Levy of Real Estate, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14. Poor Debtors, 1. Redemption of Land, 1, 2.

EXECUTORS AND ADMINISTRATORS.

See Administration. Testamentary Trustees.

EXEMPTED PROPERTY; OR PROPERTY NOT LIABLE TO BE TAKEN FOR DEBT.

Trespass against an officer for selling on execution, *by virtue of an attachment on the writ*, property which the debtor claimed to hold exempt from liability for debt, cannot be maintained, *unless* it was by law exempt, *when attached on the writ*. *Greaton* v. *Pike*, 233.

FENCES AND FENCE VIEWERS.

1. In relation to partition fences, the power of the fence viewers extends only to the assignment of the respective portions of the dividing line and to the fixing of the time, within which to build the fence. *Longley* v. *Hilton*, 332.

2. Further orders or adjudications by them, being unauthorized by the statute, are of no effect. *Ib.*

3. Thus, an order, (however *equitable* under the circumstances,) that *one* of the adjoining owners should build a fence upon a portion of the line assigned to the *other*, and exonerating the latter from building upon such portion, creates no obligation upon the former, nor relieves the latter from the duty, imposed by the statute, to build the fence upon that portion of the line. *Ib.*

4. Such an order, though incorporated into the assignment of the divisional line, is merely void, and therefore cannot vitiate the assignment itself. Shepley, C. J., *dissentiente.* *Ib.*

FISHERY AND FISH COMMITTEE.

1. The Act of 1826, regulating the alewive fishery in Bristol, repealed all the Acts then in force on the same subject, so far as operative in that town. *Bearce* v. *Fossett,* 575.

2. Under that Act, the town was annually to choose a fish committee, whose right and duty it should be to keep open, in the dams upon the stream, proper and sufficient sluice-ways for the passage of alewives. *Ib.*

3. Since that Act no power can reside in any persons, except the fish committee, to adjudicate upon the sufficiency of any sluice-way, or to open any sluice-way in another person's dam, or to abate any dam in that town as a nuisance for the absence or the insufficiency of a sluice-way. *Ib.*

FLATS.

1. The ordinance of 1641 provided that the proprietor of land adjoining on the sea or salt water shall hold to low water, where the tide does not ebb more than one hundred rods. Though that ordinance was vacated by the abrogation of the Colonial charter, it has by long usage become the law of the State. *Winslow* v. *Patten,* 25.

2. A grantor deeded a lot or square of land, bounded by an arm of the sea, "*reserving a street through the square,*" [of a described width and location,] "*together with the flats; viz: all my right to the same in front of said square to the channel;* — *Held,* that the flats were not included in the reservation, but passed by the deed. *Ib.*

FOREIGN ATTACHMENT.

See Trustee Process.

FRAUD.

1. Fraud in the procurement of a deed of land can be established only upon proof, that the grantee or his agent performed some *act* or made some *representation* which was deceptive or false, knowing it to be so. *Larrabee* v. *Larrabee,* 477.

2. A testator devised land. The heir at law resisted the probate of the will,

alleging the insanity of the testator. Upon a promise by the devisee, that the evidence before the Judge of Probate in favor of the will should be withdrawn, and that he would consent that the will should be disallowed, the heir conveyed a part of the land to the devisee;— *Held,* that in order to set aside the deed upon the allegation that it was procured by fraud, proof of the insanity is not admissible, unless connected with evidence tending to prove, or with an offer to prove, that the insanity was known to the devisee or his agent, prior to the taking of the deed. *Ib.*

See Deeds of Conveyance, 2. Evidence, 27.

FRAUDULENT CONVEYANCE.

1. A deed of land for a valuable consideration, intended to be absolute, made and received with a fraudulent intent to hinder or delay creditors, is not *on that account,* void as to *subsequent* creditors, unless some secret trust was reserved for the benefit of the grantor. *Bangor* v. *Warren,* 324.

2. A sale of property by a *debtor* is not necessarily to be held fraudulent and void as to creditors, although a contract for his own *future support* be a part consideration of the sale. *Hapgood* v. *Fisher,* 407.

3. Thus, such a sale will be sustained, if the vender retained other property, sufficient for the payment of his debts. *Ib.*

See Married Women, 10, 11.

FUNDS FOR PIOUS AND CHARITABLE USES.

A testator appropriated and bequeathed a sum of money, of which the interest was to be annually applied toward the support of "Universalist preaching," and directed his executors to pay the fund to the trustees of a Universalist society in the town of S., provided one should be formed within two years from the testator's death, and provided also that an additional *annual* specified sum should be raised and applied from other sources toward the support of such preaching. The further direction of the will was that, upon a failure in the performance of the foregoing conditions, the fund should go to another Universalist society upon certain prescribed conditions, and that, if the last mentioned conditions should fail to be performed, the fund should be paid *by the executors* to the heirs of the testator; — *Held,*

1*st. that* the bequest, being for charitable or pious uses, was sufficiently certain in its purposes to be upheld; —

2*d. that* the society, if formed within the two years, would be competent, as *cestuis que trust,* to receive the *benefit* of the fund; —

3*d. that* the *trustees,* whom the society should appoint, and not the *society itself,* were the legatees; —

4*th. that they* alone could maintain an action against the executors, for the fund; —

5*th.* and *that* the requirement to raise and apply the prescribed additional sum annually, was a condition precedent to any claim by the trustees against the executors. *Universalist Society in Sweden* v. *Kimball,* 424.

See School Fund.

GUARDIAN.

1. The first three years, within which a guardian is bound to settle a guardianship account, do not commence until assets shall have come into his hands. *Hudson* v. *Martin*, 339.

2. In settling, in the Probate Court, a guardianship account with a minor, no previous notice by the guardian is requisite, except in cases of married females, and in cases where new guardians may have been appointed. *Ib.*

3. Of the compensation for personal services and of the rate of commissions, to which a guardian is entitled. *Ib.*

See Probate Court, 1, 2, 3, 4.

HIGHWAYS AND HIGHWAY SURVEYORS.

1. For labor done upon the highway, under the surveyors' express promise to pay for it, an action may be maintained against him, although the laborer may not have satisfied the jury, that the defendant *intended* to render himself *personally* liable. *Field* v. *Towle*, 405.

2. A highway surveyor has no authority to employ laborers upon the highway, upon the credit of the town, except by the written consent of the selectmen, when the money, appropriated for the repairs within his limits, proves to be insufficient. *Ib.*

HUSBAND AND WIFE.

Neither the common law nor any statute enactment authorizes an action on contract to be maintained against husband and wife jointly. *Davis* v. *Millett*, 429.

See Married Women.

INDICTMENT.

1. In the trial of an indictment alleging facts and concluding "against the peace and contrary to the form of the statute," the Judge, though requested, is not bound to instruct the jury, whether the indictment would or would not be sustainable at common law. *State* v. *Hart*, 36.

2. In an indictment for exercising a noxious trade in a public locality, it is no defence, that the town or city authorities have omitted to assign any place for the exercise of such a trade. *Ib.*

3. An indictment for a public nuisance charged, that the defendant *in the exercise of his trade*, collected and kept certain (specified) articles in a corrupted state, "*and in manner aforesaid*" collected and kept other (specified) offensive matters; — *Held*, that the indictment sufficiently alleged, that it was *in the exercise of the trade*, that the last mentioned offensive matters were collected and kept. *Ib.*

4. To defraud a person of his money, goods or estate; *or* to cheat and defraud him of his money, goods or estate; *or* wrongfully and wickedly to obtain

his money and other property designedly and with intent to defraud; is not necessarily a crime subjecting the perpetrator to punishment.
State v. *Roberts*, 320.

5. An indictment, therefore, charging a conspiracy to commit either of those acts, without *particularizing* the object to be accomplished or the means to be used, is unsustainable. *Ib.*

6. In an indictment for such a conspiracy, a charge that it was to be accomplished by "false pretences," is not sufficiently descriptive of the means to be used. *Ib.*

7. An indictment for forgery, or counterfeiting, or for having counterfeit bills in possession, should set forth the forged or counterfeit instruments by fac simile or copy, whenever practicable. *State* v. *Bonney*, 383.

8. In such cases, the indictment must, in itself, *purport* to set forth the *tenor* of the instruments. It is not sufficient to set them forth according to their *purport and effect.* *Ib.*

9. The exceptions in the enacting clause of a penal statute are to be negatived in the indictment. *State* v. *Keen*, 500.

10. But it is not requisite that the negation be expressed in the exact words of the statute. Other words, excluding with equal certainty the exceptions of the statute, may be employed. *Ib.*

11. Under the Act of 1851, for the suppression of drinking houses and tippling shops, an indictment, charging that the accused was a common seller of intoxicating liquors, *without any lawful authority, license or permission*, is not invalidated by its omission to charge that he was *not appointed as the agent of any city or town to sell liquors for medicinal and mechanical purposes.* *Ib.*

See Complaint, 1, 2. Jurisdiction, 1, 2, 3. Riot, 1, 2.

INSOLVENCY.

See Bills and Promissory Notes, 10, 11, 12.

