REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By ASA REDINGTON,
REPORTER TO THE STATE.

MAINE REPORTS,

VOLUME XXXV.

HALLOWELL:
MASTERS, SMITH & COMPANY.

1854.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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

HON. JOHN S. TENNEY, LL. D.
HON. SAMUEL WELLS,
HON. JOSEPH HOWARD,
HON. RICHARD D. RICE,
HON. JOSHUA W. HATHAWAY,
HON. JOHN APPLETON,

} ASSOCIATE JUSTICES.

ATTORNEY GENERAL,

HON. GEORGE EVANS.

The reader is requested to make, with his pen, the following corrections: —

Vol. 34, page 578, Ruggles & Gould were for the *plaintiff*.

Vol. 35, " 57, Hobbs & Fessenden were for the *defendants*.

" " " 142, Stewart was with Hutchinson for the *defendants*.

" " " 88, last line of the page, insert *dubitante* instead of *debutante*.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1852.

COUNTY OF WASHINGTON.

STATE *versus* PALMER *& al.*

In an indictment, a count charging two distinct offences is bad for duplicity.

But a count, which *sufficiently charges one offence*, is not rendered bad by the addition of averments *insufficiently setting forth another offence.*

A count charged that the defendant, at, on, &c., being armed with a dangerous weapon, viz: a gun loaded with powder and ball, with force and arms an assault did make upon one M. M., in the peace of the State, with an intent to maim him, and did with said loaded gun then and there shoot, wound and maim him. *Held*, that the count sufficiently charged an assault with intent to maim, but did not sufficiently charge the crime of maiming, or any other crime punishable by law, and that therefore it was not bad for duplicity.

If a count be bad for charging two offences, *it seems*, that the objection should be taken by demurrer, or on motion to quash.

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

INDICTMENT. The second count charged that the defend-

ants, "being armed with a dangerous weapon, viz: a gun loaded with powder and ball, with force and arms, in and upon the body of one M. M., in the peace of the State then and there being, an assault did make with intent to maim him the said M. M., and him the said M. M., with the said loaded gun, the said defendants did then and there shoot and wound and maim, against the peace and the form of the statute."

The defendants were acquitted upon the first count and found guilty on the second. They thereupon moved in arrest of judgment: —

1. Because the offence is not set forth and described with sufficient accuracy in the indictment.

2. Because the indictment may be true, and yet the defendants be guilty of no offence described in the statute.

3. Because by the statute the offence of maiming consists in disfiguring or injuring the tongue, eye, ear, nose, lip, limb or member of the body. And the indictment does not specify any particular portion of the body maimed.

The motion was overruled, and the defendants excepted.

Fuller and *Harvey*, for the defendants.

The indictment alleges two offences in one count, and is therefore bad for duplicity.

1. It alleges an assault with an *intent* to maim.

2. It also alleges the offence of maiming, but in such a defective form, that it is not sufficient to sustain a conviction, to wit: in this, it does not specify, in the language of the statute, the part of the body *maimed.*

Where the law makes the *intent* to do an act punishable, and also the *act* itself punishable, and the *act* is consummated, the *intent* is merged in the *act*, and the latter is alone punishable; otherwise, the offender may be indicted and convicted of the intent, and also for the commission of the act. *Commonwealth* v. *Kingsbury*, 5 Mass. 106; *People* v. *Lambert*, 9 Cow. 593; *Commonwealth* v. *Atwood*, 11 Mass. 93; Archbold's Crim. Pl., (1st. ed.) 53, 58.

A conviction for maiming would be very clearly a bar to an indictment for intent to maim. But would a conviction of the *intent* bar a prosecution for the *act itself?* In the case at bar, the defendants were found guilty of maiming, if of any offence.

F. A. Pike, County Attorney, for the State.

Granting the positions assumed by the respondents' counsel in this case, 1, — that the count alleges an assault with an attempt to maim, and 2, that it alleges the offence of maiming defectively, and this case finds a perfect parallel in *Commonwealth* v. *Tuck*, 20 Pick. 356. In that case the allegations were, 1, — breaking and entering a shop alleged defectively, and 2, larceny in the shop well set forth.

The opinion of the Court in that case establishes these positions: —

1. That the objection comes too late. It should have been by motion to quash or to confine the prosecutor to one of the charges.

2. That a count charging *intent* is not vitiated by an allegation of doing the act.

Judge MORTON says, "an indictment setting forth that the defendant broke and entered the shop *with intent* to steal would be good. Can the addition of the fact that he *did steal*, which is the best evidence of his intention, vitiate the indictment? We cannot perceive it does."

If the offence of maiming is defectively set forth, as is alleged by the counsel, then it must go for nothing. A defective averment is no averment. *Commonwealth* v. *Hope*, 22 Pick. 8.

This indictment is good on § 29, c. 154, R. S. It uses the words of that section, and the description of the offence in the language of the statute defining it is sufficient. *People* v. *Pettit*, 3 Johns. 511.

The jury have found the defendants guilty under the second count only. What offence is charged in this count? The attorney for the defendants says it is *not* the offence of maiming. Very well. Then the jury have not found the

respondents guilty of maiming. In case of *Commonwealth* v. *Kingsbury*, 5 Mass. 106, which is relied upon by counsel, there were two offences well set forth, and the Attorney General admitted in the argument that the facts set forth in the indictment were sufficient to support the charge of larceny, and in that case the intent was merged in the act because the act was well charged.

The rule in Archbold, 53 and 58, where it is said that burglary and assault and battery are the only exceptions to the rule against duplicity in a count, is enlarged in *Tuck's* case, and for cause, as the same reason exists in every case where intent is charged which is followed by an allegation of doing the act. That case was neither assault and battery nor burglary and yet was held an exception.

The other case cited from 11 Mass. is overruled in *Tuck's* case and in *Hope's* case.

Shepley, C. J. — The accused were found guilty on the second count in the indictment, which alleges, that they made an assault with a loaded gun, with an intent to maim Martin Magoon, and that with it they did then and there shoot, wound and maim him.

A motion was made in arrest of judgment, which was overruled.

The objection to the count, taken in argument is, that it is bad for duplicity.

An assault, being armed with a dangerous weapon, with an intent to maim, is made felony by statute, c. 154, § 29, and that offence appears to be sufficiently described. The offence described in the thirteenth section of the same statute is not sufficiently described in the latter part of the count. Nor is there any other offence punishable by our law therein described.

The question arises, whether a count describing one offence with sufficient accuracy, and containing no sufficient description of any other offence, is bad for duplicity? The case of *Commonwealth* v. *Atwood*, 11 Mass. 93, appears to have de-

cided that it is. The opinion states, that "a substantive charge, not sufficiently alleged in an indictment, can never be rejected as surplusage, for the reason that it may have been the ground of the conviction."

This may be correct when there is no other offence charged in the count; and in such case there would be no occasion to reject the averment as surplusage, for the count would be insufficient. When another offence is sufficiently described in the count, it is apparent that the defective allegations cannot have been the only ground of conviction.

The cases of *Commonwealth* v. *Tuck*, 20 Pick. 356, and *same* v. *Hope*, 22 Pick. 1, decide, that defective averments are in many respects no averments in contemplation of law. It is quite certain that no judgment can be sustained by virtue of them.

The accused could not have been subjected to any additional danger on account of the defective averments in the count, upon which they were found guilty. They were of no importance, and their insertion does not render the count bad for duplicity, for it does not contain a description of two different offences. It contains a description of one offence and some additional averments not describing any other offence. To constitute duplicity two offences must be sufficiently described. *Commonwealth* v. *Tuck.*

It is also insisted, that the offence of making an assault with a dangerous weapon with intent to maim, is merged in the commission of the offence. No other offence being charged in the count there can be no merger. Proof of the defective averments would be insufficient to prove the commission of another offence, in which the assault with intent to commit an offence could be merged.

If two distinct offences had been sufficiently described in the same count, it would seem that the objection should have been taken by a motion to quash or by a demurrer. *Commonwealth* v. *Tuck.* *Exceptions overruled.*

TENNEY, WELLS, HOWARD, RICE and HATHAWAY, J. J., concurred.

DUDLEY *& al. versus* GREENE.

A Resolve of the Legislature, authorizing the assessors of a plantation, in their own names and for the use of its schools, to recover the value of timber and grass wrongfully taken from the lands reserved for public use, is not a *grant* of the avails.

Such a Resolve is merely an appointment of *agents* for the public.

Such an agency may, at any time, be lawfully revoked by a repeal of the Resolve.

In actions commenced under such Resolve, but defeated by its repeal, no costs are recoverable by either party.

ON FACTS AGREED.

ASSUMPSIT, brought by the assessors of Waite plantation, and involving the construction of the following Resolve, passed July 23, 1849; viz:—

"Resolved, that the assessors of Waite plantation or their successors in office are hereby authorized to commence and prosecute to final judgment actions, in their own names, as assessors of the said plantation, against any person, who shall or has cut and carried away any grass or timber, without legal authority, from the land reserved for public uses, in said plantation. Said assessors may commence and prosecute as aforesaid an action for money had and received, to the use of said plantation, against any person who has sold without authority any such grass or timber, and shall be entitled to recover the amount of money received by such person and interest thereon. All sums collected by virtue of this Resolve shall be used for the support of public schools in said plantation.

"The statute of limitation shall not be pleaded against any action commenced under this Resolve, unless the same would have barred an action commenced in behalf of the State."

This suit was brought under the authority of that Resolve.

During the pendency of the suit, the Resolve was repealed. The case was submitted for such judgment as should be conformable to law.

G. M. Chase, for the plaintiffs.

The Resolve vested a right in the plantation, which was

the beneficiary for whom the reservation was made. The State's compact with Massachusetts required the reservation to be made, and forbade any sale of the lots. The State is merely a trustee.

It has the power, and is under obligation to provide means, by which the benefits designed shall be assured to the beneficiary. The Resolve merely surrendered the rights of the trustee to the *cestui que trust.* By a public Act of the same year, passed prior to the Resolve, plantations had power to establish public schools.

In passing the Resolve, the State did but discharge its duty to the beneficiaries. What it has done in discharge of a duty, it cannot undo.

But, further, there was an actual acceptance by the beneficiary. Under that acceptance, this action was brought and is now prosecuted. Shall the State be allowed not only to resume its executed and surrendered trust power, but also to involve the beneficiaries in a bill of expense and of costs?

If so, we should no longer feel humiliated that Massachusetts was permitted to impose upon us a constitutional obligation to take care of our education and our morals, our ministers and children.

The repeal was not merely a remittitur of a penalty or forfeiture, as in *Potter* v. *Sturtevant*, 4 Greenl. 154.

It was not a regulation of remedy, as in *Oriental Bank* v. *Frieze*, 18 Maine, 109. Our action was before the judiciary. While so, the Legislature assumed, under the form of a repeal, to defeat the rights which it had already surrendered and vested in the plaintiff. Such an assumption of power is unconstitutional and void. *The Governor* v. *Porter*, 5 Humphrey, (Tenn.) 165.

A power to regulate the remedy does not include the right to take away all remedy.

But, if the repeal is to be sanctioned, and the action to be thereby defeated, no cost can be allowed to the defendant. *Thayer* v. *Seavy*, 11 Maine, 284.

F. A. Pike, for the defendant.

APPLETON, J. — It has been decided that the State by virtue of its sovereignty may take possession of the lands reserved for public uses, under the compact between this State and Massachusetts, and preserve them for the uses designated. *Maine* v. *Cutler*, 16 Maine, 349.

The management of the lands reserved must necessarily be in the State, for the protection and preservation of whatever of value there may be growing thereon, and these objects can only be effected by the intervention of agents appointed for that purpose. The mode and manner in which it shall exercise this trust, the agents to whose direction it shall intrust the care and protection of these lands, the powers it shall confer, the limitations and restrictions it shall impose, and the securities it shall require for the due execution of the powers conferred, are all obviously matters confided to the sound judgment and discretion of the Legislature. The right to control and the power to appoint agents involve and include the power to change such agents, or to transfer the duties of such agencies from one set of individuals to another.

Accordingly, the general supervision of the reserved lands in unincorporated places, devolved upon the Land Agent till 1842, when, by c. 33, § 21, the care of these lands when located was given to the County Commissioners of the several counties in which they were situated, "until such township or tract shall be incorporated," and if not located, they were empowered to procure their location. The general charge of these lands remained with them till 1848, when, by an Act passed August 11th of that year, "the care and custody" of these lands was transferred to a special agent, whose duty it was "to protect them from strip or waste till such township or tract should be incorporated." At the same time the funds received by these agents were to be placed in the State treasury, and, by the fourth section of the Act, the State was made "accountable to the beneficiaries for the full amount of all moneys thus received with interest," and the State Treasurer was directed, when one or more school districts should have been organized, to cause the annual interest arising to

be paid yearly to the clerk of such plantation or other person authorized by law to receive the same, to be applied to the support of schools in said district.

The reserved lands and the funds therefrom arising were under the general control of the State. The care and custody of these lands was thus transferred by a general law from one set of agents to another. The ordinary exercise of the legislative functions is in the enactment of general laws, applicable to the whole people. The suspension of general laws, or special legislation conferring peculiar and exclusive privileges, may in particular cases be within the constitutional powers of legislation, but their expediency always admits of question.

Now what was the effect of the Resolve under which the plaintiffs claim? Did the Legislature do more than withdraw from the operation of the general law the care and custody of this particular trust estate, and give authority to another set of agents, "to commence and prosecute to final judgment actions against any person who shall, or has, cut or carried away any grass or timber, without legal authority, from the lands reserved for public uses in said plantation," and likewise "against any person who has sold, without authority, any such grass or timber." The Resolve further provides, that all sums thus collected "shall be used for the support of public schools in said plantation." Here is no grant in express terms. All that would seem to be within the fair intent of the Act is to give authority to commence and prosecute certain suits, but nothing indicates that such authority might not be revoked. The fee of the land is untouched. The trust funds remain for the same purposes as before. The Act does not in terms purport to give or grant any thing more than a naked authority. Perhaps the Legislature might transfer the fee of the reserved lands to the inhabitants of a plantation in its incipient organization, but however that may be, the Act neither does nor purports to do any such thing. If a general law like this, and applicable to all plantations, had been passed, could it not have been repealed or modified? If so, does not the right

still remain in the Legislature to modify or repeal a particular Resolve? It seems to us that it does. Prior to this Act, the suit for trespass on the reserved lands was in the name of the State. This Act gives a mere authority to the assessors of the Waite plantation to commence a suit in their own names. No right is vested till judgment is obtained, and no reason is perceived why the Legislature may not rightfully revoke such authority.

That an action is pending, does not diminish or affect the power of the State. An individual may sue for a penalty, and the suit may be in progress to successful termination, yet a repeal of the Act upon which the suit is founded defeats the suit itself. The Legislature have full power over the remedy. *Oriental Bank* v. *Freese*, 18 Maine, 109; *Thayer* v. *Seavey*, 11 Maine, 284; *Read* v. *Frankfort Bank*, 23 Maine, 318. A statute directing that promissory notes given to the cashier of a bank may be sued in the name of the bank, is a law affecting the remedy only, and though passed after the note was given, does not affect the obligation of contracts. *Crawford* v. *Bank of Mobile*, 7 How. U. S. Rep. 279.