INSURANCE.

See Policy of Insurance.

INTEREST MONEY.

See Officer, 8, 9, 10.

INTOXICATING LIQUORS.

See Liquors.

JOINT DEBTORS.

See Release, 1.

JUDGMENT.

1. In an action upon a judgment, it is inadmissible to prove that, *prior to its rendition*, a part of the claim, upon which it was founded, had been paid.
Bird v. *Smith*, 63.

2. In an action upon a security, given in satisfaction of a judgment, it is inadmissible to prove that, prior to the rendition of the judgment, a part of the claim, upon which it was founded, had been paid, whether to the nominal plaintiff or to any party having an equitable interest in it. *Ib.*

3. A judgment against a trustee will not operate as a bar to protect him against an action by the principal defendant, unless a demand for the goods, effects and credits had been made within thirty days from the judgment by an *officer holding the execution.* *Bachelder* v. *Merriman*, 69.

4. Neither will such judgment operate as such a bar, unless the trustee had delivered or accounted for the goods, effects and credits upon the judgment. *Ib.*

5. Judgment of Courts, having competent jurisdiction, are presumed in law to have been rendered upon appropriate preliminary proceedings.
Eldridge v. *Preble*, 148.

6. An officer may be protected in the service of an execution, although there were such irregularities in the writ and in the service of it, as would, if pleaded, have abated the suit, and although, for such irregularities, the judgment was afterwards reversed on writ of error.
Wilton Manf. Co. v. *Butler*, 431.

7. A sheriff is not accountable in trespass for the act of C., his deputy, in serving an *execution*, although C. committed a fraud in the serving of the *writ* on which the judgment and execution were obtained, *if* in serving such *writ*, C. was the deputy of a *former* sheriff. *Ib.*

See Corporations, 3, 4. Lien, 1, 2, 3, 6, 7, 8, 9. Pleading, 16, 17. Poor Debtors, 1. Set-off, 1.

JURISDICTION.

1. Upon a verdict, rendered in this Court on an indictment found in the late District Court, for an offence of which that Court had exclusive jurisdiction, the judgment will be arrested, if the case was erroneously transferred to this Court for trial, while that Court was in existence.
State v. *Bonney*, 223.

2. Of an indictment for having in possession *upon a specified day*, ten counterfeit bank bills, with intent to pass the same, the District Court alone, until the time of its abolishment, had the jurisdiction, unless the indictment alleged, that the accused had the bills in possession, all *at one time*.
Ib.

3. Jurisdiction cannot be imparted to the Court by the consent of parties merely. *Ib.*

LANDLORD AND TENANT.

1. Where the grantor of land remains in possession after the conveyance, a legal presumption arises that he is tenant to the grantee.
Larrabee v. *Lumbert*, 79.

2. Upon that presumption, if uncontrolled, assumpsit for use and occupation may be maintained. *Ib.*

3. That presumption may be repelled by parol proof. *Ib.*

4. After notice to quit, the grantee may elect to treat the grantor, if in possession, as holding by wrong, and not as a tenant. *Ib.*

5. The bringing of a writ of entry is such an election. *Ib.*

6. Such writ of entry with possession thereby obtained, precludes a recovery for use and occupation. *Ib.*

LAW AND FACT.

See COURT AND JURY.

LEASE, LESSOR AND LESSEE.

Under the lease of a farm and stock of cattle, with stipulation that the rent should consist of a specified part of the products, *except the hay*, which should go wholly to the use of the lessor; the hay belongs exclusively to him though never delivered. *Potter* v. *Cunningham*, 192.

LEGISLATURE AND LEGISLATIVE GRANTS AND CONTRACTS.

1. Private corporations exist by legislative grants, conferring rights and powers for special purposes. *Yarmouth* v. *North Yarmouth*, 411.

2. Such grants constitute legal contracts, and the Legislature cannot impair the obligation of them. *Ib.*

3. A company, incorporated as trustees of a fund, with the power and duty of investing it and appropriate its income to the public schools of a town, is a private and not a public corporation. *Ib.*

4. In such a case, the trustees, holding the fund, *as a private corporation*, for the use of such schools, under a legislative contract, cannot be divested of it or of any part of it, by legislative action. *Ib.*

5. A statute, therefore, which should assume to distribute the fund between the schools of such town and those of another town, would be inoperative, although the latter town be created by a division of the former. *Ib.*

LEVY OF REAL ESTATE.

1. A levy of mortgaged land on execution against the mortgagee, who is not in possession and has never entered to foreclose, passes no title.
Coombs v. *Warren*, 89.

2. A levy of land on execution, "reserving and excepting such incumbrances and conveyances as have been made prior to the levy," is too indefinite and uncertain, to be sustained. *Thayer* v. *Mayo*, 139.

3. A levy of land, appraised at an amount, greater by fifty-two cents, than the sum to be collected on the execution, is void. *Ib.*

4. A levy of an undivided part of the interest which the execution debtor held in a tract of land jointly with others, is void, unless it specify what the interest was, which the debtor held. *Rawson* v. *Lowell*, 201.

5. In a levy of real estate, the officer may sufficiently return that the appraisers were sworn, by referring to indorsements, made upon the execution by the magistrate and by the appraisers, containing certificates that the requisite oath was taken. *Fitch* v. *Tyler*, 463.

6. No particular ceremony is required in seizing real estate on execution by an officer. It is not essential that he should enter upon the land during any stage of the proceedings in a levy. *Ib.*

7. Upon a levy of land, the "specified time" to be given by an officer to the debtor, in which to appoint an appraiser, is to be mentioned in the notice given to the debtor, but need not be stated in the return upon the execution. *Ib.*

8. What is a "reasonable" time, to be allowed to the debtor, in which to choose an appraiser, is submitted to the judgment of the officer. *Ib.*

9. A return by the officer that the debtor "refused" to appoint an appraiser, is a sufficient substitute for an allegation that notice was given to the debtor. *Ib.*

10. It implies that the debtor made no objection to the time given. *Ib.*

11. In the levy of land, the R. S. c. 94, requires, § 6, that the appraisers shall proceed with the officer and view the land, and also, § 24, that the officer shall state in his return that they appraised and set off the same; — this requirement is complied with, if the appraisers' certificate shows that they viewed the land, and appraised and set it off, *and* if the officer, in his return, refer to the appraisers' certificate, and state that they "appraised the same, *as therein appears.*" *Ib.*

12. It is not requisite that the appraisers should be residents of the county in which the land lies. *Ib.*

13. An omission by the officer to state, in his return, by whom one of the appraisers was appointed, is fatal to the validity of the levy, unless the deficiency can be supplied. *Ib.*

14. The person, however, who was the officer in making the levy, though not now in office, may, on motion to Court, supply the deficiency by an amendment according to the fact. *Ib.*

15. In the levy of land upon execution, it is the duty of the officer to notify the debtor and allow him a reasonable specified time, in which to appoint an appraiser. *Howe* v. *Wildes*, 566.

16. It is not requisite that the officer, in his return upon the execution, should state what length of time was allowed, nor in what mode the notice was given. *Ib.*

17. The R. S. c. 94, § 11, prescribing that, when the debtor's estate is held in

joint tenancy or in common with others, the debtor's part must be stated by the appraisers, applies when his apparent or known title extends only to an undivided part of the estate. *Ib.*

18. When the record shows that the debtor's title covers the whole land in fee, a levy of the whole will transfer whatever title he may have, though it be but a life estate in an undivided part. *Ib.*

LIEN.

1. The lien for fees and disbursements, which an attorney has upon his client's interest in the subject matter of a suit, does not accrue until the judgment is entered. *Hobson* v. *Watson*, 20.

2. It is not requisite that an attorney, in order to perfect his lien upon the judgment, should give notice to the judgment debtor of his intent to retain it. *Ib.*

3. The attorney's lien is an ownership in the property of the judgment, and of the same efficiency, as would be created by an assignment of the judgment for collateral security, and entitles to the same remedies for its enforcement. *Ib.*

4. An arrest is one of the modes allowed for the enforcement of an attorney's lien. *Ib.*

5. A bond given pursuant to the statute for a release from the arrest, is a substitute for the custody of the debtor. *Ib.*

6. The property in such bond belongs to the owners of the judgment, and any such owner may use the name of the obligee for the collection of it. *Ib.*

7. A judgment upon such a bond operates, to the amount recovered, as a discharge of the original judgment. *Ib.*

8. The lien which the attorney had upon the original judgment attaches to the bond, and cannot be defeated by the creditor's discharge of it. *Ib.*

9. In order that the surety in a poor debtor's relief bond should be held liable for the attorney's lien on the judgment and execution, upon which the bond arose, notwithstanding a discharge by the judgment creditor, if it be necessary that the surety have knowledge of the lien, *it seems*, that such knowledge, acquired *pending the suit*, is sufficient. *Ib.*

10. The Act of 1850, chap. 159, amendatory of R. S. chap. 125, giving liens upon buildings, was prospective only in its operation. The enlargement which it gave to the rights of lien creditors cannot aid a plaintiff who, prior to its passage, had attached to secure his lien. *Kendall* v. *Folsom*, 198.

11. A part owner of a vessel, who pays money to discharge liens for the expenses of building her, has no right to contribution from the other part owners, if the liens arose wholly from the delinquency of his vendor to pay his proportion of the building expenses. *Reed* v. *Bachelder*, 205.

12. A laborer's claim of lien on lumber is defeated, if, in the judgment which he recovers for it, any non-lien claims are also included. *Bicknell* v. *Trickey*, 273.

13. By including in the same judgment a lien claim and a claim to which no lien attaches, the creditor waives his right of lien.
McCrillis v. *Wilson*, 286.

14. The lien, given by statute upon lumber, for the personal services of a laborer does not extend to the hire of his team of cattle, though employed upon the same lumber. *Ib.*

15. The personal service, which the lien protects, embraces the time during which the laborer is detained at the employer's request, while the business is getting into a condition for the labor to be resumed. *Ib.*

16. Where laborers, in separate crews and in separate places, work for the same employer in cutting and hauling lumber in the woods; *it seems*, that each one of them has a lien for his services on any pieces of the lumber, when at the place of manufacture, though without showing that he, or the crew with which he labored, did any work upon such pieces. *Ib.*

17. A commission merchant, who has sold a part of the goods left with him for sale, is entitled to a lien upon the residue for his commissions and for freight paid and for other advances. *Sewall* v. *Nichols*, 582.

18. To secure his lien, he may maintain replevin for the goods, even against an officer who has attached them on precept against the general owner. *Ib.*

19. His consent to become keeper of the goods for the attaching officer, does not defeat his right to maintain such action of replevin. *Ib.*

See Cost, 3.

LIMITATION.

1. A part payment by the maker of a promissory note, within six years before the commencement of an action upon it, takes it from the operation of the limitation bar. *Evans* v. *Smith*, 33.

2. The payee of a negotiable note, who has indorsed it without recourse, and has received from the indorsee a release of all liabilities in connection with the note, is a competent witness for the indorsee to prove that, before the note was indorsed, the maker paid a part of it, and thus to remove the limitation bar. *Ib.*

LIQUORS, SPIRITUOUS AND INTOXICATING.

1. By the Act of 1846, chap. 205, the sale of *spirituous* liquors was restricted. By the Act of 1848, the sale of *spirituous or intoxicating* liquors, was restricted. The repeal of the Act of 1848, by that of 1851, chap. 211, § 18, does not defeat prosecutions under the Act of 1846, for the sale of *spirituous* liquors. *Parsons* v. *Bridgham*, 240.

2. In a criminal prosecution for unlawfully selling intoxicating liquor, if the defendant relies on a license for the sale, the onus of proving such license is upon him. *State* v. *Woodward*, 293.

3. In a criminal prosecution for presuming to be a *common seller of intoxicating liquor*, proof that the defendant had license as an *innholder*, and as a *common victualer*, establishes no defence. *Ib.*

4. In a written contract for the sale of all the stock of goods in an apothecary's store, the spirituous liquors within the store and belonging to the vender are, *ex vi terminorum*, included. *Ladd* v. *Dillingham*, 316.

5. If the vender had no license to sell such liquor, the contract cannot be enforced by him against the vendee. *Ib.*

6. Upon invoicing the property on such a sale, the making of a separate schedule of the liquors, by direction of both parties, if designed as an evasion of the statute, "restricting the sale of intoxicating drinks," cannot make the contract effectual as to the other goods. *Ib.*

7. The liability of a town agent to a revocation of his appointment and to a suit upon his bond, would constitute no protection from the penalty of the eighth section of the Act, if he should wilfully become a common seller. *State* v. *Keen*, 500.

See Indictment, 9, 10, 11.

LORD'S DAY.

1. A contract made on the Lord's day, and before sunset of that day, is illegal and void. *Nason* v. *Dinsmore*, 391.

2. A contract proved to have been made on the Lord's day, is not thereby rendered invalid, unless it be also proved, that it was made before sunset. *Ib.*

3. Upon a contract, dated on the Lord's day, no presumption arises that it was made before sunset, but rather that it was made upon that part of the day, in which it was lawful to make it. *Ib.*

4. Such a date, therefore, in the absence of other evidence, will not support a defence. *Ib.*

MARRIAGE.

Within the import of the Massachusetts Act of 1786, prohibiting the marriage of a white person with any negro, Indian or mulatto, a person having but one-sixteenth, (or perhaps one-eighth,) of the colored blood is to be considered a white person. The marriage of such person with a mulatto was null, and the children of such marriage, being illegitimate, could not take their father's land by inheritance. *Bailey* v. *Fiske*, 77.

MARRIED WOMEN.

1. By the common law, the husband had a life estate in land owned by his wife. *Eldridge* v. *Preble*, 148.

2. Under the Act of 1844, "to secure to married women their rights of property," that life estate was divested from the husband, in behalf of the wife, only upon condition that she proved the title not to have come to her from the husband after coverture. *Ib.*

3. The amendatory Act of 1847, and the additional Act of 1848, to secure the property rights of married women, were prospective only in their operation. *Ib.*

4. The levy of an execution against the husband, upon his life estate in the

land of his wife, was not defeated by the Act of 1844, unless the wife prove that "the title did not, in any way, come to her from the husband during coverture." *Ib.*

5. The introduction of her title deed, from a third person, is not of itself sufficient proof that the land did not come to her, in some way, from the husband during coverture. *Ib.*

6. Under the recent statutes, relating to the property of married women, the property in a negotiable note may pass from the husband to the wife during coverture, by his indorsement and delivery of it to her. *Motley* v. *Sawyer*, 540.

7. After a dissolution of the marriage, such indorsee may maintain suit upon the note in her own name. *Ib.*

8. The promissory note of a married woman, being uncollectable at law, has long been held, in legal contemplation, to be of no value. *Howe* v. *Wildes*, 566.

9. That rule was not changed by the statute of 1844, authorizing married women to "become seized and possessed of any property, real or personal, *by purchase.*" *Ib.*

10. A conveyance of land, made to a married woman in consideration of her promissory note for the purchase money, is without valid consideration, and therefore void, as to the then existing creditors of the grantor. *Ib.*

11. As against such creditors, the punctual payment of the note cannot impart any new vitality or strength to the conveyance. *Ib.*

MERGER.

Mergers are not favored in courts of law or in courts of equity.
Simonton v. *Gray*, 50.

MESNE PROFITS.

See Dower, 7.

MILLS AND MILL DAMS.

1. The three years "before the commencement of the *action*," during which a proprietor of land, flowed by a mill-dam, has a lien upon the mills, mean three years before the institution of the *original complaint.*
Pierce v. *Knapp*, 402.

2. A judgment, recovered upon such a complaint, is a charge upon the estate. The obligation to pay the damage runs with the land, and an action to recover the amount may be maintained against an assignee of the estate. *Ib.*

MINISTERIAL FUND.

1. Property, held by a religious society as a ministerial fund, is to be assessed to the treasurer. *Hunt* v. *Perley*, 29.

2. A fund was vested in a board of trustees, under charge that its interest should be annually paid to support a minister of certain specified qualifica-

tions, statedly preaching in a house of public worship to be located in a prescribed portion of the town: —
That portion together with another portion of the town, was afterwards incorporated into a parish, and the parish settled a minister who statedly preached in a house of public worship in the prescribed locality: —
Held, that the fund in the hands of the trustees was not property held by the *parish* as a *ministerial fund; and* that the treasurer of the board of trustees, is not, *ex officio*, the treasurer of the parish; and *that* taxes upon the fund cannot be assessed to him. *Ib.*

MISNOMER.

See CORPORATIONS, 3, 4. JUDGMENT, 6.

MORTGAGE.

1. When the purchaser of an equity of redeeming mortgaged land becomes also the assignee of the mortgage, there is not necessarily an extinguishment of either estate. *Simonton* v. *Gray*, 50.

2. If substantial justice may be promoted, the mortgage may be upheld by the assignee, according to his intention or his interest. *Ib.*

3. A widow has the right to redeem real estate, mortgaged by her husband during coverture, although the rights of the mortgagee and also of the mortgager have both come by assignments to the defendant, and although, in the mortgage deed, she relinquished her right of dower. *Ib.*

4. Of the mode of computing the entire value or the annual value of a widow's right of dower in mortgaged real estate. *Ib.*

5. A levy of mortgaged land on execution against the mortgagee, who is not in possession and has never entered to foreclose, passes no title. *Coombs* v. *Warren*, 89.

6. A town or city tax cannot lawfully be assessed to the mortgagee of land, who is not in possession, and has never entered to foreclose. *Ib.*

7. A writ of entry is maintainable by a mortgager, except against the mortgagee and those claiming under him, notwithstanding that the tenant in the suit has, by long occupation, become entitled to betterments. *Huckins* v. *Straw*, 166.

8. The cases, in which a mortgagee of real estate may recover possession, before condition broken, are those in which there has not been any "agreement to the contrary." *Clay* v. *Wren*, 187.