Neither will the interests of the *cestui que trust* suffer by the repeal of this Resolve. They remain protected by the general law of the State, and the rights of this plantation can be enforced in the same manner as those of all the other plantations in this State. Whether the prerogative of the State, by which its rights are protected as against the statute of limitations, is transferable, might well deserve grave consideration, but as the resolve in question is repealed, the discussion of this question ceases to have any bearing on the decision of this case. It cannot be doubted that the State, upon whom the duty now devolves, will wisely and efficiently protect the trust estate for the purposes for which it was created, and that in granting equally as in revoking this special authority, the Legislature acted within its legitimate limits.

The plaintiffs' right of action is defeated without their knowledge or consent by the action of the Legislature. In

such a case the general rule as to costs would not seem applicable, and accordingly it has been decided that they are not recoverable by either party. *Thayer* v. *Seavey*, 2 Fairf. 284; *Saco* v. *Gurney*, 34 Maine, 14.

Plaintiffs nonsuit. No costs allowed.

SHEPLEY, C. J., WELLS, HOWARD and RICE, J. J., concurred.

MACHIAS RIVER COMPANY *versus* POPE *& als.*

County Commissioners, designated *eo nomine* to audit bills of expenditure in the improvements of a river to facilitate the driving of lumber, act, when auditing such bills, not as a judicial court, but as individuals; and no entry of their doings need be made upon the records of the County Commissioners, although the rate of toll for the use of the improvements be made to depend upon the amount of the expenditure, as ascertained by such audit.

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

ASSUMPSIT.

The plaintiffs, as a corporation, were authorized to erect dams, sluice-ways and other improvements in the Machias river, to facilitate the driving of lumber, upon which they were to have right to a toll. The rate of the toll was to be proportionate to the sums expended in making the improvements. For the purpose of ascertaining the amount of such expenditures, the charter, § 11, required that the accounts should "be audited" by the County Commissioners. There was an amendatory Act of 1846, which is sufficiently recited in the opinion of the Court.

Under their charter, the plaintiffs erected works and improvements on the river, through which the defendants drove their logs, and this suit is brought to recover tolls for the same.

The plaintiffs read in evidence an instrument, dated Jan. 8th, 1842, signed by "Ichabod Bucknam and Joseph Adams, County Commissioners," certifying *that* they had examined

the accounts of the expenditures made by the company during the year 1841; *that* they had found the accounts to be properly vouched and correctly cast, and *that* they amounted to $6848,83.

The certificate did not purport that the examination of the accounts was had at any term or court of the County Commissioners, nor was any entry concerning the same ever made in the records of that court. The defendants objected to the introduction of the certificate, because it did not purport to show any action by the County Commissioners, as a judicial tribunal, and was never recorded. There was other evidence in the case.

The Judge ordered a nonsuit, to which the plaintiffs excepted.

Thatcher, for the plaintiffs.

Walker and *O'Brien*, for the defendants.

If the provision in the 11th section of the Act of incorporation be a condition precedent to the plaintiffs' right to recover, the condition must be complied with, and the duty performed before this action can be maintained. Whether the duty be a condition precedent or one merely directory, in the management of the affairs of the corporation, depends upon the nature and object of the provision in the charter. *Middle Bridge* v. *Brooks*, 13 Maine, 391; *Wales* v. *Stetson*, 2 Mass. 146; *Bank United States* v. *Dandridge*, 12 Wheat. 64.

Corporations stand on the same footing with natural persons, open to the same implications, and receiving the benefit of the same presumptions.

The public have an interest in the audit and record of the bills, showing the expenditures. The record was to inform people what was legally required of them, and thus to protect them from fraud. The auditings were for the benefit of the public, as well as the corporation. The nature of the provision, and the public convenience, require them to be of record. The Legislature must have intended that the adjudications should be of record, by restricting the ultimate rem-

edy, (in case of an overcharge of toll upon works gone to decay,) to an appeal to the County Commissioners.

RICE, J. — This is assumpsit for toll on logs which the defendants run over certain dams and improvements made by the plaintiffs on the Machias River. The company was incorporated March 4th, 1840, and in 1846, July 30, an Act was passed additional to the original Act of incorporation.

The second section, of the original Act of incorporation, provides for levying a toll. The third section gives the company a lien on all logs that pass their works, as security for tolls, or the right to bring an action of assumpsit to collect the same.

Section eleven provides "that for the purpose of ascertaining the cost of the improvements contemplated in this Act, and ascertaining the amount of tolls chargeable, according to the second section hereof, the amounts showing said expenses shall be audited by the County Commissioners, for the county of Washington; and no accounts shall be allowed for repairs."

Certain original papers, purporting to be adjudications and certificates of the County Commissioners of Washington county, auditing plaintiffs' accounts of improvements, were offered at the trial, and objected to by defendants, as not being matter of record, but were admitted by the Court.

The only point in defence insisted on at the argument was, that the plaintiffs' accounts for improvements should have been audited by the County Commissioners, acting as a court of record, and that the whole proceedings should have been recorded by them, for the information of the public. The auditing and recording by the Commissioners, it was contended, were conditions precedent to be performed by the company before any right to demand or receive toll accrued to them.

It was not controverted that Ichabod Bucknam and Joseph Adams were County Commissioners for the County of Washington in 1842, nor that in January of that year, those men did audit the accounts, with the vouchers of the company for expenditures made in improving the Machias river, under the

provisions of the Act of 1840, and certified the amount of those expenditures; nor was it claimed by the plaintiffs that those accounts or the proceedings of the Commissioners in auditing them, had been recorded with the records of the County Commissioners.

Does the Act of incorporation require that these proceedings should be made matter of record? It certainly does not so require in terms. It would seem to have been the intention of the Legislature to restrict the corporators in the imposition of tolls to a rate proportionate to the amount actually expended upon their improvements. And as a measure of public security the Act provides that the cost of these improvements shall be examined and certified by the County Commissioners.

In this proceeding there were no adversary parties. The auditing was not to settle a matter of litigation, but was rather in the nature of a special commission provided by law, to examine the accounts of the plaintiffs, connected with their improvements, and certify the same as a basis upon which the company would be authorized to found its claims for tolls. To audit, is to examine an account, compare it with the vouchers, adjust the same, and to state the balance, by persons legally authorized for the purpose. It is not a judicial act.

The intention of the Legislature may reasonably be presumed to have been to designate persons to perform this duty, whose character and position in society was such as to entitle them to public confidence. The acts required do not fall within the legitimate scope of official duty prescribed by law to the courts of County Commissioners, and cannot by implication be deemed a part of their official duty. Had the Act required those accounts to be audited by the Judges of the Supreme Court, or a Judge of Probate, it would, we apprehend, hardly be contended, that it thereby would become the duty of those courts to enter upon their records a transcript of those accounts and the adjudications thereon.

This view of the case receives support, by a reference to the additional Act of 1846, in which provision is made for application to the County Commissioners in certain contingen-

cies, and by which they are specially empowered to act judicially, to issue notices, and to hear parties with their witnesses, and finally to adjudicate between them and award cost to the prevailing party.

From these considerations we are of the opinion that the auditing prescribed in the eleventh section of the original Act of incorporation was not intended by the Legislature to fall within the sphere of duty imposed upon County Commissioners, as such, but rather upon the men as individuals, who should, for the time being, hold those offices. Their proceedings, therefore, while acting in the capacity of auditors, were not matter of public record, the statute not having so provided.

Exceptions sustained and a new trial granted.

SHEPLEY, C. J., WELLS and APPLETON, J. J., concurred.

COUNTY OF HANCOCK.

PERKINS *& al. versus* JORDAN.

It is competent for a witness, by his own testimony, to show that he was an agent of the party calling him as a witness; and also to show, that in the business of the agency, he conformed to the authority given him.

Upon a dispute as to the contract upon which a shipmaster sailed a vessel, evidence is admissible to prove the custom in such business.

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

ASSUMPSIT.

The plaintiffs owned a schooner, which the defendant sailed as master. It became a question whether the defendant was on hire by the month, or whether he took the vessel on shares.

The plaintiffs offered the deposition of one Varnum to show, that he had verbal authority from the plaintiffs to let the vessel on shares, and that he did accordingly so let her to the defendant.

The defendant objected to the admission of the deposition on the ground of interest in the deponent; but it was admitted.

The plaintiffs offered several other depositions to show, that the general custom was for masters to take such vessels on shares. These depositions too were received, although objected to.

The verdict was for the plaintiffs and the defendant excepted.

J. A. Peters, for the defendant.

Varnum was interested. The plaintiffs allowed him to make a particular contract. He made, as the defendant contends, a different contract. If he did so, he exceeded his authority. If the plaintiffs cannot hold the defendant to the bargain, which they authorized Varnum to make, they can hold Varnum for exceeding his authority. It was, therefore, Varnum's interest to testify, that the contract which he made with the defendant, was within the scope of his authority.

The proof of custom was inadmisible: —

1. Because the law in such cases, or the contract really made, must govern. *Amee* v. *Wilson,* 22 Maine, 120.

2. Because it was alleged and attempted to be proved, there was a contract in the case, and therefore usage had nothing to do with it. It was inconsistent with the plaintiffs' allegation; was irrelevant, and only tended to mislead the jury. It should be determined by the contract itself.

If the defendant had taken the vessel *without contract,* usage might have an influence in deciding the principles upon which he should account.

It will do to explain an act, only when no explanation of it is found in the other parts of the testimony. A contract made between the parties better informs us of their understanding, than any usage can.

A contract is the higher testimony, more certain; and is conclusive, whether usage agrees with, or differs from it. Why then should evidence of usage in such a case be admitted? May it not tend to vary and contradict? Will it

not tend to make a contract for parties, variant from that agreed upon by themselves.

We do not perceive how such testimony can be received where a contract is alleged, and attempted to be proved.

3. Because there was no evidence that such usage is certain, general, frequent, and so ancient as to be generally known and acted upon. *Leach* v. *Perkins*, 17 Maine, 462.

H. Williams, for the plaintiffs.

RICE, J. — There are two questions only, raised by the exceptions. 1st, whether Varnum was a competent witness; and 2d, whether the evidence of custom was admissible.

Varnum had been the former master of the schooner, and his deposition was offered to prove that he hired the defendant to take the vessel upon shares, and that he had authority from the owners to do so.

An agent is a competent witness to prove the contract, and also to prove his own authority, if it be by parol. 1 Greenl. Ev. § 416. He is safely admitted in all cases to prove he acted according to the directions of his principal, and within the scope of his duty. Ib. § 417. It is not perceived that he was interested in the event of the suit. His deposition was, therefore, properly admitted. The evidence as to custom was admissible to explain the acts of the parties, and to enable the jury to determine whether those acts amounted to a hiring on shares, or simply to the appointment of a master. *Thompson* v. *Hamilton*, 12 Pick. 424. It may deserve consideration, whether the plaintiff had any occasion to resort to proof of custom. But if such custom existed, it is consistent with the contract, and the proof of its existence is not in our judgment liable to any legal objection. *Emmons* v. *Lord*, 18 Maine, 351.

Exceptions overruled,
judgment on the verdict.

SHEPLEY, C. J., and WELLS, HATHAWAY and APPLETON, J. J., concurred.

Webber *versus* Closson.

By the R. S., sheep, found doing damage upon the land of any person, are liable to be impounded by him, as a remedy to recover for such damage.

That remedy, however, does not accrue, if the sheep, being rightfully upon the adjoining land, escaped therefrom through a defect in that distinct part of the division fence, which the person, suffering the damage, was, by prescription or otherwise, bound to maintain.

From the maintenance of a partition fence *jointly* by the owners of the adjoining lands, *for however long a period*, there can arise no *prescriptive* obligation upon either of them to maintain any separate and distinct part of it.

If, therefore, through a defect in such joint fence, the sheep, which are rightfully upon one side of it, escape into the land upon the other side, and do damage to it, they are liable to be impounded.

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

Replevin, for sheep impounded.

The facts were agreed.

The parties owned adjoining lands. The dividing line had never been assigned for the maintenance of a partition fence. But so far as their contiguous improvements extended, the parties had *jointly* maintained a partition fence for more than twenty years. After that time, a defect occurred in it, and the plaintiff's sheep escaped through that defect from his own land into that of the defendant and damaged it. For that cause he impounded them; whereupon this action of replevin was brought. The Judge ruled that the action was not maintainable, and the plaintiff excepted.

Hinkley, for plaintiff.

Adjoining occupants of inclosed lands are bound to maintain partition fences. R. S. c. 29, § 2.

They are also bound to keep them in good repair throughout the year, unless they otherwise agree. R. S. c. 29, § 7.

This obligation commences with, and continues during "*improvement*," and is the consequence of that alone. R. S. c. 29, § 2.

The only penalty consequent upon a neglect of this requirement, is the withholding of the common law remedy of trespass or distress, in case of damage by cattle. R. S. c. 30,

§ 6; *Gooch* v. *Stephenson*, 13 Maine, 371; *Eastman* v. *Rice*, 14 Maine, 419.

It is no excuse for *the person suffering damage*, that he did not know where and how much his part of the fence was, for the law puts it in his power to have it determined at any time. R. S. c. 29, § 3, 5.

There is nothing in the statute, making the obligation in any manner dependent upon the assignment or division of the fence.

If the plaintiff was equally bound with the defendant, still the defendant could not distrain the sheep.

"Where an injury, of which a plaintiff complains, has resulted from the fault or negligence of *both parties*, without any intentional wrong on the part of the defendant, an action cannot be maintained." *Williams* v. *Michigan Rail Road*, 4 Law Magazine, 282; 8 Johns. 421; 1 Cow. 88; 19 Wend. 399; 4 Met. 49; 7 Met. 274.

The parties having maintained the fence jointly or in common for more than twenty years, the defendant was bound by *prescription* to continue to do so, until some other legal mode was established. 2 Greenl. Ev. § 539; *Little* v. *Lothrop*, 5 Maine, 356; *Low* v. *Rust*, 6 Mass. 90.

Drinkwater, for the defendant.

Appleton, J. — The parties in this suit were occupants of contiguous fields. The fences between them had been maintained jointly and without any assignment under the statute provisions relating to fences. The plaintiff's sheep, being rightfully on his own premises passed over into the adjacent lands of the defendant by whom they were impounded. The plaintiff thereupon commenced his action of replevin.

By the common law every man is bound at his peril to keep his cattle on his own land. As is well observed by Beardsley, C. J., in *The Tonawanda R. R. Co.* v. *Munger*, 5 Denio, 259, "fences were designed to keep one's own cattle at home and not to guard against the intrusion of those belonging to other people."