9. Such an "agreement to the contrary" may arise by implication from the mortgage and the written instruments executed with it, and intended to carry the purposes of the parties into effect. *Ib.*

10. In a case, (submitted to the Court, with power to draw inferences of fact,) in which a mortgage, given to secure the price of a farm, was conditioned for the delivery, at the mortgagee's barn, of a specified quantity of hay in each year, for ten years, of an average quality with that cut on the farm,

the Court will infer, that the hay was to be cut by the mortgager upon the farm, and that in order to do so, he was to retain possession, until a breach of the condition. *Ib.*

11. Where the condition of the mortgage was merely for the delivery of the hay, but a note was given by the mortgager to the mortgagee at the same time for the same quantity of hay, deliverable at the times and place specified in the mortgage, and also stating the quality and value of the hay, the Court will consider, that the mortgage was intended to secure that note, although no note be referred to in the mortgage. *Ib.*

12. Where upon such a note, the mortgager was charged as trustee of the mortgagee, and had delivered to the officer, holding the execution, the annual instalments of the hay, so far as they had become payable, — *Held*, that the condition of the mortgage had not been broken. *Ib.*

13. A conveyance of chattels, *if unconditional in its form*, need not be recorded, although intended merely for security, and although the chattels are permitted to remain in possession of the vendor, and the debt thereby secured is of more than thirty dollars. *Knight* v. *Nichols*, 208.

14. Whether the adoption of that form, would be indicative of a fraudulent intent, as against creditors of the vendor, would be for the consideration of the jury. *Ib.*

15. A bill for the redemption of mortgaged land, may be maintained without a previous payment or tender, if the mortgagee or person claiming under him, shall have neglected on request to render, before the commencement of the suit, a true account of the sum due and secured by the mortgage. *Roby* v. *Skinner*, 270.

16. After such request, the mortgagee is to be the moving party, not only in making up the account, but also in rendering it to the mortgager. *Ib.*

17. For the making up and rendering such an account, a reasonable time is allowed to the mortgagee. *Ib.*

18. Though the mortgager in demanding the account, may have prescribed a time unreasonably short, in which it should be rendered, that will not excuse the mortgagee for a neglect to do it within a reasonable time. *Ib.*

19. In adjudging upon the question of cost, the conduct of the parties toward each other, in relation to the whole subject, may be taken into consideration. *Ib.*

20. A mortgage of land is not, under all circumstances, discharged by a payment of the debt which it was intended to secure. *Kinnear* v. *Lowell*, 299.

21. A mortgage is not discharged by a payment, coerced from the mortgager, when in fact he had conveyed the right of redemption to one, who was bound to pay the debt. *Ib.*

22. In such case, the mortgager is entitled to repayment, and to be regarded *in equity* as the assignee of the mortgage to secure its enforcement. *Ib.*

23. If, in such case, the mortgager, after making the payment, shall obtain a release of the estate from the mortgagee, he will in law be regarded as the assignee. *Ib.*

See TAXES, 1, 2.

NONSUIT.

A nonsuit cannot be ordered, except by consent, after testimony has been introduced in defence. *Emerson* v. *Joy*, 347.

OFFICER.

1. The written approval, by a plaintiff, of a receipt taken by the officer for goods attached, and a delivery of the receipt to the plaintiff, discharge the officer from liability to him for the goods. *Jewett* v. *Dockray*, 45.

2. Such an approval and acceptance of the receipt are of the same effect, whether done by the plaintiff or by his attorney in the suit. *Ib.*

3. The delivery to the plaintiff of such an approved receipt, is entitled to be protected, as an equitable assignment. *Ib.*

4. In a suit brought by such plaintiff, in the name of the officer, upon such a receipt, a release by the officer, delivered to the receiptor, after knowledge by him of such an assignment, is of no effect. *Ib.*

5. An exhibition made at the trial, to the Court, and in presence of the receiptor, of the receipt so assigned, is a sufficient notice to the receiptor of the assignment. *Ib.*

6. A release, therefore, by the officer, delivered to the receiptor, *after such an exhibition*, will not qualify the receiptor to be a witness for the defendant. *Ib.*

7. It is not allowable that one, in the discharge of an official duty, should make a gain out of property entrusted by the law to his custody for the benefit of others. *Gannett* v. *Cunningham*, 56.

8. An officer, who, under the R. S. chap. 114, has sold upon mesne process, the goods which he may have attached thereon, and taken a note to himself therefor, approved by the attaching creditor, has no right to retain, for his own use, the interest money accruing upon such note. *Ib.*

9. An assignment, by the debtor to the creditor, of the goods so attached, or the proceeds of the same, includes the interest as well as the principal, collected by the officer upon such note. *Ib.*

10. When the assignment was accompanied by an order, directing the officer to deliver the goods or pay the avails of them to the assignee, it may, from a payment of the *principal* according to the order, be *inferred* that the officer accepted the order, though he at the same time refused to pay over the interest money, and claimed to retain it for his own benefit. *Ib.*

11. Upon such implied acceptance, an action of assumpsit may be maintained by the creditor against the officer for the interest money. *Ib.*

12. For an act, affecting another's rights, and done by a person under claim of authority as a public officer, the authority may be established by proof that such person had, on other occasions, acted as such public officer. *Hutchings* v. *Van Bokkelen*, 126.

13. This mode of proof may be adopted by the party, who exercised the authority, even in a suit against him for so doing. *Ib.*

14. That a person was a public officer, may be shown, in a suit to which he is

not a party, by proof that he had been in the practice of acting as such an officer, and he is competent, as a witness, to prove such a practice.
State v. *McNally*, 210.

15. A precept or process, though voidable for irregularity or mistake, is a protection to the officer who serves it, if the magistrate, by whom it was issued, had jurisdiction of the subject matter. *Ib.*

16. A warrant, which the statute authorizes "any sheriff, city marshal or deputy" to serve, may be executed by a deputy of the sheriff, as well as by a deputy of the marshal. *Ib.*

See Execution, 2, 3. Levy of Real Estate, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.

ORDINANCE OF 1641.

See Flats, 1.

PARISH.

See Ministerial Fund.

PARTITION.

1. When, in a process for partition of land, a person interested is not named, and has had no notice or opportunity to appear and answer, he *may* on motion, at any time before final judgment, *be allowed* to appear and defend. R. S. chap. 121, sect. 9. *Field* v. *persons unknown*, 35.

2. The granting of such motion is at the discretion of the Court. *Ib.*

3. The Court, in the exercise of its discretion, will refuse to grant the motion, unless made prior to the interlocutory judgment that partition be made. *Ib.*

See Tenants in Common, 3.

PARTNERS AND PARTNERSHIP.

See Copartnership.

PAYMENT.

Where money for the payment of a debt had been left with a depositary for the creditor, and the creditor, with knowledge of all the circumstances, had ratified the act of deposit for his use, it will be deemed a payment.
Ingalls v. *Fiske*, 232.

See Bills and Promissory Notes, 7, 17, 18, 19, 20, 21, 22.

PAUPERS.

1. Where the only evidence to establish the *residence* of a pauper, showed

that his home was in a particular family, it is not erroneous in the Judge, to instruct the jury that, in order to justify them in finding a *residence*, it must be proved that he was a member of that family.
Corinth v. *Lincoln*, 310.

2. No one can become a member of another person's family, so as thereby to gain a *residence* within the meaning of the pauper laws, unless *voluntarily*, and *by consent of the family*. *Ib.*

3. If, while a person is a member of another's family, pauper supplies are furnished to the family, it will be considered that supplies are furnished to him, even though of full age, and not subject to the control of any of the family. *Ib.*

4. Where the only evidence of supplies being furnished to one who had called for relief, was that such articles were *sent* by the overseers of the poor, it is for the jury to decide whether they were received. *Ib.*

PLEADING.

1. A brief statement by the tenant in a real action, alleging non-tenure, and pleaded in connection with the general issue, imparts no advantage, unless it be filed within the time allowed for pleas in abatement.
Eldridge v. *Preble*, 148.

2. A declaration charging a trespass upon the plaintiff's close is bad, *on general demurrer*, if it do not describe the close or allege the venue.
Moody v. *Hinkley*, 200.

3. A general demurrer to a declaration containing several counts, is unsustainable, if any of the counts are good. *Blanchard* v. *Hoxie*, 376.

4. In a declaration upon the covenants of seizin and of right to sell, contained in a deed of land, the breaches are sufficiently alleged by negativing the words of the covenants. *Ib.*

5. In a declaration upon the covenants of freedom from incumbrances, and for quiet enjoyment, the breaches must be specifically set forth. *Ib.*

6. In a count for covenant broken, alleging several breaches, there may be a recovery for such breaches as are well assigned, although the assignment of some other breaches may be fatally defective. *Ib.*

7. A declaration negativing the words of the covenant of seizin, is not defeasible on general demurrer, although it proceed to allege that the defendant's seizin did not extend to a described part of the land. *Ib.*

8. In such a case, the measure of damage is the consideration paid for that part of the land, with its interest. *Ib.*

9. It is only in the *form* of declaring, and not in any *matter of substance*, that the R. S. c. 115, § 13, has abolished the distinction between *trespass* and *case*.
Sawyer v. *Goodwin*, 419.