The common law was changed in this State by the statute of 1834, c. 137. The decisions of this Court, in *Gooch* v. *Stephenson*, 13 Maine, 371, and in *Rice* v. *Eastman*, 14 Maine, 419, were based entirely upon the provisions of that statute. By the R. S. all preceding legislation on this subject was repealed and the rights of parties remain as at common law, except so far as they may be modified by their provisions.

At common law the plaintiff could not maintain this action. Whether it is now maintainable depends upon the construction of R. S. c. 30, § 6, which authorizes an action of trespass against the owner of the beasts or the distraining of them or any of them doing damage "provided that if the beasts shall have been lawfully on the adjoining lands and shall have escaped therefrom in consequence of the neglect of the person who had suffered the damage to maintain his part of the partition fence, the owner of the beasts shall not be liable for such damage." No assignment had ever been made of the partition fences between these parties. No particular portion therefore belonged to the plaintiff or defendant to keep in repair. Either party was at liberty under the provisions of R. S. c. 29, to procure a division of the partition fences and an assignment to each of the portion to be by him repaired and kept in repair. Until this be done there can be no neglect by any one "to maintain his part of the partition fence," for he has no part specially designated and set apart for him to keep in repair. This section presupposes a division and an assignment and that the party suffering damage has neglected to keep in repair the part assigned him, in which case alone "the owner of the beasts shall not be liable for such damage." The language of this section is nearly identical with that of the statute of Massachusetts on the same subject, and this view is fully sustained by our own decisions as well as those of that State. *Lord* v. *Wormwood*, 29 Maine, 282; *Thayer* v. *Arnold*, 4 Met. 589; *Sheridan* v. *Bean*, 8 Met. 284. It follows therefore that the plaintiff

cannot sustain his action. By the agreement of parties he is to be nonsuit. *Plaintiff nonsuit.*

SHEPLEY, C. J., and TENNEY, WELLS and RICE, J. J., concurred.

FRYE *versus* GRAGG.

An open, exclusive, and adverse possession of a tract of land by a demandant is not established by proof that no other person than such demandant had occupied it for thirty years, and that he had cut wood upon it, and had always fenced portions of it.

Occupation of land by a demandant, in submission to the title of another, will not authorize him to assert a title by disseizin and possession.

A writ of entry had been brought jointly against two persons. They united in the defence, which prevailed in this Court, upon a report of certain facts agreed and of certain testimony introduced.

In a suit by one of those defendants against the other, for the same land, *Held*, that it was not competent for the demandant to use that report in evidence.

The title of a lot of land was disputed. One of the claimants permitted a third person to occupy, upon a stipulation that if his title should prove to be good he would sell it to such occupant, but no price was agreed; *Held*, that the occupant was not estopped to deny the title of such claimant.

Where a plaintiff has examined one of his witnesses solely to prove the execution of papers used on the trial, an examination of him by the defendant on other and distinct matters, *immaterial to the issue*, will not take from the Judge the power to order a nonsuit.

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

WRIT OF ENTRY.

In 1825, the demandant obtained a bond, conditioned that, if he paid the proprietors an agreed sum, they would convey to him a lot of land, No. 24. He claimed that that lot includes the "Swamp lot."

The proprietors thought otherwise, and in April, 1844, conveyed the Swamp lot to R. Fitts.

In the fall of 1844, the title being thus in uncertainty, Gragg, the tenant, by permission of Frye, the demandant, entered into possession of the Swamp lot, upon a verbal understanding, that Frye was to sell it to him, if his claim under

the bond should prove to be good, but no price was agreed upon, and nothing was paid.

According to the testimony, Gragg said he would go on and take the land at his own risk. The occupation by Gragg has continued to the present time.

Fitts brought his writ of entry for the Swamp lot against the parties to this suit jointly. Pending that suit, an unsealed contract was made between Fitts and Frye, that if the former should prevail, he would convey the land to Frye at a stipulated price.

That case was defended, the grounds of the defence and the evidence in support of it being fully understood by Gragg as well as by Frye.

It was finally submitted to the Court upon a report of the evidence, and a nonsuit was ordered.

Pending that suit, Frye completed the payments mentioned in the condition of the bond of 1825, whereby he became entitled to a conveyance from the proprietors of lot No. 24. But the conveyance has not yet been made.

This suit is brought by Frye against Gragg to obtain possession of the Swamp lot. Before commencing it, notice to the tenant to quit was seasonably given.

The demandant offered in evidence the report of the facts and testimony, upon which the action of Fitts had been tried and nonsuited. This was rejected.

The demandant introduced Mr. Jarvis, to prove the execution of certain papers, and examined him to that point only. The tenant then examined him upon the question, whether the Swamp lot is within the lot No. 24, and he testified that it is not. The demandant then offered other evidence to prove that lot No. 24 included the Swamp lot.

The Judge considering that question immaterial, rejected the evidence.

The demandant also set up a title by disseizin and possession. On this point it was testified, that no person but the demandant had occupied the land for thirty years, and that he had cut upon it, and had always fenced portions of it.

A nonsuit was ordered, which, if the order was improper, is to be taken off.

John A. Peters, for the demandants.

1. We offered to prove that the lot No. 24, (of which we have a right to a conveyance under our bond, already paid,) includes the lot, called the Swamp lot, now in question. That proof having been excluded, it is now to be considered as proved.

Though the conveyance to the demandant has not actually been made, he has an equitable title, which he might enforce under the bond, if the land had not been conveyed to Fitts. And he has a judgment for it against Fitts, in whom the legal title was vested.

The tenant is in possession under us, in submission to our title. He makes no pretence of any title in himself from any other source. In substance, the possession was given to him by us. He is tenant to the demandant. To establish the relation of landlord and tenant, no form of words is requisite. *Mosher* v. *Redding*, 12 Maine, 478. Gragg, then, being tenant, cannot controvert the title of his landlord, this demandant. 21 Maine, 250; 23 Maine, 538; 1 Metc. 95; 3 Metc. 175; 24 Maine, 425; 30 Maine, 494; 2 Greenl. Ev. § 305; 14 S. & R. 385; Comyn's Land. & Ten. 17; 5 Wend. 246.

Though the demandant had no title; though he were but a disseizor, or merely a trespasser, he is entitled to the possession against one who holds under him.

But the demandant was in under his bond; rightfully in.

2. Our possession of the land, if not included in our bond, having been of more than twenty years adverse continuance, is a sufficient title.

3. The report of the evidence in the action brought by Fitts ought to have been admitted. It would show that Gragg knew what title Frye, his landlord, had, and that the judgment in that case could confer no rights upon Gragg.

4. There was error in directing the nonsuit, because the tenant by examining Mr. Jarvis, upon a point disconnected

with that upon which we had examined him, made him his own witness. And a nonsuit cannot be ordered, after testimony has been offered on both sides. *Dennett* v. *Dow*, 17 Maine, 19; 32 Maine, 576.

Herbert, for the tenant.

SHEPLEY, C. J. — This writ of entry has been commenced to recover a lot of land in the town of Dedham, called the Swamp lot. The demandant, on December 1, 1825, obtained a bond of the agent of the proprietors of that township for a conveyance of lot numbered twenty-four upon conditions, which appear to have been performed. He claimed the Swamp lot as being included in lot twenty-four. The proprietors did not so regard it, and they conveyed it to Roswell Fitts on April 17, 1844. The tenant, according to the testimony, entered upon it in the autumn of that year by the permission of the demandant and has continued to occupy it. Fitts commenced a suit by writ of entry against the demandant and tenant to recover the lot, and upon certain facts agreed by the parties, and upon other testimony reported, a nonsuit was ordered in the year 1846.

Whether the Swamp lot did or did not constitute a part of lot twenty-four, it appears to have been legally conveyed by the proprietors to Fitts; for they might convey it to him, if they had before bound themselves to convey it to the demandant, who might have his remedy against them upon his bond.

It is insisted, however, that the demandant had acquired a title to it by an entry and occupation of it as his own for more than twenty years before the conveyance of it was made to Fitts.

The lot appears to have been during that time mostly uncultivated and unfenced. A witness states, that no one but the demandant had occupied it since the year 1821, and that he had cut upon it and had always fenced portions of it. This is not sufficient proof of an open, exclusive and adverse possession. If it could be so regarded, the testimony clearly proves, that the demandant did not claim to hold the lot ad-

versely to the proprietors, but under his bond for a conveyance of lot twenty-four, and in submission to their title. He cannot therefore maintain this suit by virtue of any title acquired by disseizin and possession.

He also claims to recover the lot by virtue of an alleged privity of estate between himself and the tenant, alleging, that the tenant entered into possession under him, admitting his title, and that he thus became his tenant, and that he is therefore estopped to deny that title.

The testimony fails to establish facts, by which this position can be sustained.

It is true, that he entered by the consent of the demandant, not, however, admitting his title absolutely but conditionally only, and under a verbal agreement to purchase of him, if he "held it under the bond," and stating that "he would go on and take it at his own risk." No sum to be paid for it was agreed upon; nothing was paid; and no written contract was made. The conversation between the parties does not appear to have amounted to more than that the tenant might enter into possession of the lot and pay the demandant for it if he should hold it under his bond, and if he should not, the tenant should assume the risk of losing his improvements or of obtaining a title to it in some other way. To require the tenant to restore possession of the lot to the demandant, when he has not obtained any title to it, would deprive him of a privilege secured to him by the arrangement, under which he entered upon it. The demandant never engaged to protect and secure the possession to the tenant, and he cannot deny to him the right to retain possession until he is able to convey the title. The tenant has never admitted a fact, which it is now necessary for him to deny to retain possession. This is the principle upon which an estoppel must rest, and he is not therefore estopped to deny the title of the demandant.

The testimony offered and rejected was properly excluded.

Nonsuit confirmed.

TENNEY and WELLS, J. J., concurred.

TREAT *versus* CHIPMAN.

The Colonial Ordinance of 1641 presents no rule for apportioning flats to the owners of the adjoining uplands.

Neither have the decided cases entirely agreed in furnishing a rule for that purpose.

Though there may be cases, in which the rule laid down in *Emerson* v. *Taylor*, 9 Greenl. 42, cannot be applied, there has been found no serious difficulty in extending it to the flats in the larger rivers and coves of this State.

It seems, that a title to flats may be acquired by an occupation of them by one of the owners of the adjacent lands, if continued fifty years, adverse, exclusive, open and notorious, although commenced without regard to any fixed rule of apportionment.

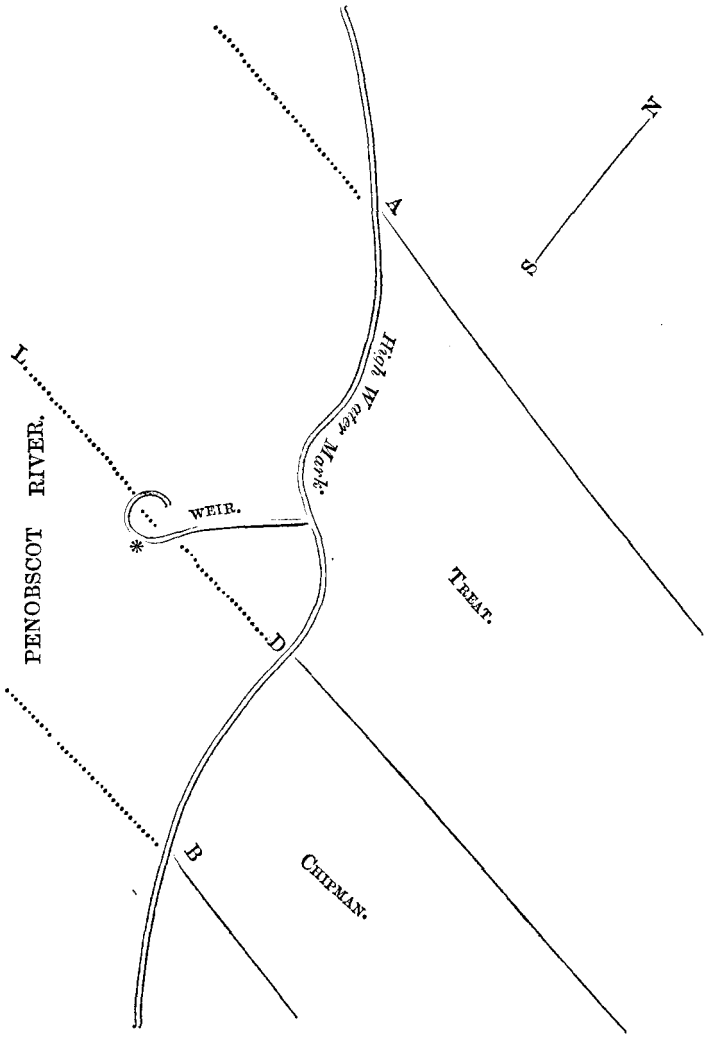
An occupation of flats by one of the owners of the adjacent lands, commenced without regard to any fixed rule of apportionment, and continued under a claim of right for fifty years, with the knowledge of the other owner, may furnish a presumption that the flats had been apportioned by such owners in accordance with such occupation.

Fences of stakes or twigs, erected for fish weirs upon flats covered by water, though used for taking fish during only a *part* of each year, may sufficiently evidence an occupation, with claim of ownership of the flats, upon which such fences are erected.

ON FACTS AGREED. TRESPASS *quare clausum.* The plaintiff is the owner of the lot marked "Treat" on the plan. The defendant is the owner of the lot marked "Chipman." The deeds under which the parties severally claim bound them "on and by Penobscot river." Each of the dotted lines upon the plan represents an extension below low water mark, of the upland line of the lot; and the parties and those under whom they claim, have occupied in conformity to said dotted lines by building fish weirs, and occupying them during the usual season for taking fish, annually, for more than fifty years. Said occupation by each has been exclusive and uninterrupted until the spring of 1852, when the plaintiff erected a weir, the location of which is marked upon the plan, a portion of it being above and a portion below low water mark. On the first day of July, 1852, the defendant entered and took down that portion of said weir which extended over the line, to which he had always occupied; — said line being a continuation of the upland line (between his land and that of the plaintiff,) extended to low

water mark. This is the trespass alleged in the plaintiff's declaration. Both parties claim to own the premises on which said weir was built and the right to occupy the same exclusive of the other; and whatever was done by both was in the exercise of what they claim to be their legal right.

A nonsuit or default is to be entered according to the legal rights of the parties.



* Trespass complained of consisted in removing the portion of the weir south of the dotted line, L. D.

The question presented by the parties was, whether the line, between the uplands of the parties, should be continued *on the same course* to and beyond low water mark; or whether it should be on a different course after leaving high water mark.

The defendant contends that the upland line should be continued on the same course. The plaintiff contends that a base line should be drawn from the point marked A. to the point marked B., and that the dividing line below that should be at right angles to it.

W. G. Crosby, for the plaintiff.

Alden, for the defendant.

SHEPLEY, C. J. — In the decided cases there has not been a perfect agreement respecting a rule to be applied to apportion flats to the owners of the adjoining uplands. There does not appear to have been any difference of opinion, that the Colonial Ordinance of 1641, makes no provision for it; that the intention was to have the flats apportioned justly and equally to the riparian proprietors; that this cannot ordinarily be effected by an extension over the flats of the lines bounding the uplands.

In the case of *Emerson* v. *Taylor*, 9 Greenl. 42, this Court presented a rule believed to be generally applicable, which would effect an equal and just apportionment; and it has been affirmed in the cases of *Treat* v. *Strickland*, 23 Maine, 234, and of *Kennebec Ferry Co.* v. *Bradstreet*, 28 Maine, 374.

The rule adopted in Massachusetts in the case of *Rust* v. *The Boston Mill Corporation*, 6 Pick. 158, appears to have been recognized in the cases *Sparhawk* v. *Bullard*, 1 Metc. 95; *Ashby* v. *Eastern R. R. Co.* 5 Metc. 368, and *Piper* v. *Richardson*, 9 Metc. 155. While a different rule was deemed to be necessary to effect the same purpose in the cases of *Dawes* v. *Prentice*, 16 Pick. 435; *Valentine* v. *Piper*, 22 Pick. 85; *Walker* v. *The Boston & Maine R. R.* 3 Cush. 1, and *Gray* v. *Deluce*, 5 Cush. 9.

In the last named case the rule established by the case of *Emerson* v. *Taylor*, is alluded to with the remark that, "in none of the cases, which we have been called upon to consider, have we found that rule practicable for want of a full survey of all the connected flats in and about Boston." While such has been the state of facts presented in those cases, there has not hitherto been found any serious difficulty in the application of that rule to the flats found in the larger rivers and coves of this State. It has, however, been at all times admitted, that there may arise cases, in which the rule could not be applied.

In the case of *Valentine* v. *Piper*, after alluding to the difficulty of establishing a practical rule, it is said, "but after possession has been long taken and locations originally made without regard to any fixed rule, have come to be settled and fixed by actual and continued possession, the question is much more complicated. Where enough has been done to raise a presumption, that lines have been settled by mutual agreement, considerable force ought to be attributed to actual possession."

Such a settlement of lines upon their flats may be inferred from the long continued occupation of them by these parties in the manner described in their agreed statement.

The doctrine of disseizin, by adverse occupation, was considered to be somewhat extended by the provisions of the statutes of the year 1821, c. 47, § 5, c. 62, § 6. It having been stated in many judicial opinions, that an adverse possession commencing without a recorded title could operate as a disseizin only to the extent of an actual and exclusive occupation exhibited by fences, cultivation or some act equivalent to a *pedis possessio*, these statute provisions were framed to declare, that a possession, occupation or improvement, open, notorious and exclusive, comporting with the ordinary management of similar estates in the possession or occupancy of those, who have title thereto, should be sufficient evidence of disseizin. These enactments were decided to be inoperative so far, as they might act retrospectively, while it was

admitted, that they might act prospectively without any violation of the provisions of the constitution. *Proprietors of Kennebec Purchase* v. *Laboree*, 2 Greenl. 275. By an additional Act approved on Feb. 25, 1825, the effect of this decision was intended to be obviated by a limitation of those enactments to actions commenced after the fifteenth day of March, then next. The substance of them was retained on a revision of the statutes, c. 145, § 42; and it was admitted by this Court, that the provision might properly operate to effect the rights of parties. *Tilton* v. *Hunter*, 24 Maine, 29.

It is admitted by the agreed statement, that the parties and those under whom they claim, have occupied these flats in conformity to lines to be ascertained by an extension over them of the lines bounding their uplands for more than fifty years, "by building fish weirs and occupying them during the usual season for taking fish annually;" and that such occupation by each has been exclusive and uninterrupted. It must necessarily have been adverse, for each claimed to occupy the flats by an extension over them of his title to the upland. It was of course open and notorious, for it was within the sight and knowledge of the respective occupants.

A "weir" is understood to be formed by a fence of stakes or twigs erected upon flats covered with water and remaining during the whole year, although used for taking fish only during the fishing season. Such fences would seem to exhibit the exercise of a claim to be the owner of the flats and a possession of them almost as clearly as by driving piles or by erecting a wharf.

The width of the respective lots is not named in the agreed statement. Nor does it state what portion of the flats was covered by the weirs. It is probable, that a small portion only of each lot was so covered, but the agreed statement fully authorizes the conclusion, that the lot claimed by each upon the flats was clearly designated by them; as clearly as their uplands would have been by monuments erected upon the line dividing their lots and recognized by the respective

parties. If such facts should be regarded as insufficient to establish such a possession as would by the provisions of the statute amount to a disseizin, there can be little doubt, that they should be regarded as sufficient to authorize the inference, that the flats had been apportioned to each upland lot according to their long continued and exclusive occupation.

The plaintiff having no legal right to enter upon the flats, to which the defendant had thus acquired a title, can maintain no action for a removal of that part of the weir erected on those flats. *Plaintiff nonsuit.*

WELLS, HOWARD, RICE, HATHAWAY and APPLETON, J. J., concurred.

BROWN *versus* LEACH *and wife.*

A mortgagee of a farm has the right to immediate possession, unless he has waived such right by agreement.

Such right is waived by a condition in the mortgage that the mortgager should fulfil a bond which he had given to maintain the mortgagee upon the farm, and to keep the farm in good order.

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

WRIT OF ENTRY.

Brown conveyed to Martha Leach, one of the defendants, a farm of fifty acres. In consideration thereof, Reuben Leach, the other defendant and the husband of Martha, gave to Brown a bond in the penal sum of $1200, conditioned to be void, if the obligor should well and sufficiently maintain said Brown, or cause him to be well and sufficiently maintained and kept, at the said farm, and furnish him good and sufficient apartments by himself, &c. and keep the farm in as good condition and repair as it was then in, and pay all taxes on the same, and keep the house insured.

To secure the fulfilment of the bond, a mortgage of the farm was given to Brown by the tenants.

Difficulties arose between the parties, as to the sufficiency of the support furnished to Brown. These difficulties were

submitted to referees, who, among other things, awarded that it did not appear to them that the bond had not been performed and fulfilled. This suit is upon the mortgage.

Upon these facts, the case was submitted to the Court for a legal decision.

C. J. Abbott, for the demandant.

The action upon the mortgage is maintainable without proof of a breach of the condition, there being no agreement that the mortgagers should remain in possession. R. S. c. 125, § 2; *Coleman* v. *Packard*, 16 Mass. 39; *Allen* v. *Parker*, 27 Maine, 531.

Woodman, for the tenant.

HOWARD, J. — The mortgagee has the legal estate in lands mortgaged, and is regarded as owner in fee, as against the mortgager, and those claiming under him, subject to defeasance. He, consequently, has the immediate right of possession, before condition broken, unless it has been waived or controlled by agreement. This general doctrine has been affirmed by statute, 1841, c. 125, § 2.

The demandant as mortgagee, in this case, claims the right to possession of the premises demanded, before showing a breach of any of the conditions of the mortgage. The estate was conveyed to him by the tenants to secure the performance of the conditions of a bond given by Reuben Leach, one of the tenants, for the support and maintenance of the demandant during his life, upon the estate; and which contains among other provisions, a stipulation that the obligor "shall keep the premises conveyed, in as good condition and repair as they are now in, and pay all taxes assessed upon him, or upon said premises, and shall keep the house, if said Shubael so require, insured," &c.

The bond and mortgage deed were executed at the same time, had reference to the same subject matter and were parts of the same transaction, and they must be construed together. The tenant, who was obligor and joint mortgager, was bound to keep the estate, which was a farm containing about

fifty acres of land, with buildings thereon, in as good condition and repair, during the life of the demandant, as it was when mortgaged. This he could not do if the demandant was to have exclusive possession of the premises. But in order to fulfill his bond, and do what the demandant required to be done by the terms of the obligation and mortgage, he must have the control, management and possession of the estate.

The demandant cannot deprive the tenants of the right and power to keep the conditions which he requires to be kept. While he insists upon performance he must not prevent it. He relies upon an agreement which operates as a restraint upon his general rights as a mortgagee. It is in substance and effect an agreement incorporated into the mortgage, that the obligor should possess and manage the estate, to enable him to perform his obligations, and prevent a breach of the conditions of the mortgage. *Lamb* v. *Foss*, 21 Maine, 240; *Allen* v. *Parker*, 27 Maine, 531.

Demandant nonsuit.

SHEPLEY, C. J., and TENNEY, WELLS, RICE and APPLETON, J. J., concurred.

BUCK, *in equity*, *versus* SWAZEY AND DARLING.

In the creation of a trust, no exact form of words is requisite.

Lands conveyed to one, but purchased with funds advanced for the purpose by another, are held by the grantee in trust for the latter.

Lands conveyed to one, but purchased with funds belonging jointly to himself and another, are held by the grantee in trust for the other, to the extent of his part of such funds.

If part of a debt, secured by mortgage of land, be held in trust, the trust is not dislodged, by a written agreement of the trustee "to account and pay over to the *cestui que trust*, his proportion of any moneys which may be received upon the debt.

Such a trust is assignable, and may be enforced in equity by the assignee.

In order to create a trust by the purchase of lands with the funds of another person, such funds must have been advanced and invested at the time of the purchase. If the funds be furnished subsequently to the purchase, no trust arises therefrom.

Buck *v.* Swazey.

If a person, after having purchased a mortgage debt, receive funds from another person, and contract in writing to pay to him a specified part of the proceeds of the debt when received, *and in manner as received*, a specific performance of such contract may be enforced at equity, although there may be a remedy at law.

Upon a foreclosure of the mortgage, the land is to be treated as a payment upon the mortgage debt, and is held under the same trust as was the debt, and the trustee is compellable to convey the same to the *cestui que trust*, in proportion to his ownership in the mortgage debt.

Where one having, as *cestui que trust*, the right to compel a conveyance of land to him by his trustee, becomes himself by contract the trustee of another in the same land, he is compellable to convey to his *cestui que trust*, so soon as he shall himself obtain a conveyance.

In such case, to avoid circuity, the *first* trustee may be compelled to convey directly to the *last cestui que trust*.

Such a conveyance by the first trustee will protect him from the claims of his own immediate *cestui que trust*.

Allegations in an answer to a bill in equity are not of themselves evidence, unless responsive to the bill.

Of the costs to be awarded in equity suits.

Bill in Equity. Darling was defaulted. Swazey appeared and answered. As to him, the bill, answer and proofs appear to exhibit the following state of things: —

On September 12, 1835, one Charles Brown gave three promissory notes to Charles Trafton, secured by a mortgage of real estate. In June, 1836, the notes and mortgage were purchased by these defendants for $1025,50, and were paid for by their joint funds. The notes, however, were indorsed and the mortgage assigned to Darling alone, who at the same time gave to Swazey a written memorandum, (called paper A,) acknowledging him to be equally interested with Darling in the purchase, and agreeing "*to account and pay the said Swazey one half of all sums of money received on said notes, as collected.*" In September, 1836, Swazey gave to the plaintiff a memorandum, (called paper B.,) promising to *account for and pay* the plaintiff *one sixth* part of the amount of the notes, "to be paid when received, *and in manner as received.*"

The bill, among other things, alleges that the money, with which to purchase one sixth of the notes and mortgage, was advanced by the plaintiff to Swazey, and that the same was

invested for the plaintiff in the purchase. The answer denies this allegation, and asserts that the plaintiff did not, *until after the purchase*, pay the money for the one sixth.

In 1841, Swazey gave to one G. W. Swazey a note, (called paper C,) acknowledging the receipt of $50, "*which was invested in the purchase*" of the notes, and promising "*to pay him or order his proportion of the proceeds when collected.*" That note called C was afterwards indorsed in blank to the plaintiff. The bill alleges that the making of the promise by J. Swazey to the plaintiff, and the making of the promise by J. Swazey to G. W. Swazey were known, at the time, to Darling. The answer does not deny such knowledge.

The mortgage was foreclosed by Darling. The plaintiff claims to be the equitable owner of one sixth of the land, in accordance with the memorandum of June, 1836, and also of $\frac{100}{2051}$ other parts in accordance with the note given to G. W. Swazey, and indorsed to the plaintiff. He demanded of each of the defendants a conveyance, which was refused. This suit was thereupon brought to compel a conveyance. Swazey now insists that there was no trust, as between Darling and himself, but that his rights against Darling rested wholly in contract; also, that as between himself and the plaintiff, there was no trust, but that the plaintiff's rights rested wholly in contract; and that upon such contracts the common law afforded an adequate remedy without the intervention of a court of equity.

The answer asserts, (though not responsively to the bill,) that between the plaintiff and the defendant Swazey, there are unsettled accounts, growing out of their joint interest in a brig, and claims that, upon an adjustment of these accounts, there will be due to Swazey an amount larger than all the plaintiff's claims alleged in the bill.

Woodman, for the plaintiff.

1. Darling, by receiving the notes and the assignment of the mortgage, became trustee for all concerned in the purchase. *Root* v. *Blake*, 14 Pick. 271; *Johnson* v. *Candage*, 31 Maine, 28.

2. Even if the plaintiff was not interested in the property at the time it was purchased by the defendants, yet Darling, by having knowledge of the plaintiff's subsequent purchase, without objecting, assented to that purchase and became trustee to the plaintiff to the extent of his purchase. *Evans* v. *Chism*, 18 Maine, 223; *Steere* v. *Steere*, 5 Johns. Ch. 12; 31 Maine, 28.

3. By the foreclosure, the plaintiff took an interest in the land in the proportion of his purchase in the notes. 31 Maine, 28.

4. Darling agreed to pay Swazey, *as the avails of the notes should be received by him.* Having received the land as payment, he is bound to convey to the plaintiff his proportion, in order to fulfill that agreement.

5. That agreement was assigned, in part, to the plaintiff. As assignee, the plaintiff will be sustained in claiming a conveyance to himself to the extent of that part. *Ensign* v. *Kellogg*, 4 Pick. 1. If Darling was bound to convey to Swazey, then Swazey would be bound, after receiving a deed from Darling, to convey to the plaintiff; and the parties interested being all now before the Court, the Court, to avoid circuity, should decree a conveyance from him to the plaintiff.

6. Darling has been defaulted, thereby admitting the plaintiff's claim; and Swazey is not in a position to object to the relief prayed for. It does not appear that such a conveyance will do him any wrong. The allegations that the plaintiff had received moneys on account of the brig are not responsive to the bill, and are wholly unsupported by proof.

7. There is no adequate remedy at law. There is in Swazey no *legal* title to any part of the mortgaged premises, nor has he received any of the proceeds of the notes. We therefore cannot reach *him* by a suit at *law*, and at law, there is not that privity between the plaintiff and Darling, which will enable us to maintain a suit against him.

8. With regard to costs, the case finds, that we have duly demanded a deed, which was unreasonably refused. Why then should we not recover costs against both defendants?