10. An allegation of breaking and entering into land, is of *substance* and not of form merely. *Ib.*

11. A count, containing no such allegation, but framed technically in *case*, for injuries done to land, or in *trespass de bonis* for goods taken from it, cannot be sustained by merely proving an unlawful entry. *Ib.*

12. Nor can a declaration in trespass *quare clausum*, alleging *immediate* acts of injury to land, be sustained by merely proving an injury, *consequentially* resulting from acts done upon other land. *Ib.*

13. To such a declaration, an amendment, introducing a count, *framed as in case*, alleging the damages to have been *consequential*, is not allowable. *Ib.*

14. It is not a rule of law, that all the points, which may be raised by the pleadings in a case, are necessarily involved in the decision.
Dunlap v. *Glidden*, 517.

15. In trespass *quare clausum*, an absolute title in the plaintiff is not essential. Such title is therefore not admitted by a default of the defendant. *Ib.*

16. A judgment upon such default is no estoppel to the defendant, in a subsequent suit, to assert title in himself or in another. *Ib.*

17. If the ground of a judgment be not shown by the record, it may be proved by parole. *Ib.*

See Disclaimer.

POLICY OF INSURANCE.

1. A policy, issued by a mutual insurance company, and a premium note given at the same time for the payment of assessments, are independent contracts.
New England M. F. Insurance Company v. *Butler*, 451.

2. When mutual contracts are independent, the neglect of one party to perform will not absolve the other party from performance. A contract, made by a mutual insurance company with one of its members, is equally binding as if made with a stranger. *Ib.*

3. A vote by such a company that, if the assessments upon its premium notes should not be punctually paid, the insurances previously made should be suspended, is of no validity, unless assented to by the insured. *Ib.*

4. Such a vote, if unassented to, will not impair the force of the policy; so it will not absolve the insured from liability upon his premium note, unless when *first apprized* of it, he notify the company of his assent. *Ib.*

5. A policy, after insuring $1700, upon a mill and fixed machinery, and $150 on moveable machinery therein, proceeded, *in written words*, as follows; "said insured being the lessee of said mill for one year from November 1st, 1850, and having paid the rent therefor of $2171,01, which interest, diminishing day by day, in proportion to the whole rent for the year, is hereby insured; — *Held*, that the policy was a valued one, although, in a *printed* part of the instrument, there was a provision that the "loss or damage should be estimated according to the true and actual cash value at the time such loss or damage shall happen." *Cushman* v. *North-western Insurance Co.* 487.

6. The *manuscript* provision is to be viewed as the agreed basis, upon which to ascertain the true and just value. *Ib.*

7. In such a case, it is not competent for the defendant, (except for the purpose of proving a fraud practiced by the insured,) to introduce evidence that the rent, paid by the insured for the mill, was less than the sum stated in the policy. *Ib.*

8. The insurance money, which the purchaser of an equity of redemption, sold to him on execution, may receive within the year allowed for redemption, upon a policy effected on the property by himself for his own benefit, belongs to him and not to the mortgager. *Cushing* v. *Thompson*, 496.

9. Thus, the purchaser of such a right, acting for his own benefit, insured against fire a building standing upon the land, and within the year received the insurance money, the building having been burnt; *Held*, that in redeeming against the sale, the mortgager was not entitled to the benefit of the insurance. *Ib.*

POOR DEBTORS.

1. The adjudication of commissioners, appointed by the Court to determine, upon an examination of a debtor's affairs, whether the execution should or should not run against his body as well as against his property, has the character of a judgment, and cannot be set aside or vacated on motion to the Court. *Howe* v. *Newbegin*, 15.

2. A bond given pursuant to the statute for a release of a debtor from arrest, is a substitute for the custody of the body. *Hobson* v. *Watson*, 20.

3. In order that the surety in a poor debtor's relief bond should be held liable for the attorney's lien on the judgment and execution, upon which the bond arose, notwithstanding a discharge of the judgment creditor, if it be necessary that the surety have knowledge of the lien, *it seems*, that such knowledge, acquired *pending the suit*, is sufficient. *Ib.*

4. The discharge certificate, given by two justices of the peace and of the quorum, to a poor debtor, of his having taken the poor debtor's oath, furnishes *prima facie evidence* that the justices were duly selected and qualified to act in granting the certificate. *Bachelder* v. *Sanborn*, 230.

5. When a poor debtor, in his disclosure, shows that he holds unsettled accounts, it is his duty to cause his interest in them to be appraised. *Ib.*

See Lien, 8, 9.

POUNDS AND IMPOUNDING.

See Rescue.

PRACTICE.

1. On an appeal from a decree of the Judge of Probate, the right in this Court to open and close belongs to the appellant. *Deering* v. *Adams*, 41.

2. A nonsuit cannot be entered, except by consent, after testimony has been introduced in defence. *Emerson* v. *Joy*, 347.

See Abatement, 3.

PRESCRIPTION.

1. The acceptance, within twenty years, of a deed granting a mill site, and reciting the existence of another mill site above it, does not estop the grantee

from asserting the abandonment, by non-user, of the upper site, unless the deed shows that the upper site had a right of priority in the use of the water. *Farrar* v. *Cooper*, 394.

2. A right, acquired by use, to maintain a dam, unimpeded by any dam below it on the same stream, may be lost by non-user. *Ib.*

3. A non-user of such a right for twenty years furnishes presumptive evidence of an extinction of the right by abandonment. *Ib.*

4. Such presumption, however, may be rebutted by proof. *Ib.*

5. Though, from the time of ceasing to use a mill privilege, twenty years may not have elapsed, prior to its being overflowed and destroyed by a dam below, still an abandonment of the privilege may be presumed, *if* its proprietor, *witnessing* the erection of the dam and of expensive works upon it, and *knowing* that it must destroy his privilege above, makes no effort or remonstrance to prevent it or claim of remuneration for it, *within the residue of the twenty years.* *Ib.*

6. A servitude is presumed to be extinguished, when the proprietor of the estate charged with it, is permitted, for a sufficient length of time, to manage it in such manner as to preclude the exercise of the rights, arising out of that servitude. *Ib.*

PRINCIPAL AND AGENT.

1. A written but unsealed authorization to use the name of the principal, in settling for him a controverted matter, does not justify the agent in affixing the seal of the principal. *Wheeler* v. *Nevins*, 54.

2. A release of a debt, signed and sealed by an agent, for and in the name of his principal, is inoperative, unless the authority of the agent was itself under seal. *Ib.*

3. The affixing of a seal without such authorization cannot be regarded as an immaterial act, so as to impart to the instrument the character and effect of an unsealed one. *Ib.*

PROBATE BOND.

1. Suit upon an administration bond can be brought for the benefit of such persons only, as are interested in the estate. *Rawson, Judge,* v. *Piper*, 98.

2. It is a *general rule* that suits upon probate bonds are not maintainable, unless authorized by the Judge of Probate, or unless the amount due from the obligor has been ascertained by a judgment of Court. This rule, however, does not apply to suits brought by residuary legatees, whether the legacies be for their own benefit, or in trust for the use of others. *Williams, Judge,* v. *Cushing*, 370.

PROBATE COURT.

1. On an appeal from a decree of the Judge of Probate, the right in this Court to open and close belongs to the appellant. *Deering* v. *Adams*, 41.

2. By the R. S. chap. 105, sect. 25, any person "aggrieved" by a decree of the Judge of Probate, may appeal to this Court. *Ib.*

3. In legal acceptation, a party is aggrieved by such decree, only when it operates on his rights of property, or bears directly upon his interest. *Ib.*

4. From a decree of the Judge of Probate, appointing a guardian to a minor child, the trustees of a fund bequeathed for the benefit of such child have no authority to appeal. *Ib.*

PURCHASE.

See Sale and Purchase.

RAIL ROADS.

1. The right of holding shares is a sufficient consideration for a promise to the corporation to take such shares and pay for them.
Kennebec & Portland R. R. Co. v. *Jarvis*, 360.

2. When the amount of stock, which a corporation may hold, is *not fixed in its charter;* and the corporation has voted what the amount should be it is not requisite, (in order to a valid assessment upon the shares of a member,) that the whole of that amount should have been subscribed for, although his subscription was made after the vote was passed. *Ib.*

3. Upon a subscription, promising a corporation to take and pay for shares in its capital stock, assumpsit may be maintained, although the corporation has not exercised its chartered authority to sell the shares for the delinquency of payment. *Ib.*

4. Of the liability of a person, upon a subscription made jointly by himself and others, agreeing to take shares in the stock of a corporation.
Kennebec & Portland R. R. Co. v. *Palmer*, 366.

5. Of the consideration, necessary to sustain a suit by a corporation upon such a subscription. *Ib.*

6. In a suit by a corporation against a subscriber to its capital stock, to recover assessments made upon the shares subscribed for, it is not competent for a defendant to show, by parol evidence, that his subscription was upon a condition not expressed in the writing.
Kennebec & Portland R. R. Co. v. *Waters*, 369.

See Constitutional Law.

REAL ACTION.

1. After notice to quit, the grantee may elect to treat the grantor if in possession, as holding by wrong, and not as a tenant.
Larrabee v. *Lumbert*, 79.

2. The bringing of a writ of entry is such an election. *Ib.*

3. Such writ of entry with possession thereby obtained, precludes a recovery for use and occupation. *Ib.*

RECEIPTORS.

1. The written approval, by a plaintiff, of a receipt taken by the officer for goods attached, and a delivery of the receipt to the plaintiff, discharge the officer from liability to him for the goods. *Jewett* v. *Dockray*, 45.

2. Such an approval and acceptance of the receipt are of the same effect, whether done by the plaintiff or by his attorney in the suit. *Ib.*

3. The delivery to the plaintiff of such an approved receipt is entitled to be protected, as an equitable assignment. *Ib.*

4. In a suit brought by such plaintiff, in the name of the officer, upon such a receipt, a release by the officer, delivered to the receiptor, after knowledge by him of such an assignment, is of no effect. *Ib.*

5. An exhibition made at the trial, to the Court, and in the presence of the receiptor, of the receipt so assigned, is a sufficient notice to the receiptor of the assignment. *Ib.*

6. A release, therefore, by the officer, delivered to the receiptor, *after such an exhibition*, will not qualify the receiptor to be a witness for the defendant. *Ib.*

RECORD.

1. In a suit between individuals, the public records of a city, of the location or alteration of its streets, may be used in evidence. *Barker* v. *Fogg*, 392.

2. Such records furnish evidence of the facts, of which they speak, equal to ordinary testimony given under the obligation of an oath. *Ib.*

3. Thus, where it became material for a party to show *at what time* a public street was *actually* widened; *Held*, competent to introduce the records of the city to prove at what time the widening was *authorized.* *Ib.*

See Town Meetings.

REDEMPTION OF LANDS.

1. The right which a mortgager has to redeem against an execution sale of his right of redemption, is to be exercised within one year from the sale. *Cushing* v. *Thompson*, 496.

2. When the mortgager and his tenants have retained the possession, without paying rent to the purchaser, though it was demanded of them, such mortgager, in redeeming against the sale, is not entitled to require of the purchaser any account for rents. *Ib.*

REFEREES.

See Award, 1, 2.

RELEASE.

1. In assumpsit against joint debtors, it is no defence, that one of them has

been discharged from *his share* of the debt by an unsealed instrument in writing, although founded upon an adequate consideration.
McAllester v. *Sprague and Morgan*, 296.

2. Should the discharged debtor be afterwards molested on account of the debt, his remedy is against the creditor by a special action, founded upon the discharge. *Ib.*

REMAINDERS, VESTED AND CONTINGENT.

See Trustees, 5, 6, 7.

REPEAL.

An unqualified repeal of a penal statute, upon which a pending action was founded, extinguishes the suit; and no costs are recoverable by either party. *Saco* v. *Gurney*, 14.

REPLEVIN.

1. The bond to be taken by an officer, before replevying property, is to be in double its true value. *Kimball* v. *True*, 84.
2. For his failure to take *such* a bond, it is no defence that, in the writ, the property is stated to be of a value, less than its true value; or that the writ prescribes, as the amount of the bond to be taken, a sum less than double the true value. *Ib.*
3. The damage to be recovered against the officer, for such a failure, is the amount of injury thereby occasioned. *Ib.*
4. From the Act, giving the writ *de homine replegiando*, it is inferrable that one person may be entitled to the custody of another, although without a civil or criminal process. *Hutchings* v. *Van Bokkelen*, 126.

See Lien, 18, 19.

RESCUE.

In an action to recover the statute penalty for the rescuing of animals to prevent an impounding, an allegation in the writ that they were found in the *highway* cannot be treated as surplusage. It is a material averment, and must be proved as laid. Such an averment is not supported by proof that the animals were found upon a *town* way. *Cleaves* v. *Jordan*, 9.

RIGHT OF RE-ENTRY.

The right of reëntry for breach of condition in a conveyance of land cannot be taken on execution. *Bangor* v. *Warren*, 324.

RIGHT OF WAY.

See Ways, 5.

RIOT.

1. An allegation that the defendant and others, being assembled, did in a violent, tumultuous and riotous manner, perform a described unlawful act, to the terror and disturbance of the people, is a sufficient charge of a riot. *State* v. *Boies*, 235.

2. To obstruct and break up a "justice's court" in a violent and tumultuous manner, to the disturbance and terror of the people, is an unlawful act, whether the person, acting as a justice, was or was not duly commissioned, and whether he was proceeding lawfully or unlawfully in the business before him. *Ib.*

SALE AND PURCHASE.

1. A purchase of personal property, made by a debtor with his own money and for his own benefit, exposes the property to his creditors, although the bill of sale may have been made to a third person, for whom he pretended to purchase, and although the vendor may have supposed that he was selling to such third person. *Godding* v. *Brackett*, 27.

2. The manufacture of an article, pursuant to the order of a customer, does not transfer the title. *Moody* v. *Brown*, 107.

3. Neither does the tender of the article, when so manufactured, transfer the title. *Ib.*

4. Neither does the leaving with the customer, against his will, of the article, so manufactured and tendered, transfer the title. *Ib.*

5. To pass the title, there must be an acceptance, either express or implied. *Ib.*

6. An action against the customer, as for an article sold and delivered, cannot be maintained by the manufacturer, unless the article have been accepted. *Ib.*

7. An exception to this rule obtains, when the customer employs a superintendant, and pays for the property by instalments as the work progresses. *Ib.*

8. The sale of an article, delivered and carried away, may be valid, although the price remains to be ascertained by an admeasurement at another stipulated time and place. *Cushman* v. *Holyoke*, 289.

9. The admeasurement, when so made, although differing from one made at the time and place of the delivery, will control in determining the price. *Ib.*

10. Thus, saw logs, at the river in the forest, were there sold and delivered at an agreed price per thousand, to be driven by the purchaser, and to be paid for at a scale made at the place of manufacture; *Held*, that a survey there made will be binding, although it shows the quantity to be less than was shown by a scale of them, made at the time and place of delivery. *Ib.*

11. Where the quantity was to be ascertained by a survey of an agreed surveyor if the purchaser should desire it, such desire may be inferred from the fact that the purchaser procured such a survey, although without notifying the seller. *Ib.*

12. Where saw logs were purchased, to be driven to the boom by the purchaser, and to be paid for at a scale there to be made, and a part of the logs were left by the way upon the intervales and shoals; *Held*, that the purchaser was not chargeable for any logs so left, if, in the driving, he used such care and diligence as prudent men ordinarily use in their own affairs. *Ib.*

See Shipping, 2, 3.

SANITY AND INSANITY.

See Will, 1, 2, 3, 4, 5.

SCHOOL FUNDS.

See Corporations, 2. Trustees, 1, 2.

SEAL.

It is not necessary that a magistrate's warrant, issued upon a penal statute, should be under seal, unless the statute expressly require it. *State* v. *McNally*, 210.

See Principal and Agent, 1, 2, 3.

SEIZIN AND DISSEIZIN.

1. A right of entry is made by statute a sufficient seizin upon which to maintain a writ of entry. *Sargent* v. *Rogers*, 135.
2. Upon a plea of disclaimer in a real action, if the tenant, at the commencement of the suit, was in possession of *any part* of the land disclaimed, the demandant must be the prevailing party. *Putnam F. School* v. *Fisher*, 172.
3. Under R. S. chap. 91, § 1, the title of a grantor to land will pass, though he may be disseized at the time of his conveyance. *Ib.*
4. By an entry into land and a visible possession of a part of it, by one claiming title under a registered deed, the true owner is constructively disseized of the whole tract described in the deed. *Ib.*
5. But such constructive disseizin would not extend to any part of the land, of which some other person was, at the time, seized and possessed. *Ib.*
6. There cannot be two distinct and independent seizins of the same land at the same time. *Ib.*
7. Where no seizin passes by the conveyance, and no possession is taken, there can be no eviction. *Ballard* v. *Child*, 355.

See Conveyance of Land, 4. Deeds of Conveyance, 4. Landlord and Tenant, 4, 5, 6. Real Action.

SERVICE OF WRITS.

The R. S. chap. 114, sect. 48, authorizing a new summons to be issued and served in certain cases, does not extend to a case in which no summons had been delivered to the defendant, or left at any place or with any person for him. *Briggs* v. *Davis*, 158.

SET-OFF.

1. Where judgments are recovered at the same term, one in favor of A against B and sureties, and the other in favor of B against A, the Court, on motion of B, will set off the one against the other. *Prince* v. *Fuller*, 122.
2. In a trustee process, co-partners, summoned as trustees, and indebted to the principal defendant, may set off a claim due from him to one of the co-partners. *Robinson* v. *Furbush*, 509.

See Bills and Promissory Notes, 10, 11, 12.

SHIPPING.