A. W. Paine, for the defendant.

The plaintiff seeks either to enforce a trust, or to compel the specific performance of a contract. The case depends upon a construction of the papers used in evidence. In giving the construction, the same rules will apply, as if the suit were at law. *Dwight* v. *Pomroy*, 17 Mass. 303, 325.

The plaintiff's claim is based upon a supposed right in Swazey to compel a conveyance from Darling. But there was no such right. Darling's contract was in writing, and it was merely "to account and *pay* one half of all *sums of money* received on said notes, *as collected.*" The notion of a conveyance is carefully excluded.

The purchased notes amounted to $1427. The price paid for them and the mortgage was $1025,50 only. No one could suppose that notes, which could be purchased at such a discount, would be of any value. It was not payment of the notes that the parties expected. They considered the trade as substantially a purchase of the land only, and that it was to lie in the hands of Darling, to be rented for the equal benefit of both the purchasers.

The paper B, signed by Swazey, is the one on which the larger part of the plaintiff's claim rests. But that paper makes no mention of the mortgage, or even of the contract with Darling. Containing no allusion whatever to real estate, either expressly or by reference, how can it be made to bind the signer of it, to convey real estate?

The same omission of all allusion to real estate marks the paper C, upon which the residue of the plaintiff's claim pretends to rest. It must result then that the plaintiff's claim to a conveyance is wholly groundless.

Another difficulty in the plaintiff's way is, that Darling's contract was not transferable. It was personal to Swazey alone.

But if transferable, the papers B and C, are not assignments of the contract A or of the mortgage.

The paper C, to G. W. Swazey, was not legally assigned to the plaintiff. It was indorsed merely in blank. Such an indorsement was insufficient.

But on the question of jurisdiction, there seems unanswerable objections to this suit.

1. There is a complete and adequate remedy for the plaintiff at law. It is merely a case of assumpsit in one of its simplest forms. Equity will interfere in such cases, only where there is great uncertainty as to the damages, or where the specific thing is of such a character that the recovery of damages cannot compensate for it. 2 Story's Eq. c. 18; *Russ* v. *Watson*, 22 Maine, 207. Here the matter contracted for is *money;* its *measure* is *certain.*

2. The contracts relied on by the plaintiff plainly admit of no such construction as to justify a claim for a conveyance or any interposition in equity.

3. The only claim of jurisdiction is under the head of *trust.* Trusts are either express or implied. An express trust is where the rights of the parties are raised and regulated by agreement. An implied trust stands on the presumed intention of the parties or is forced upon the conscience of the party by operation of law. 2 Story's Eq. 1195. Where express contracts are made, the law presumes nothing. In this case, the contracts are express, leaving no room for implications. For the paper A, on which the case reposes, is an express agreement to pay *money.* Being, then, an express trust, the only question, as before remarked, is upon the construction of the contracts. *Haskell* v. *Allen*, 23 Maine, 448; *Marston* v. *Humphrey*, 24 Maine, 513, 517, 518; *Cowan* v. *Wheeler*, 25 Maine, 267.

The case of *Johnson* v. *Candage*, cited for the plaintiff, is not applicable. It was a case of *implied* trust, and this is the case of an *express* one. *Root* v. *Blake*, also cited for the plaintiff, is not at variance from the views I have presented, but is fully in harmony with them.

Appleton, J. — From the bill, answer and proof, it appears that, on the 12th day of September, 1835, one Charles Brown gave three several notes to Charles Trafton, and a mortgage to secure their payment. On the 27th day of June, 1836,

the defendants, Henry Darling and James Swazey, purchased these notes, but the notes and mortgage were transferred to Henry Darling though the purchase was made with their joint funds. At the same time Darling gave to his co-defendant, Swazey, the following memorandum.

"Bucksport, June 27, 1836.

"Received of Charles Trafton three notes of hand, signed by Charles Brown, and dated Sept. 12th, 1835, and indorsed by said Trafton, for the following sums, one for $283, and interest, payable in three months, one for $541,50, and interest, in one year, and one for $541,50, and interest, in two years. Also an assignment of a mortgage deed to said Trafton from said Brown, of a lot of land and premises situate in Bangor, for the security of the payment of said notes. This is to certify that James Swazey is *equally interested* with me in said notes and the *security* for the payment of the same, and I hereby agree to account and pay the said Swazey one half of all sums of money received on said notes as collected.

"Henry Darling."

On the 16th of Sept. 1836, the defendant Swazey, gave the plaintiff an agreement in these words: —

"September 16, 1836. — I hereby agree and promise to account for and pay Moses G. Buck one sixth part of the amount of three notes of hand, signed by Charles Brown and payable to Charles Trafton, dated Sept. 12, 1835, and indorsed by said Trafton, one for $283, and interest, payable in three months, one for $541,50, and interest, payable in one year, and one for $541,50, payable in two years, and interest. To be paid when received and *in manner as received.*

"Attest, S. Cobb." "James Swazey."

In addition to the sixth set forth in the agreement last recited, the plaintiff claims to have conveyed to him the interest in the notes and mortgage specified in the following memorandum, which he claims as assignee by indorsement.

"$1025,50. "Nov. 5, 1841.

"Received of George W. Swazey fifty dollars, which was *invested* in the purchase of three notes (described as above)

which I promise to pay him or order his proportion of the proceeds when collected, said notes secured by mortgage of real estate situate in Bangor.

"The sum invested was ten hundred and twenty-five dollars and fifty cents. "James Swazey.

"Attest, H. Darling." Indorsed "Geo. W. Swazey."

Brown and Trafton both became insolvent, and the mortgage given by Brown to Trafton and assigned to Darling, was by him foreclosed. The plaintiff seeks a conveyance of the premises mortgaged to the extent of his interest as disclosed. The requisite demand to convey has been made. Darling has been defaulted, and may be deemed as taking no exceptions to the plaintiff's claims except so far as may be necessary for the protection of his legal rights. The defendant Swazey, admits that the purchase of the notes and mortgage was made with the joint funds of Darling and himself, but denies that any trust has arisen between him and his co-defendant in consequence of such purchase, and insists that his rights as against Darling, and the plaintiff's claims as against him, rest only in contract, and that on such contracts the remedies existing at common law are ample for the protection and enforcement of all just claims, without the interposition of a court of equity.

The first question to be determined is, what were the relations subsisting between Darling and Swazey, under and by virtue of their joint purchase and of the memorandum of June 27th. The bill alleges, and the answer of Swazey admits, that the purchase was made by Darling with joint funds and on joint account. It is well settled that when one makes a purchase in his own name, but with funds belonging to another, that the purchaser holds the property thus acquired in trust for the person by whom the funds were furnished. So where it is made with joint funds and the conveyance is made to one only of the parties interested in the purchase money, he holds it in trust for his associate to the extent of the funds by him advanced. The same principle applies where securities are taken in the name of one only who may be interest-

ed, the others will be entitled to their share as a resulting trust. 2 Story's Equity, § 1206. In the absence then of any other evidence, here would seem to be a trust which a court of equity would enforce.

So where the trust is in writing, the law requires no particular form of words, by which it is to be evidenced. The letters of a party to be charged, his memoranda, notes or papers left by him and found after his decease, his answers to a bill in equity, have been a sufficient foundation for judicial action. 2 Story's Eq. § 1201. By the memorandum of June 27th, it appears that Swazey was equally interested with Darling in the notes transferred and the accompanying mortgage assigned to him. If this had been all, it must most unquestionably have been deemed a sufficient declaration of trust, in conformity with the decision of the Court in *Fisher* v. *Fields*, 10 Johns. 496. But the memorandum, after reciting the joint interest of the two defendants, adds these words, "and I hereby agree to account and pay the said Swazey one half of all sums of money received on said notes as collected." Does this discharge the trust obviously arising from the antecedent facts as recited, and if the notes should by levy or foreclosure be converted into real estate, leave it in the hands of Darling relieved from all trust obligation? Without the addition of these words the law would imply, in a case of a joint purchase of the notes, a promise to account for their proceeds, and this clause, merely asserting an implied promise, cannot be considered as destroying the trust, so that Darling could hold the funds or their proceeds in whatever form received free from such trust. It negatives no facts by which the trust is created.

In case of a mortgage the notes are deemed the principal and the land merely accessary thereto. When one of many notes secured by mortgage is transferred, and after such transfer the mortgagee forecloses his mortgage, he holds the land foreclosed in trust for the unpaid mortgage notes, in whose hands soever they may be, in the ratio such notes bear to

the whole debt remaining unpaid. *Pattison* v. *Hull*, 9 Cow. 747; *Johnson* v. *Candage*, 31 Maine, 31.

The notes being held in trust by Darling, the same trust would attach to the land which went to constitute their payment. The memorandum of June 27 looks only to a money payment. But if Darling were permitted, as against Swazey, to hold these lands in his own right, he would be without remedy. If, by the notes being in whole or in part paid by a foreclosure there is no trust, and a court of equity would have no jurisdiction, — then neither a sale could be enforced nor a conveyance compelled, and the time might never arrive when Swazey would be able to derive any benefit from his investment. The equal interest between these parties is not merely in the notes, but "in the security for the payment of the same." By the express declaration of Darling in writing, the interest of Swazey is not to be confined to the mere notes but attaches likewise to the security. By operation of law, the notes become paid in whole or in part by a foreclosure of the mortgage given for their security. The security thus changes its relation and becomes principal, but the interest of Swazey equally exists therein, when the title became perfected by foreclosure as when the real estate was collateral only to the notes.

As between Swazey and Darling, the conclusion is that a trust arose and that Swazey might compel a conveyance to the extent of his interest. He was the *cestui que trust* and had an interest which he might assign or sell and which by the laws of descent would pass to his heirs.

The bill alleges that the plaintiff Buck, furnished funds to the amount of one sixth, and that Swazey, as his agent, invested them in the purchase of so much of the notes and mortgage. This is explicitly denied by the answer, which states that the purchase was made by Darling with his funds and those of the defendant Swazey, and that Buck subsequently to the purchase advanced the funds for which the receipt of Sept. 16 was given. If the purchase had been made with money advanced by Buck to Swazey and by

Swazey furnished to Darling, if no equities of the latter intervened, the plaintiff Buck, might follow his funds as far as they could be traced and hold the estate purchased to the extent of such advance. 2 Story's Eq. § 1259. But while a trust will thus be enforced, it must arise at the time of the purchase if at all. No resulting trust can be created by after advances or funds subsequently furnished. *Rogers* v. *Murray*, 3 Paige, 390; *White* v. *Carpenter*, 2 Paige, 238. The allegations in the bill being denied, there is no evidence of any joint interest on the part of Buck in the funds by which the notes were purchased and he cannot therefore on that ground charge the estate as trust property.

By the contract of Sept. 16, Swazey gave the plaintiff certain rights. The receipt of that date does not disclose in whom the legal title to the notes and mortgage was vested. But having a trust estate in notes and mortgage and consequently the means to coërce a conveyance, Swazey would be equally compelled to convey when he should acquire a title, as if the title had been in him at the time of making such contract. For a valuable consideration, Swazey agreed to account for and pay one sixth of the proceeds of the Brown notes "*when received and in manner as received.*" So far therefore as regards him, the case stands as if the notes and mortgage had been originally transferred to him and he had foreclosed the mortgage. If then the land was taken in payment, Swazey would be bound to make the same payment. The clause was obviously beneficial to him, as he would by the terms of his agreement be at once discharged upon paying or tendering payment "*in manner as received.*" In no other mode could he perform his stipulations. The case then resolves itself into the common one of a contract to convey specifically, and which the Court will enforce though the party may have a remedy at common law. *Ensign* v. *Kellogg*, 4 Pick. 1. By this contract Buck became entitled to his part of whatever might be received in payment of the notes therein described, "to be paid when received and in the manner received." If the title to the notes and mortgage had been in

Swazey, a trust would have been created in his favor the execution of which a court of equity would have compelled. 1 Greenl. Cruise on Real Property, 355. As between them, the trust none the less arises, though Swazey, instead of having the title in himself, has the right of obtaining it by equitable process against his trustee.

By the memorandum of November 5, 1841, given by James Swazey to George W. Swazey, it is clearly admitted that fifty dollars had been *invested* in the original purchase of the Brown notes and mortgage by the latter. As the notes have by the foreclosure been paid in whole or in part by the land mortgaged, the same investment, and to the same relative amount, must be deemed as continuing in the land after such foreclosure, as existed previously in the notes.

By the terms of this contract, the interest was subject to the order of the party interested, and though that would not entitle the assignee to maintain in his own name an action at common law, yet in equity the rule is well settled to be otherwise. 2 Story's Eq. § 1040.

The interest of James Swazey, in the original transaction, is one which would pass by assignment or transfer or by will. If these contracts signed by him were to be viewed as assignments *pro tanto*, of his interest in the notes and mortgage, the same results would follow. In *Lett* v. *Morris*, 4 Sum. 607, an order to pay out of a particular fund was decreed to be an equitable assignment to such extent. In all cases of assignment of a debt the assignee will be entitled to the full benefit of such securities as the assignor may have, unless there is an express stipulation otherwise between the parties. *Pattison* v. *Hull*, 9 Cow. 747.

As in this case the plaintiff is ultimately entitled to a conveyance, Darling must be decreed to hold the land in trust for him and a conveyance may be directly enforced in his favor. 2 Story's Eq. § 1250. The conveyance when made will discharge the defendant Darling, from so much of his contract as shall thereby have been performed.

The answer of Swazey refers to certain unsettled matters

arising out of his and the plaintiff's joint interest in the brig Mattawamkeag, upon an adjustment of which he claims that a balance would be his due. The answer, except so far as responsive to the bill, is not evidence. Whenever matter in discharge or avoidance is asserted or new and substantive claims are advanced, they must be established by proof. No proof whatsoever in reference to the claims upon which the defendant Swazey relies, as an excuse or justification for withholding the plaintiff's rights, has been offered. They cannot therefore be regarded.

As Darling has submitted to a default and is to be regarded as a mere stakeholder, the conveyance as prayed for against him must be decreed, but without cost on his part. As to Swazey, the plaintiff is entitled to a decree against him with costs.

SHEPLEY, C. J., TENNEY, WELLS and RICE, J. J., concurred.

COUNTY OF PENOBSCOT.

LORD *versus* BICKNELL.

Where one of several sureties upon a replevin bond was sufficient at the time of giving it, and is not shown to have since become irresponsible, an action cannot be maintained against the officer, for taking an insufficient bond, although all the other sureties were insolvent when the bond was given.

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

CASE. The defendant is a deputy sheriff. He took from Lord a yoke of oxen upon writ of replevin in favor of one Miller. Judgment was rendered in favor of Lord, the defendant in that suit, for a return of the oxen, and for damage assessed at $40, and for cost $115,54. Execution upon that judgment was duly issued and seasonably placed for service in the hands of an officer, who returned it in no part satisfied, certifying that he had demanded the oxen of Miller, who

neglected to deliver them; and also that he had made search for them, but without being able to find them.

Lord charges, that the sureties taken by the defendant on the replevin bond were insufficient, wherefore he brings this action. Before the rendition of the judgment in that suit, both the sureties had removed from the State, and have not since returned.

The plaintiff admitted, that, at the time of signing the bond, one of the sureties was sufficient, and offered to prove the insufficiency of the other. A nonsuit was entered by consent, to be taken off if the evidence ought to have gone to the jury.

McCrillis and *Crosby*, for the plaintiff.

M. L. Appleton, for the defendant.

HATHAWAY, J. — Case against a deputy sheriff for taking insufficient sureties in a replevin bond.

The writ of replevin was in form prescribed by stat. of 1821, c. 63, reënacted by c. 114 of the R. S., and required the officer to take a bond with sufficient surety or sureties. Chapter 130, § 10, provides that the officer shall take a bond with sufficient sureties. The bond taken by the defendant had two sureties, one of whom only was sufficient.

By c. 114, § 1, the Court is authorized to make alterations in the forms of writs to adapt them to the changes in the law, but no alteration seems to have been made by the Court in the form of the writ of replevin. How far the defendant might justify himself in the literal obedience to his precept, by taking a bond with sufficient "surety or sureties," under the general rule of law that the sheriff, being a ministerial officer in the service of writs, is bound to obey the process of the Court, in matters of which the Court has jurisdiction, it is unnecessary to determine in this case, for the liabilities of sureties in a replevin bond are similar to the liabilities of bail. *Badlam* v. *Tucker*, 1 Pick. 287.

By stat. 23 Henry 6, c. 9, the sheriff was authorized to let to bail upon "reasonable sureties." Yet a bond with one

surety was good, and valid against the surety; and the liability of the sheriff contingent, "if the surety taken should not be sufficient to respond on a recovery in a suit on the bond," or "if he become irresponsible the liability devolves upon the officer, who has accepted a bail bond with less than two sureties." *Glezen* v. *Rood*, 2 Met. 490.

The case at bar finds that one of the sureties was sufficient, and furnishes no evidence that he does not continue so, or that the plaintiff has suffered any damage by reason of the insufficiency of the other surety; and in all cases where an officer is sued for official misfeazance or negligence, the rule is clear that the plaintiff is entitled to recover no more, than what he has actually lost by such misfeazance or negligence. *Pierce & al.* v. *Strickland*, 2 Story, 310.

The removal of the sureties from the State was a contingency, against which the defendant was not bound to provide.

Nonsuit confirmed.

SHEPLEY, C. J., and WELLS and RICE, J. J., concurred.

MORAN *versus* PORTLAND STEAM PACKET COMPANY.

The pleading of the general issue admits the competency of the defendants to be sued by the name given them in the writ.

The special owner of property, having it in his possession, may recover its value in a suit against a common carrier by whose negligence it has been lost.

In such a suit, the general owner, after having released the plaintiff, may be a witness to testify for him the loss and the value.

CASE, against common carriers, for the loss of a valise and its contents on board the steamboat St. Lawrence, owned and run by the defendants.

The general issue was pleaded, with brief statement that there is no such corporation as the Portland Steam Packet Company, with the powers and duties as described in the plaintiff's writ.

The defendants also moved, that the writ be quashed, be-

cause it does not describe them as a corporation, or as a company liable to sue and be sued. The case states, that the parties agreed as follows: — the defendants are common carriers of passengers and freight; on board their steamer, the plaintiff placed in charge of the baggage master his valise, worth $5,00, containing articles belonging to himself, worth $12,00. Wall and Reynolds were companions of the plaintiff. Wall placed in valise articles worth $31,00; Reynolds placed in it articles worth $4,00. The valise was under the plaintiff's charge and he kept the key. On the arrival of the boat at Portland, the valise could not be found. The case also states, that all the evidence as to the valise, its contents and the values, and its having been put on board, comes from Wall and Reynolds, they having previously given releases to the plaintiff.

J. E. Godfrey, for the plaintiff.

That the testimony of Wall and Reynolds was properly admitted cannot be questioned, so far as it relates to the property of Moran. They had no interest whatever in that property, and there is no pretence that they were disqualified from any other cause.

They were not disqualified in regard to the other property contained in the valise. The plaintiff had a special property in those articles. They were intrusted to him; put into his valise; and he had the key. Consequently he can maintain trover for them. He introduces the general owners to prove the articles converted and their value.

They had no interest in the event of the suit. Whatever interest they had in the articles in the valise, was as general owners.

In *Herman* v. *Drinkwater*, 1 Maine, 27, the plaintiff himself was allowed to testify to the contents of the trunk, after having proved its delivery to the defendant.

Trover may be maintained by general owner, or by one having special property, as bailee or consignee. *Smith* v. *James*, 7 Cowan, 328; *Everett* v. *Saltus*, 15 Wend. 474.

A general bailee without lien may maintain trover for the

property against all persons but the rightful owner. 13 Wend. 63.

The existence of the corporation can only be called in question by plea in abatement. *Penobscot Boom Corp.* v. *Lamson & al.* 16 Maine, 224; *Min. and School Fund* v. *Kendrick*, 12 Maine, 381; *Fogg* v. *Virgin*, 19 Maine, 352.

The defendants have appeared generally; are a party to the suit; are regularly in court, and authorize it to render judgment against them unless they can make a legal defence. *Maine Bank* v. *Harvey*, 21 Maine, 38.

Hobbs and *Fessenden*, for the plaintiff, submitted without argument.

SHEPLEY, C. J. — The general issue having been pleaded and joined, and the facts having been agreed, the other matter presented by brief statement became unimportant.

Reynolds and Wall, owners and bailors of part of the goods contained in the valise, had, before they were allowed to testify, released all their interest in those goods to the plaintiff; and they were competent witnesses for him.

The plaintiff, as bailee of that portion of the goods originally owned by Reynolds and Wall, was entitled to maintain the suit for them and for his own goods. He is now entitled to recover for the value of all the goods lost, amounting to the sum of $52,00. *Judgment for plaintiff for* $52.

WELLS, TENNEY and RICE, J. J., concurred.

PIERCE *& al. versus* HENRIES, AND MANSON *as his Trustee.*

It is an *actual*, and not a mere *constructive*, possession under a recorded mortgage of personal property, which may subject the mortgagee to a suit as trustee of the mortgager.

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

Manson disclosed *that* he held a recorded mortgage, made by Henries of a stock of goods, to secure a debt of about

$400; *that* the goods were of a value more than sufficient to pay his debt; *that*, before the service of the writ, he had never taken possession or delivery; *that*, *after* the service of the writ, he took actual possession, and his debt has been paid; and that the goods have been since mortgaged by Henries to Bebee & Co.

The Judge ruled Manson to be chargeable as trustee, and he excepted.

S. H. Blake, for the trustee.

J. E. Godfrey, for the plaintiff.

Was the trustee in possession of the goods of the principal defendant, as contemplated by R. S. c. 119, § 58?

If the person summoned as trustee shall disclose, that, at the time of the service of the process on him, he had "*in his possession* property not exempted by law from attachment, but that the same was mortgaged, pledged or delivered to him by the principal defendant, to secure the payment of a sum of money due" him, and that the principal defendant has a subsisting right to redeem the same, on payment, or tender of payment of the money due, the Court shall order a delivery of the property to the officer, &c.

The right of redeeming was in the principal defendant, at the time of the service of the writ, and the trustee was in possession, or what is the same thing, had the right to immediate possession of the goods, the mortgage having been recorded as provided by R. S. c. 125, § 32.

At common law, a delivery and generally the possession of the property mortgaged were necessary to vest the property in the mortgagee. The above § 32, made the record of the mortgage a substitute for this. *Pickard* v. *Low*, 15 Maine, 48; *Flanders* v. *Barstow*, 18 Maine, 357; *Welch* v. *Whittemore*, 25 Maine, 86; *Bullock* v. *Williams*, 16 Pick. 35.

The *right to the actual possession* is tantamount to actual possession. *Lane* v. *Nowell & trustee*, 15 Maine, 88; *Ward* v. *Lamson & trustee*, 6 Pick. 358.

The possession of the mortgager is the possession of the mortgagee. *Noyes* v. *Sturtevant*, 18 Maine, 104.

Such a construction should be given to the Acts of the Legislature as will give effect to them. Unless the recording of the mortgage is tantamount to possession, as intended by § 58, c. 119, that section cannot aid the creditor in securing his debt. No mortgagee will ever be in actual possession where registration only is necessary for his security, and no attaching creditor will be any better for the enactment. It is hardly probable that the Legislature would have passed an act for the benefit of attaching creditors, as in this case, and immediately make it of no effect, by rendering possession of the property unnecessary for the security of mortgage creditors.

What possible injury can arise from the construction, that the possession referred to in *Pickard* v. *Low*, and the other cases cited, is the possession intended by the statute? The trustee could suffer no injury if he used ordinary care, the principal defendant could suffer no injury more than if the goods were absolutely his and attached by ordinary process, and there is no other party to be affected injuriously.

Unless this construction obtain, the law becomes a mere protection to fraud.

WELLS, J. — The question presented in this case is, whether a mortgagee, whose mortgage has been recorded, but who has never had the actual possession of the goods mortgaged before the service of the trustee process upon him, can be considered in possession so as to be liable to the trustee process.

The statute, under which the trustee is claimed to be held, c. 119, § 58, provides, that "when any person, summoned as a trustee, shall in his disclosure state, that he had, at the time the process was served on him, in his possession, property not exempt by law from attachment, but that the same was mortgaged, pledged or delivered to him by the principal defendant," &c. The statute requires that the mortgagee shall

have possession of the mortgaged property in order to render him chargeable as trustee. It appears to have contemplated an actual possession, so that the trustee should have the control of the property, and to have made this the ground of his liability. If the trustee were held upon a constructive possession merely, he might suffer loss, when he ought not to be subjected to it. *Central Bank* v. *Prentice & trustee*, 18 Pick. 396.

As Manson, the trustee, never had possession of the goods before the plaintiff's writ was served on him, he must be discharged. *The exceptions are sustained and the trustee discharged.*

SHEPLEY, C. J., and RICE and APPLETON, J. J., concurred.

FOSTER *& al. versus* CUSHING *& al.*

The R. S. c. 67, § 9, provides that any person, whose logs, in the stream, are so intermixed with those of another, that they cannot be conveniently separated for the purpose of being floated down, may drive them all, and recover from such other owner a reasonable compensation for the driving of his part.

Any owner, who is compelled by such intermixture, to drive the logs of other persons as well as his own, is bound, in selecting the time for driving and in all other particulars, in which the rights of such others are involved, to exercise good faith, sound discretion and prudent management.

After having thus proceeded, there arises to him a claim to recover of the others a reasonable compensation, and it is no defence to such claim, that they had formed the purpose and made ample provision to drive their own logs.

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

CASE, under R. S. c. 67, § 9, to recover for driving the defendants' logs, which had become so intermixed with those of the plaintiffs' that they could not be conveniently separated, for the purpose of being driven down the river.

The plaintiffs introduced evidence tending to show that the logs were intermixed, and that they, in order to drive their

own, were compelled to drive those of the defendants, and that they made a clean drive.

In defence it was offered to be shown *that* one Jellison was driving logs down the river; *that* his drive was not more than two or three days behind those of the plaintiffs; *that* the defendants *employed* him to drive *their* logs; *that* many of their logs were left by the plaintiffs, which Jellison drove, and *that* the defendants had paid him, in part, for doing it.

The defendants requested instruction to the jury that, "if the defendants had made ample provision for the driving of their logs, the plaintiffs could not recover." This request was refused, and the jury were instructed "*that* a contract made by the defendants with a third person to drive their logs would not necessarily vary the rights of the plaintiffs;" "*that*, to enable the plaintiffs to recover, it was necessary that they should bring their claim within the provision of the statute;" "*that* the plaintiffs must prove that the defendants' logs were so intermixed with theirs, that they could not be conveniently separated for the purpose of being floated to the market or place of manufacture, and *that* they were under the necessity of driving the defendants' logs in order to drive their own, and *that* they did drive them in good faith towards such market or place."

The verdict was against the defendants, and they took exceptions.

A. W. Paine, for the defendants.

Rowe & Bartlett, for the plaintiffs.

Appleton, J. — This suit is brought to recover compensation for driving logs under the provisions of R. S. c. 67, § 9.

The defendants proved, or offered to prove, that they engaged one Jellison to drive the logs in controversy; that Jellison proceeded to drive the same, his drive being a short distance, two or three days, behind that of the plaintiffs; that many of the defendants' logs were left by the plaintiffs; that Jellison drove such logs reasonably clean and that they had paid Jellison in part for so driving.

The counsel for the defendants requested the Court to instruct the jury that if the defendants had made ample provision for the driving of these logs, the plaintiffs would not be entitled to recover.

If by ample provision is to be understood any thing more than or differing from the facts proved or offered to be proved, the request would fall within that class of cases, where instructions not applicable to the facts proved are requested. The Court are not bound to enunciate abstract principles uncalled for by the evidence or to give instructions upon any hypothetical state of facts which counsel may suggest.

If the request is to be considered in reference to the evidence and is to be limited to the contract with Jellison and the facts set forth in the bill of exceptions, then the instructions were properly withheld. The owner of each portion of logs must necessarily determine for himself the time when his logs shall be driven, and is not bound to defer his judgment to that of any other person as to when may be a suitable time to commence driving. The statute imposes no restriction in this respect.

Neither does any thing in its language indicate that its provisions are to be applied only to such logs as may be derelict. Logs may be so intermixed "that the same cannot be conveniently separated for the purpose of being floated to market or place of manufacture" and not be derelict. Difficulty of separation would seem to confer upon the person driving the right to a compensation, to which without this provision he would not be entitled. The counsel for the defendants, in his very able argument, has suggested many difficulties, which may arise in the practical operation of this statute, but however well founded they may be in the abstract, they hardly seem to apply to the facts of this case. In this, as in all other transactions, good faith, sound discretion, and prudent management, so far as the rights of others are involved, are required on the part of the individual by whom the logs are driven. The plaintiff having a right to commence his labors on his own logs at such time as in the exercise of a sound

discretion he may deem expedient, it is not easy to perceive why his rights under the statute, to drive all logs so intermixed with his own "that the same cannot be conveniently separated," do not forthwith accrue when the logs specified in the statute shall have been driven. If a question arises whether the person driving commenced at a proper time or exercised good faith towards the owner of the logs, they are for the determination of the jury. The fact that the owner of the logs driven had entered into a contract for their driving and that the individual contracting had made preparations to perform his contract, cannot affect or change the rights of one to whom such facts are unknown, and who is proceeding in good faith and with prudence and discretion in the management of his own property. It does not appear, that the plaintiffs were aware who were the owners of the logs or that they had commenced or were about commencing to drive their own logs. Nor does the evidence show any want of good judgment or good faith on the part of the plaintiffs in commencing or proceeding. The right to recover depends on establishing proof of all the facts set forth in the statute as necessary to support an action. The same facts which would authorize a recovery against an owner might equally exist though a contract had been made. The mere existence of an outstanding contract cannot defeat the plaintiffs' right to recover if the facts necessary to the maintenance of the action are established. They may exist notwithstanding the utmost promptness on the part of an owner in making, and the greatest vigilance in endeavoring to enforce his contracts. The material inquiry is, does a party bring his case within the requirements of the statute. Ample provision should not affect a party ignorant that it had been made, and who, in commencing at a fit and seasonable time and proceeding in a prudent and judicious manner, had in driving his own logs at the same time driven those of others, which were so intermixed that they could not be conveniently separated. Such must be the construction of the statute, else every party seeking to recover compensation may be defeated by

a proof of facts, which do not diminish the meritoriousness of his services.