1. Where a cargo is shipped to a foreign country, without naming any particular port or place of delivery in that country, it is fair to conclude that the port of *general* delivery of *such* cargoes in that country, was the place intended in making the shipment. *Smith* v. *Davenport*, 520.
2. When goods on shipboard are consigned to the captain for sale, his power to sell at the port of destination is not revoked by a sale made while the goods are at sea, and of which he had received no notice. The purchaser, in such case, adopts the captain as *his* consignee, until he appoints some one else to act for him. *Ib.*
3. If the goods thus sold while at sea, were by the contract of sale to be delivered to the purchaser on their arrival, and he have no one there to receive them, the captain, when unlading them, is to be deemed the agent of the seller in delivering, and of the purchaser in receiving them. *Ib.*
4. In a suit for a share of the supplies, furnished to a vessel of which the plaintiff and defendant were part owners, an admission made by the defendant (after having alienated his part,) that the claim was justly due, in the absence of any evidence or pretence of other outstanding bills, is to be treated as an admission, that upon a final adjustment of all liabilities by the joint owners, such balance was due to the plaintiff. *McLellan* v. *Longfellow*, 552.
5. Upon such an admission, therefore, the suit is maintainable. *Ib.*

SHORE.

See Flats.

SKILL, PROFESSIONAL.

1. It is not a *rule of law* that a more skillful and learned person is entitled to a greater compensation for the performance of a professional service, than

one competent, but less skillful or learned, who should perform the service as well. *Stockbridge* v. *Crooker*, 349.

2. In awarding compensation for a professional service, the jury may properly take *into consideration* the degree of skill exhibited, and of responsibility incurred, in the performance of it; but are not *imperatively bound* to award a sum "*commensurate*" with such skill and responsibility. *Ib.*

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STATUTE, PENAL.

See REPEAL, 1.

STREET.

See WAYS, 3, 4.

SUNDAY.

See LORD'S DAY.

SURETY.

1. When the holder of a promissory note, knowing that one of the makers is but a surety for the other, contracts with the principal, without the knowledge of the surety, and for a valuable consideration, to enlarge the time of payment, the surety's liability to the holder is discharged.
Lime Rock Bank v. *Mallett*, 547.

2. If such holder have, without the consent of the surety and for a valuable consideration, contracted with the principal to enlarge the time of payment, the surety's defence will not be defeated by proof, of an *earlier* contract of the same kind, made *with the consent of the surety*. *Ib.*

3. Upon such a note, the holder had made several successive indorsements of the words, "Received, Renewed." To each of these indorsements a date was prefixed, each date being of a day subsequent to the pay-day of the note; — *Held,* that each of the indorsements was equivalent, to the words, — "Received the interest for a renewal, and that the word "Renewed" might be properly regarded as an agreement to consider the note to be the same, as if made in the same terms, anew from that date. *Ib.*

4. The receiving of interest in advance upon a note is a valuable consideration to support a contract for enlarging the time of payment. *Ib.*

SURVEY.

See SALE AND PURCHASE, 8, 9, 10, 11, 12.

TAXES.

1. A town or city tax cannot lawfully be assessed to the mortgagee of land, who is not in possession, and has never entered to foreclose.
Coombs v. *Warren*, 89.

2. If so assessed, a sale made by the collector for payment of the tax gives no title. *Ib.*

3. A town is not responsible for the failure of title to land sold and conveyed by their collector for town taxes. *Packard* v. *New Limerick*, 266.

4. Taxes upon the land, having been once paid by the money received upon such a sale, cannot be re-assessed, although, through deficiency in the proceedings, either of the assessors or of the collector, the title of the owner was not impaired by the sale. *Ib.*

5. The risk of title in such sales is upon the collector and the purchaser. *Ib.*

6. It is upon the purchaser, except so far as he may be protected by covenants of the collector. *Ib.*

7. For the breach of such covenants, there is no recourse to the town. The remedy is only upon the collector personally. *Ib.*

8. Where a judgment against a town was satisfied by the collector, out of money received by him upon a sale of land for taxes, and the purchaser failed to get title, through want of authority in the collector to make the sale, such failure confers no right to revive the judgment. *Ib.*

TENANCY AND TENANTS IN COMMON.

1. Of land held by tenants in common, a conveyance, by one of them, of a part *by metes and bounds* is inoperative, as against the others.
Soutter v. *Atwood*, 153.

2. Thus, two persons owned a tract of land as tenants in common. One of them conveyed his undivided half to M, taking back a mortgage of it, to secure the purchase money. The other conveyed his undivided half to G. These grantees, M, and G, divided the land, to M the North half, and to G the South half; and they made division deeds accordingly. G then conveyed the South half by metes and bounds. That half, under that ocnveyance, became vested in the plaintiff, who afterwards took from G a deed of the undivided half of the whole tract. The defendants hold under the mortgage, which was given by M, and which was foreclosed. Their title is, therefore, to an *undivided* half of the tract. They have, however, by their lessees, occupied both halves, and received the rents therefor; —
Held, that the title of G, by his division deed, became limited to the *South half;* and that his subsequent conveyance to the plaintiffs, of the *undivided half* was inoperative; —
Held, that, as the title of the plaintiff extended only to the *South half*, he could maintain no process for partition of the whole tract; —
Held, further, that in a suit at equity, the defendants could not be coerced to convey to the plaintiff any portion of their interest in the tract; nor to apply for a partition of it; nor to account to the plaintiff for any portion of the rents. *Ib.*

See Levy of Real Estate, 17, 18. Shipping, 4, 5.

TENDER.

For a party who claims under a tender, made after the agreed pay-day, and relies upon circumstances to justify the delay, *a suit at law* is not an avail-

able remedy, although the time of payment was not of the essence of the contract. *Hill* v. *Fisher*, 143.

TESTAMENTARY TRUSTEES.

1. One, having been appointed by a will, as executor and also as trustee, and having given bond as executor, will be deemed to have declined the appointment as trustee, unless he give bond in that capacity also. *Williams* v. *Cushing*, 370.
2. Where a *testamentary trustee* of the residuum of the testator's estate has declined to act in that capacity, another person may be appointed in his room by the Judge of Probate. *Ib.*
3. The person so appointed will have the rights of a residuary trustee, in relation to suits upon probate bonds. *Ib.*
4. If there be a residuary trustee, it is to *him* that the executor is to pay the residuary fund. *Ib.*
5. If the executor, instead of paying such fund to the trustee, have paid it, *as executor*, to some person having no just claim to it, there is no jurisdiction in the Judge of Probate to allow for such payment in settling the executor's administration account. *Ib.*
6. A decree by the Judge of Probate, making such allowance, being merely void, will not preclude the trustee from recovering the amount of the fund in a suit upon the executor's bond. *Ib.*

TIME.

See Contract, 4, 5.

TOWN MEETING.

1. Generally, the notice for calling a town meeting is to be given by posting a copy of the selectmen's warrant "in some public and conspicuous place" in the town. *Bearce* v. *Fossett*, 575.
2. An officer's return showing that he posted the notice in a "*public*" place, without saying in a "*public and conspicuous*" place, is insufficient. *Ib.*
3. At a meeting, thus insufficiently called, no officer can be legally chosen. *Ib.*
4. A person elected at such a meeting, though sworn into his office, can draw from such an election, no justification for acts done under color of the office. *Ib.*
5. Where one, justifying as a town officer, has read the record of his election at a meeting of the town, it is competent for the other party to show the illegality of the election, by reading from the record a copy of the officer's return upon the selectmen's warrant ordering the meeting to be called. *Ib.*

TOWN OFFICER.

See Town Meeting.

TREES.

Trees, as soon as severed from the soil, become personal property.
Moody v. *Whitney; Kimball and Farnsworth*, 563.

TRESPASS.

1. One who abuses the authority, vested in him by law for a special purpose, will be treated as having had no authority for any part of his acts.
Mussey v. *Cummings*, 74.

2. Thus if an officer, who had authority to remove from the street the building of another person, should after removing it, make sale of a part of its materials, he will be deemed a trespasser *ab initio*, and held chargeable for the whole value of the building. *Ib.*

3. A delivery of possession under a writ of *habere facias possessionem*, can furnish no justification for a previous invasion of the land.
Smith v. *Guild*, 443.

See Corporation, 3. Execution, 2. Judgment, 6, 7. Pleading, 9, 10, 11, 12, 13, 15, 16.

TROVER.

1. Trover is a transitory action. *Robinson* v. *Armstrong*, 145.

2. It lies for a conversion of property, committed within the bounds of a foreign jurisdiction. *Ib.*

See Conversion.

TRUSTEE.

1. A company, incorporated as trustees of a fund, with the power and duty of investing it and appropriating its income to the public schools of a town, is a *private* and not a *public* corporation. *Yarmouth* v. *North Yarmouth*, 411.

2. Though the Act incorporating the trustees authorized them to *create* the fund by a sale of the *town's* property, the approval of the Act, *by the town*, may be inferred from their long continued acquiescence in the trustees' proceedings according to its provisions. *Ib.*

3. A deed of land in trust, though it contain no words granting an inheritance will be construed to convey a fee, if such construction be necessary for effectuating the purposes of the trust. *North* v. *Philbrook*, 532.