The instruction in reference to this request was, "that a contract made by the defendants with a third person to drive their logs would not necessarily vary the rights of the plaintiffs, for it might not have been performed, or performed in part only, or the plaintiffs might have been ignorant of it." In this there is nothing erroneous.

The jury must be presumed to have rendered their verdict under the instruction, "that to enable the plaintiffs to recover, it was necessary for them to bring their claim within the provision of the statute; that they must satisfy them that the defendants' logs were so intermixed with theirs that they could not be conveniently separated for the purpose of being floated to the place of market or manufacture, and that they were under the necessity of driving defendants' logs to drive their own, and that they drove them in good faith to such market or place." These instructions are almost verbally coïncident with the language of the statute, and if these facts were proved to the satisfaction of the jury, no reason is perceived for setting aside the verdict. The defendants did not interpose the bar of any special provision, by which they were entitled to an exemption from the operation of the statute.

Exceptions overruled. Judgment on the verdict.

SHEPLEY, C. J., and WELLS and RICE, J. J., concurred.

WYMAN *versus* FARRAR *& al.*

Exceptions or reservations in a deed of conveyance are to be construed most strictly against the grantor and most beneficially for the grantee.

F owned a water privilege and dam, by which the wheels of his tannery were worked. He deeded a part of the land, with a right to take water for machinery from his dam, reserving "sufficient water *at all times* to work" the tannery wheels, "*as now used.*" — *Held*, that the water reserved was the quantity, (and no more than the quantity,) *actually used* by the tannery at the time when the deed was given.

Though the lease of a factory, which is usually moved by a water power, should not, *in express terms*, contain a grant of the water power, such grant would result by implication of law.

Such grant, thus arising by implication, will not extend beyond the rights possessed by the lessors.

If, therefore, the water power was but a part of a larger water power, in which the lessors were co-tenants with other persons, and if the lessees should use more than their lessors' proportion of it, no right of action against the *lessors* could arise in favor of the other co-tenants, for such disproportionate use.

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

Case, for diverting water from plaintiff's tannery.

Jonathan Farrar owned the water power and mill privileges upon a stream in Dexter. He there built a dam and upon one shore of the stream he erected and conducted a tannery with its bark mill, fulling stocks and roller, driven by water wheels.

In 1834, he conveyed to one Baker the land opposite to the tannery upon the other shore, "*together with the privilege of drawing water from the dam on the premises, sufficient to carry a turning lathe and other necessary machinery for the chair making business and no other*," with a wheel "in such way as not to injure the dam or in any way interfere with the bark mill," &c., "*meaning to reserve water sufficient at all times to work the bark mill, fulling stocks and roller as now used.*"

Baker erected on the premises a chair factory, which, with all the rights derived to him by the deed from Farrar, became the property of these defendants. The wheels of the factory have ever since been fed by water from the dam.

On February 26, 1845, the tannery with its water power and connected machineries, was conveyed by the heirs of Jonathan Farrar, to the plaintiff, who has ever since carried on the tanning business, having altered and improved the wheels and machinery, introducing much of saving economy in the application of the water. He has greatly enlarged the amount of the tanning business; so that he uses and needs to use the water a *larger portion of the time* than it was used, when Jonathan Farrar's deed was made to Baker.

In these operations he has suffered much loss through the want of an adequate supply of water. He ascribes that loss to the wrongful acts of the defendants, in drawing from the dam a greater portion of water than was authorized by Jonathan Farrar's deed to Baker, under which their title is held; and this suit is brought for those wrongful acts of diverting the water from the plaintiff's tannery.

On March 22, 1845, Cutler, one of these defendants, gave to Fitzgerald and Curtis an unsealed lease of the factory for three years, signing the same by the name of Farrar & Cutler, which was the name, under which the defendants conducted their partnership business in relation to that property.

Fitzgerald & Curtis occupied under that lease, using the premises, not as a chair factory, but as a machine shop, having made many changes in the wheels and gearing.

The defendants contended that no more water had been used for the machine shop than was allowed by Jonathan Farrar's deed; and they introduced evidence to show that, *prior* to the occupation by their lessees, much less water had been used by them than would have been required for a chair factory with one lathe, and they contended that, if too much water was used by the lessees, the plaintiff's action should have been brought against them, and not against these defendants.

The plaintiff contended that there was no authority in Cutler to make such a lease, and that it was therefore a nullity, and could furnish no protection to the defendants.

In order to economize the water, a reservoir dam had been made at the foot of the pond, in which that stream originated. Testimony was introduced, proving that that dam discharged $63\frac{9}{12}$ cubic feet of water, and that the spouts of the plaintiff's mill would discharge $63\frac{7}{12}$ cubic feet, per second.

The plaintiff introduced evidence to show that, from his improvements in the application of water, he actually used a less quantity than Jonathan Farrar *would have used*, if his tannery business had been so enlarged as to require the work-

ing of the wheels *at all times, in the mode* in which they were *constructed to run.*

On these facts the plaintiff contended, *that* the defendants had no right to use the water for any purpose whatever, except for the chair making business; or, however that might be, *that* he, the plaintiff, had a right, under the terms of said reservation, to use all the water that flowed in the stream, if he needed it for his tannery, provided he took no more than could have been used by said Jonathan Farrar in running his tannery day and night with the wheels constructed as they were at the date of his deed; *that* the plaintiff did need all the water for his tannery; — and *that* therefore the grant to Baker of the water had become void, excepting when there was an unusual flow of water in the stream.

The defendants contended that the grant to Baker contained no limitation of the purpose for which the water should be used in his shop, but only of the quantity which might be taken; and further that the reservation of water for the tannery restricted the plaintiff to the use of that quantity of water which said Jonathan Farrar required to carry on the business in his tannery in the mode and at the times he actually used it, and for the amount of business which he did in it, before the date of the Baker deed.

The Judge, among other things, instructed the jury *that* the plaintiff could not recover damage for any injury prior to Feb. 26, 1845, the date of the deed from the heirs of Jonathan Farrar; *that* the restrictions of the Baker deed have reference to the *quantity* of water and not to its *use*, both in the grant and the reservation; *that* the grant gave to Baker and his assigns the right to use, for any machinery, as much water as would be sufficient to work machinery, necessary for the turning of one lathe and for the chair making business, subject to the reservation; *that* the reservation did not limit the grantor or his assigns to the quantity of water necessary to do the amount of business that was then or had before been done in that tannery, nor to the amount which could have been done in the mode of tanning then in use, provided the

tannery had been enlarged, nor to the amount that could have been done in the tannery as it then was by any other mode of tanning, but only to the amount of water that was *sufficient*, at the date of the Baker deed, *to use the wheels in the mode in which they were then constructed to run*, for the purposes of tanning in that yard in any mode and to any amount; *that* the plaintiff had a right, if he needed for the purpose of his tannery, to use as much water as could have been required to work three wheels at all times, in the mode in which they were constructed to run; *that* he could not alter the construction or mode of running so as to draw more water in a given time, than could have been drawn at the date of the deed; *that* this doctrine must hold even though it should deprive the defendants entirely of the use of the water, but *that* if the wheels were so constructed at the time when the deed to Baker was given, that the whole could not be run together, or if the amount of water was not such as to allow three wheels or two wheels to run at the same time, without very soon exhausting the power, the plaintiff could not so alter his machinery as to take more water than was used by the grantor of that deed at its date, by changing the mode of construction, or the mode of use as designed in the construction by the grantor; *that* the burden was upon the plaintiff to show that his rights have been invaded; *that* he must show how much water would be required to do his work in the tannery by said mills, as they were constructed at the date of the Baker deed and in the mode in which they were then used, and that he has not exceeded that quantity; *that*, if the defendants have drawn out the water so that they have taken a part of that quantity which belonged to the plaintiff by the reservation, they are liable, provided he has been injured thereby; *that* the defendants, by giving the lease to Fitzgerald and Curtis, rendered themselves liable for any damage arising from the use of the water by their lessees for the purpose of working the machinery in the shop at the time of the lease, in the mode in which, by its construction, it was designed to be used, but not for working any machinery after-

wards put in, unless put in by their procurement. The verdict was for the plaintiff. To these instructions, the defendants excepted. They also filed a motion for a new trial.

Rowe & Bartlett, for the defendants.

A. W. Paine, for the plaintiff.

RICE, J. — This case comes before us on exceptions and on a motion for a new trial on the ground of newly discovered evidence.

Jonathan Farrar was the owner of the entire estate now owned by the plaintiff and defendants, concerning which the controversy has arisen. Oct. 11, 1834, said Farrar conveyed to one Baker a piece of land opposite his tannery with certain rights of water. The deed to Baker contains certain reservations for the benefit of the grantor. The defendants now represent Baker, and the plaintiff Jonathan Farrar, as he stood immediately after his deed was made to Baker. The rights of the parties mainly depend on the construction of the Baker deed. That deed conveys the land therein described "together with the privilege of drawing water from the side dam on said premises sufficient to carry a turning lathe and other necessary machinery for the chair making business, and no other," said deed also contains the following reservation — "meaning to reserve water sufficient at all times to work the bark mill, fulling stocks and roller as now used."

Upon the question whether the defendants had the right to apply the water to any other use, than that of propelling a turning lathe, &c., the Judge gave instructions which, being in favor of the defendants, are not made the subject of complaint.

Since the date of the Baker deed, important alterations and improvements have been made by the plaintiff in the machinery in his tannery, and the business of the establishment has been very much increased, which requires the machinery to be kept in operation more constantly than prior to that time.

The fact whether it would require more water to work the

machinery now in the tannery, than was required to work the old machinery during a given period of time, was in controversy, and upon that point there was much conflict of testimony.

The plaintiff contended, that by the provisions in the Baker deed, he was authorized to use as much water as was sufficient to work the bark mill, fulling stocks and roller, all the time, in the condition that the mill and machinery was at the date of that deed. The defendant contended, that the true construction of that deed, was, that the plaintiff should be entitled to so much water only as was actually used for propelling the different pieces of machinery in his mill at the time above specified.

Upon this point the Judge instructed the jury, "that the reservation did not limit the grantor or his assigns to the quantity of water necessary to do the amount of business that was then or had before been done in that tannery, nor to the amount which could have been done in the mode of tanning then in use, provided the tannery had been enlarged, nor to the amount that could have been done in the tannery as it then was by any other mode of tanning, but only to the amount of water that was sufficient, at the date of the Baker deed, to use the wheels in the mode in which they were constructed to run, for the purpose of tanning in that yard, in any mode, and to any amount; that the plaintiff had a right, if he needed for the purpose of his tannery, to as much water as could have been required to work three wheels at all times, in the mode in which they were constructed to run; that he could not alter the construction or mode of running so as to draw more water in a given time, than could have been drawn at the date of the deed. That this doctrine must hold even though it should deprive the defendants entirely of the use of the water," &c.

The instruction is explicit and could not by possibility have been misunderstood by the jury.

The case finds that the gates at the pond or reservoir dam were so constructed as to vent sixty-three and nine-twelfths

cubic feet of water per second, and that the spouts of the plaintiff's mill would vent sixty-three and seven-twelfths cubic feet, being, within an immaterial fraction, all the water that could pass the gates at the foot of the pond.

The plaintiff contended and introduced evidence to prove, that he had so altered the spouts, wheels and geering of his mill, that he actually used less water than said Jonathan Farrar would have used, had he extended the business of his tannery so as to require his wheels to be worked at all times, in the mode in which they were constructed to run.

The deed to Baker purports to grant rights of water to be applied to actual and beneficial use. The parties must be presumed to have intended to transfer something by that deed. It can hardly be presumed that a person purchasing a privilege on which to establish a manufacturing business for the successful prosecution of which a constant water power was essential, would consent to the insertion of a reservation in his deed which would effectually negative the terms of his grant.

It is however manifest, that it was the intention of the grantor to put some restrictions upon his grant to Baker. What was the extent of those restrictions? What is the standard by which the rights of the parties are to be measured?

Every exception or reservation in a deed is the act of the grantor and should therefore be construed most strictly against him and most beneficially for the grantee. 10 Coke, 106, b; Com. Dig. Tit. Foil. E. 8; *Case* v. *Hoight*, 3 Wend. 632.

The Judge, in his instructions to the jury, construed the words, *as now used*, as being equivalent to the words, *as now constructed to run*. According to this construction the reservation would read, "meaning to reserve water sufficient at all times to work the bark mill, fulling stocks, and roller *as now constructed to run*," thus making the capacity of the mill to vent water the standard by which to determine the rights of the parties, rather than the amount of water then actually used. Had the words of the reservation been "*now in use*," instead of "*as now used*," this construction would seem to have been correct. But we think the obvious meaning of the

language shows, that the rights of the parties are to be determined by the quantity of water then actually used by the mill and not by its capacity to use water, and that such must have been the intention of the parties cannot well be doubted, when we consider that the other construction would render the grant of little or no value. If, however, there is doubt as to the true construction of the language in the reservation, the general rule above referred to requires, that the construction be given which is most favorable to the grantee.

The instruction "that the defendants by giving the lease to Fitzgerald and Curtis, rendered themselves liable for any damage arising from the use of the water by the lessees for the purpose of working the machinery in the shop at the time of the lease, in the mode in which, by its construction, it was designed to be used, but not for working any machinery afterwards put in, unless by their procurement," is also objected to by defendants.

The lease to Fitzgerald and Curtis gives no right to use any water by express terms. It does however, by implication, convey the right to the use of the water necessary to the enjoyment of the premises leased, so far as that right existed in the lessors. *Rackly* v. *Sprague*, 17 Maine, 281; *Hathorn* v. *Stinson*, 10 Maine, 224.

This right to the use of water, being obtained only by implication of law, could not be extended beyond the rights possessed by the lessors.

The fact that the lessors were not authorized to draw water sufficient to propel all the machinery they had in their shop at the same time would not change this result if such fact were found to exist.

From the view we have taken of this case, the question whether Cutler had authority to lease the premises does not become material. Nor is it necessary for us to consider the motion for a new trial. *Exceptions are sustained and a new trial granted.*

SHEPLEY, C. J., and WELLS and APPLETON, J. J., concurred.

HATHAWAY, J., concurred in the result.