4. Thus, a conveyance in trust, for the purpose of making sales, though it contain no words of inheritance, will convey a fee. *Ib.*

5. Land was conveyed *in trust*, to the use of G. one of the grantor's sons, for *his* life, and then "to descend and vest in the heirs" of the grantor. G. died subsequently to the death of the grantor, leaving one child. — *Held*, that, if it was at the death of the *grantor*, that the remainder, subject to the life estate, became vested in his heirs, G., being one of them, might effectually convey his vested remainder, thus leaving to his child no inheritance in the land. — *Ib.*

6. Also, *Held*, that, if the remainder was contingent until the death of G., and *then* vested in the heirs of the grantor, G., not being then in life, could not inherit, and his child could take nothing in the land, as she would not be among the heirs of the grantor. *Ib.*

7. Whether it was at the death of the grantor or at the death of G., that the remainder vested, was a point controverted, but not decided. *Ib.*

See Funds for Pious and Charitable Uses, 1, 2. Testamentary Trustees.

TRUSTEE PROCESS.

1. A judgment against a trustee will not operate as a bar to protect him against an action by the principal defendant, unless a demand for the goods, effects and credits had been made within thirty days from the judgment by an *officer holding the execution.* *Bachelder* v. *Merriman*, 69.

2. Neither will such judgment operate as such a bar, unless the trustee had delivered or accounted for the goods, effects and credits upon the judgment. *Ib.*

3. The decision of the Court below, upon the answers of one summoned as trustee, respecting the deposit with him, by the principal defendant, of a negotiable note, and of his liability to account for the same, is not of that class, in which an adjudication of that Court, as to matters of fact, is conclusive. *Wilson* v. *Wood*, 123.

4. A chose in action is not trusteeable as goods, effects or credits. *Ib.*

5. Thus, one holding an indorsed promissory note, under an obligation to the principal defendant, to account for it, *when collected*, is not chargeable for it as trustee. *Ib.*

6. One, having a lien upon goods with power to sell, and being, *before they came to his actual possession*, summoned as trustee of the general owner, (the right to take possession having been postponed for a limited period by the lien contract,) will be charged as trustee, if he afterwards take and sell the goods, at a price more than enough to discharge his lien. *Brunswick Bank* v. *Sewall*, 202.

7. Neither will he be discharged by the fact that he took negotiable notes for the goods, and held the same unpaid at the time of his disclosure. *Ib.*

8. A placed goods in the hands of his creditor, B, as collateral security, with power to sell, the surplus avails to be accounted for to A, who then, for the purpose of securing C, a second creditor, in the sum of seventy-five dollars, gave to C a draft upon B for the surplus. B accepted the draft, and was immediately afterwards summoned as trustee in this suit. He afterwards sold the property and found the surplus to be $243,33. He paid the seventy-five dollars to C, who for the benefit of A, the drawer, assigned the balance due on the draft to a third creditor. This third creditor drew an order upon B, for $125, "to be paid out of the avails of the sale." B, accepted this order, "to pay when in funds;" —
Held, that, upon the payment of the seventy-five dollars to the second creditor, the draft had fulfilled its office, and ceased to have vitality; and *that* B was chargeable, as trustee, without the right of deducting for his acceptance of the $125 order. *Ib.*

9. In the process of foreign attachment upon exceptions to the rulings as to the supposed trustees' chargability, this Court must examine the disclosures, in order to decide the preliminary statute question, whether "justice requires a revision." *Head* v. *Merrill*, 586.

10. A corporation, summoned as trustees, may disclose by attorney. *Ib.*

11. Such attorney need not be a member of the corporation or their general business agent. *Ib.*

12. The answers made by such attorney are to be considered true, until disproved. *Ib.*

13. When, (after due examination and inquiry,) he shall have answered all the interrogations, according to his best information and belief, if his statements show that the corporation had no goods, effects or credits of the defendant, and if no opposing proof is introduced, the supposed trustees are to be discharged, although he, the disclosing attorney, had no personal knowledge of the dealings between them and the defendant, but derived his information wholly from the books of the corporation and the statements of officers. *Ib.*

USE AND OCCUPATION.

See Landlord and Tenant, 2, 3, 6.

USER.

See Prescription.

WAIVER.

The taking of depositions in vacation by a defendant to prove the defence, pending a motion by him to dismiss the suit, is not an abandonment of the motion, or a waiver of the ground upon which it had been presented. *Briggs* v. *Davis*, 158.

WARRANT.

A warrant issued by one as a justice of the peace, purporting to be founded on a complaint sworn to before him, furnishes of itself a legal presumption of his authority. *State* v. *McNally*, 210.

WAYS.

1. The statute provides, that if swine be found going at large without a keeper on the *highways* or *town ways*, the owner shall be subject to a penalty. *Cleaves* v. *Jordan*, 9.

2. In common acceptation, the term "highway" means a public way. But when used in a statute, its import is restricted to county roads or county ways, unless its connection should require some different construction. *Ib.*

3. In the assessment of damage, done to an individual by the establishmen of a city street, which would require a removal of his building, a provision that he should not be required to do it, until necessary for the opening of the street, does not require any special notice to him of the time for the removal. *Mussey* v. *Cahoon*, 74.

4. That time would be sufficiently indicated to him by the progress made in the formation of the street. *Ib.*

5. Where, by one of the persons having a right of passage, an action is brought against another of them for obstructing it, no defence is established by proof that the plaintiff has obstructed it at its termination adjoining his own land. *Ricker* v. *Barry*, 116.

6. Proof that a part of the proceedings, for the establishment of a *town* road were legally conducted, will authorize a jury, after the lapse of thirty years, to infer that all the other requisites of the law were complied with and that the road was legally established. *State* v. *Bigelow*, 243.

See Highways and Highway Surveyors.

WILL.

1. On the question, whether a will shall be established, there is no legal presumption of the testator's sanity. *Cilley* v. *Cilley*, 162.

2. It is a fact to be proved. *Ib.*

3. The subscribing witnesses to a will, though not experts, may give opinions as to the sanity of the testator, when the facts are stated upon which their opinions are founded. *Ib.*

4. The facts proved upon such a point are to be considered of more importance, in acting upon the appeal, than the opinions of the witnesses. *Ib.*

5. In such a case, it is not essential to the establishment of the will, that any of the subscribing witnesses should testify to any opinion respecting the sanity of the testator. *Ib.*

6. To the publication of a will no prescribed form of words is requisite. No other publication is necessary than that the testator, at the time of executing the instrument, was apprized of its contents, and knew and intended it to be his will. *Ib.*

7. If one accepts a beneficial interest under a will, he is precluded from setting up any title or claim in himself, whereby to defeat the will in any of its provisions. *Smith* v. *Guild*, 443.

WITNESS.

1. In a criminal trial, the complainant is not compellable to state, as a witness, the reason which induced him to believe the charge made in the complaint *State* v. *McNally*, 200.

2. To the success of a complaint under the Bastardy-Act, it is indispensable that the complainant be admitted and testify, as a witness. *Blake* v. *Junkins*, 237.

3. In a prosecution by the State, the competency of a witness for the State is not taken away by the fact that he is an inhabitant of the town to which the law appropriates the penalty, if recovered in the prosecution.
State v. *Woodward*, 293.

4. The R. S. c. 158, § 17, imposes a penalty of not more than thirty dollars, recoverable by action of debt, for falsely and corruptly certifying as a witness, to more travel and attendance than there had really been.
Kennedy v. *Wright*, 351.

5. Such a certificate is presumed to be true, till disproved. *Ib.*

6. When shown to be false, it is presumed to have been made corruptly. *Ib.*

7. Such presumption may be repelled by proof. *Ib.*

8. In an action of debt to recover penalties, for the making of false and corrupt certificates of that descriptiou, the amount recoverable is to be assessed by the jury. *Ib.*

9. To justify one in certifying his travel and attendance, as a witness, he must have been in actual attendance at the court house. And though not bound to be constantly within the house, he must, at his peril, be within call when needed. *Ib.*

See Receiptors, 6. WILL, 3, 4, 5.

WRIT.

A writ may lawfully be framed as an original summons, with or without an order to attach property —

Or, (with some exceptions as to contracts and judgments founded on contracts,) it may be framed to attach the property, and, for want of it, to arrest the body ; —

Or it may be framed merely to attach the property, without any order as to the arrest of the body. *Cleaves* v. *Jordan*, 9.

WRIT OF ENTRY.

1. A right of entry is made by statute a sufficient seizin upon which to maintain a writ of entry. *Sargent* v. *Roberts*, 135.

2. An unsealed agreement by a dowress, (after having recovered judgment for her dower,) made with the warrantor of the judgment-tenant, that she would receive a specified sum yearly during life, in lieu of dower, will not, after a neglect of payment, bar her right to recover possession by writ of entry. *Ib.*

See Dower, 7, Mortgage, 7. Real Action. Seizin and Disseizin.