Bangor *versus* Goding *& al.*

The repeal of a statutory provision, giving a lien upon property, defeats the lien remedy, although, at the time of the repeal, the proceedings, prescribed by the statute for enforcing the lien, had been instituted and were rightfully pending in Court.

A lien, created by the provision of a statute in favor of a contract-creditor, is but a part of the remedy afforded for collecting the debt.

The repeal of such a provision, is merely a change in the remedy, and does not impair the obligation of the contract.

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

The city of Bangor contracted with Thompson and Files to erect a school-house upon land belonging to the city. These defendants did a part of the work for Thompson and Files. To secure them for doing the work, they claimed a lien upon the school-house and its lot, under the provisions of R. S. c. 125, § 37, which gave liens for labor and materials furnished in erecting any buildings, "by virtue of any contract with the owner thereof *or other person who had contracted with such owner.*"

To make the lien available, they instituted a suit against Thompson and Files, and attached the school-house and its lot. Upon the execution recovered in that suit, they seasonably caused a portion of the school house and lot to be levied and set off to themselves.

While that action was pending in Court, the statute was amended by *striking out* the words, "*or other person who had contracted with such owner.*"

This is a writ of entry brought by the city to recover possession of the school-house and lot.

The Court are to render judgment according to the legal rights of the parties.

Wakefield, city solicitor, for the demandants.

Moody, for the tenants.

Shepley, C. J. — The city made a contract with Thompson and Files to build a school-house. Goding and Wood, the defendants, worked on that house for Thompson and

Files; commenced a suit against them; recovered judgment, and caused an execution thereon to be levied upon a part of the house and a lot of land, on which it had been erected.

The suit was commenced and an attachment of the house and lot made on March 16, 1850. The judgment was rendered on Feb. 11, 1851. The levy was made on March 5, 1851.

An amendment of the statute, c. 125, § 37, was made by an Act approved on June 28, 1850, "by striking out the words 'or other person, who had contracted with such owner.'"

This amendment was in force as early as Oct. 1, 1850. It operated as a repeal of so much of the thirty-seventh section as provided for a lien in favor of those, who provided materials or furnished labor to erect a building by virtue of a contract not made with the owner, but with a person who had contracted with the owner. There was no clause saving the rights of those, who had already performed such labor for one who had contracted with the owner. The amendment did not act retrospectively to destroy the attachment or any other right, but it did operate from the time, when it became a law, upon all existing persons and rights alike. Those, who had not already acquired and perfected their rights under the provisions of the statute, before it was amended, were left without any authority to proceed further and by subsequent proceedings to levy upon the property of another than their debtor in payment of their debt.

It is insisted, that by the existing law, and by the attachment made by virtue of it, the defendants had acquired rights, which could not be destroyed by a subsequent change of the law.

A lien created by statute, in favor of a creditor, upon the property of his debtor or upon that of another person, for payment of the debt, is but a part of the remedy afforded by law for its collection. A change of that remedy does not affect the obligation of the contract. It does not attempt to do so, but leaves it perfect and unimpaired. If the lien be an in-

cumbrance upon the estate, it is no more so than a common attachment made by a creditor of the estate of his debtor; and that is clearly a part of the remedy provided for the collection of his debt.

If, after such an attachment had been made, the provisions of the statute authorizing a levy to be made upon the estates of debtors should be repealed, there would remain no law authorizing the officer to seize the estate and perform the acts necessary to make a perfect levy; and the creditor would lose the benefit of his attachment. So in this case, although the attachment was not destroyed by the amendment, there remained afterward no provision of law authorizing the officer, by virtue of an execution against Thompson and Files, to seize and make a levy upon the estate of the city.

The cases cited in argument, by the counsel for the city, fully establish the rule of law, that whatever incipient rights, not perfected, are given by statute, may be taken away by statute; and also that the legislative power may rightfully act upon the remedy provided for the collection of debts.

Defendants defaulted.

TENNEY, WELLS and HOWARD, J. J., concurred.

BANNISTER *versus* ROBERTS.

Upon a note for money payable at a future pay-day, whether in an entire sum or by installments, "*with interest to be paid annually*," the interest which may have accrued in any year, may be recovered, if sued for before the pay-day of the principal.

In a suit brought upon a note payable by installments with interest annually, and declaring for the principal and interest, no interest upon interest is recoverable, unless the suit be commenced before the pay-day of the last installment.

ON FACTS AGREED.

ASSUMPSIT on a note promising to pay $2250, in three equal annual payments, *with interest to be paid annually.*

At the end of the first year, the installment which then became payable with interest upon it, was paid. At the same

time, the interest for one year on the other two installments was demanded and refused. At the end of the second year the installment which then became payable with simple interest upon it for two years was paid, and an indorsement was made upon the note of the receipt of "$840, for the principal and interest for two years, of second installment." At the same time the interest due for the two years on the last installment was demanded and refused. After those payments were made, and before the last installment became payable, this suit was brought to recover the annual interests.

A nonsuit or default is to be entered, according to the legal rights of the parties.

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

J. A. Peters, for the defendant.

1. The defendant's construction is, that he was to pay interest annually, only on the sums becoming payable annually. He contends for a difference between this case and one where the *whole sum* is payable on time, "with interest annually." The argument is, that where interest is "payable annually," and also a part of the principal; interest annually is limited to the amount due annually as principal.

2. The receipt of the second installment, with interest upon it for two years, taken in connection with the indorsement of it on the note, is a waiver of interest on the first years interest of said second installment.

Shepley, C. J. — The question presented in this case has reference only to the interest recoverable. The suit was commenced after the first and second installments had been paid with interest, and before the third installment had become payable.

When a note is made payable with interest annually, whether by installments or not, the interest accruing before the whole of the principal becomes payable may be collected, if a suit be commenced to recover it before the whole of the principal becomes payable.

If no suit be commenced for that purpose until after that

time, interest upon the interest, not paid from the time when it should have been paid, cannot be recovered in a suit for the principal and interest due upon the note. *Hastings* v. *Wiswell*, 8 Mass. 455; *Doe* v. *Warren*, 7 Greenl. 48; *Wilcox* v. *Howland*, 23 Pick. 167.

When the first and second installments were paid with interest on them, the defendant did not pay the interest on the installments or installment not then payable; and he insists, that upon a correct construction of the language used in the note, he was not required to do it; and that the words "with interest to be paid annually," have reference only to each particular installment requiring it to be paid with interest annually.

This construction supposes the intention of the parties as exhibited by the note to have been, that each installment should be paid annually with the interest accrued upon it. It would leave the words "to be paid annually," wholly inoperative; for the language before used provided, that the amount should be paid "in three equal annual payments with interest." The words "to be paid annually," must therefore be considered applicable to the interest on the whole sum requiring it to be paid annually.

It is also insisted, that the reception of the interest on the two first installments operated as a waiver of any claim to have the interest paid on the installment not then payable. The case, however, states, that the annual interest was demanded and refused each year as it became payable. The indorsements only state, that the installments as they became payable, were paid with interest on them to that time.

Defendant defaulted.

WELLS, HOWARD and RICE, J. J., concurred.

Hopkins *versus* Megquire.

Upon the question whether a signature be genuine, evidence as to its resembling the writing of the party may be given by a witness who has seen him write; and such witness may state his belief as to the genuineness.

Upon evidence thus given of a resemblance and of a belief in the genuineness, it is competent for the jury to find a verdict that the signature was genuine.

For goods belonging to the defendant, but tortiously taken and detained by the plaintiff, an account filed by the defendant in set-off to the plaintiff's demand cannot be sustained.

In a suit by the indorsee of a note against the maker, a note given by the indorser to the defendant cannot be allowed in set-off, if not mentioned in the defendant's statement of his set-off demands.

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

Assumpsit upon a promissory note given by the defendant to *Pierce & Poor*, and alleged to have been indorsed by them. The evidence introduced to show the indorsement, is reported in the opinion of the Court.

The defendant filed an account in set-off for four thousand pickets, $60,00. To prove this claim he introduced witnesses whose testimony tended to show *that* the defendant, on a demand by the plaintiff, refused to pay the note, alleging that it had already been paid; *that* thereupon the plaintiff replied that he had kept back four thousand pickets belonging to the defendant and did not care whether the defendant paid the note or not; *that* the defendant then demanded of the plaintiff to return the pickets, and that the plaintiff answered that he should keep them until the note should be paid.

The defendant requested the Judge to instruct the jury that, if the defendant said to the plaintiff that the note had been paid, the plaintiff's non-denial of such payment was equivalent to an admission of it. This instruction was refused, and to the refusal the defendant excepted.

The defendant also requested the Judge to instruct the jury that, if the plaintiff had the defendant's pickets in possession, the law raised a promise to pay for them, upon which the set-off claim can be sustained. This instruction was refused, and to the refusal the defendant excepted.

In the said set-off account was wrapped up a note given to the defendant by David E. Pierce, one of the indorsers, for $15. Upon the back of the account was a certificate of the clerk, as follows; — "Account and note in offset, *Hopkins* v. *Megquire*, filed," &c. The Judge excluded the note, because not mentioned in the set-off account. To this exclusion, the defendant excepted.

The Judge instructed the jury *that*, whether the plaintiff's omission to deny that the note had been paid, was or was not equivalent to an admission of the payment, was for their decision, the whole conversation of the parties being considered together; *that* the wrongful taking and withholding the pickets, would not authorize the defendant to be allowed for them in this suit; and *that*, as the note of $15 was between other parties, it was not to be considered by the jury.

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

Sewall, for the defendant.

The Judge erred in allowing the note and indorsement to be read upon such testimony. The witness did not swear that he was acquainted with Pool's hand-writing, that he ever saw him write, or that he had ever seen writing known to be his. The testimony was too vague and uncertain, (admitting the full credibility of the witness,) to establish the fact sought to be proved.

The Judge also erred in rejecting the note filed in off-set. The case finds, that there was duly filed an account in off-set in this case, in which was folded a note. On the back of the account was written the following words: — "Acct. and note in off-set, *Hopkins* v. *Megquire*, D. C. Oct. Tr. 1850, 1, filed, attest, W. T. Hilliard, Clerk." The Court thereupon ruled that the note not having been specified upon the face of the account, as an item thereof, it was not properly filed in off-set.

This note was filed in a wrapper in the usual manner of filing notes in off-set, and the defendant was not required by law to specify the note, or set it out in any statement of

his account. It was of itself as certain as any statement of it could be, and the manner of filing it was a compliance with c. 115, § 25, of the R. S. *Fox* v. *Cutts*, 6 Maine, 240.

Morrison, for the plaintiff.

APPLETON, J. — The plaintiff claims to recover as the indorser of a note, signed by the defendant, payable to Pierce & Pool or order, and by them indorsed. To prove the indorsement of the note, he called a witness, who on his direct examination, testified that he had seen Pool write five or six times and that it was his strong impression that the indorsement was in his handwriting; that it looked like it; and, being cross-examined, he said, that the writing on the back of the note resembled Pool's, but that he could not swear to the indorsement nor to his writing. It is insisted, by the counsel for the defendant, that this evidence is not sufficient to prove an indorsement. All that a witness, called in such cases, can be expected to testify is, that the handwriting in question resembles that of the person, whose it purports to be; in other words, that it looks like it. From the resemblance between the signature before him, as compared with those of the same person previously observed, the witness has drawn the inference that they were made by one and the same individual. The strength of his belief will depend on the greater or less degree of similarity. He can only testify to his own state of mind on this question. The language used as indicative of the strength of his belief, was properly before the jury for their consideration, and it was for them to determine its sufficiency to establish the fact, which it was offered to prove. When the witness stated that he could not swear to the handwriting nor to the indorsement, he was probably understood by the jury as referring to his own knowledge, and not as intending thereby to limit or restrain the testimony previously given, and it is not for us to say that they misunderstood him. *Hammond's case*, 2 Greenl. 33; *Page* v. *Homans*, 14 Maine, 478.

The claim for lumber tortiously converted was not the proper subject of set-off by virtue of the provisions of R. S. c. 115, § 28. "The price of real or personal estate sold" is specified as among the demands which shall be set off. No sale of the pickets charged is proved. When goods and chattels tortiously converted, have been sold and the money received from such sale, the party injured has been permitted to recover such proceeds. To this extent the doctrine of waiving torts and maintaining assumpsit has proceeded and no further. In no case has a recovery in assumpsit been allowed for goods converted as in a sale. *Jones* v. *Hoar*, 5 Pick. 285; *Osborn* v. *Bell*, 5 Denio, 370.

In the account filed in set-off was folded a note of Pierce, payable to the defendant. R. S. c. 115, § 25, requires that "the defendant shall file a statement of his demand," and that "the clerk shall enter on the same the day when it was filed." The note was between others than the parties to this suit. No statement of his demand was filed by the defendant, nor did it appear from any thing filed, what connection the note had with the cause or why it was filed. It was therefore properly excluded. *Exceptions overruled.*

Judgment on the verdict.

SHEPLEY, C. J., and WELLS and RICE, J. J., concurred.

STATE *versus* TIBBETTS.

Proof that prohibited sales were made at the store of a trader, of articles belonging to him, by a clerk in his employ, does not alone create a *legal presumption* of guilt in such trader, though having knowledge of such sales and receiving the pay for the articles sold.

Such proof would authorize a *jury* to *infer*, that the trader either directed or assented to the sales, but would not justify the *Court* in deciding, *as matter of law*, that unless there should be some opposing proof, he would be equally responsible for the sales, as if made by himself.

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

INDICTMENT against the defendant as a common seller of intoxicating liquors.

There was evidence tending to show that such liquors belonging to the defendant were sold in his shop, by a clerk in his employ, the defendant having knowledge of such sales, and receiving the pay for the liquors. The clerk was called as a witness by the defendant.

The Judge instructed the jury, that if sales of such liquors belonging to the defendant were made in his shop, by a clerk in his employ, the defendant having knowledge of the sales, and receiving pay for the same, the *presumption* was, that it was done by his direction or consent, unless there be some proof to the contrary; and that he would be equally responsible for the sales, as if made by himself. To that instruction the defendant excepted.

J. A. Peters, for the defendant.

The words in the instructions "receiving pay," do not mean that he took pay *at the time of sale*, but only that it went into his money.

In addition to every thing that was proved, one more element was necessary to constitute crime. The respondent might know of the sales, and after the sales might receive the pay for them, and still have disapproved of the sales. The guilt would not depend upon any act after the sales, where the intention was good at the time of sale. All the facts proven therefore *might* be consistent with innocence.

The Judge erred in stating that there was any *presumption* about it. It was the very point for proof. If there was any presumption, it was one of fact only, which should have been left to the jury. It was their province; something which should have been left to the jury to decide according to their own convictions. What should therefore have been left *to* the jury, was decided *for* them.

Then further, the Court was still more in error to add that this was so, *unless* there was proof to the contrary, and that the respondent would be legally as much responsible for the sales as if made by himself.

This was in effect saying that upon the facts proven, he must be found responsible, unless he adduces proof to clear himself.

It was as much as to say, that the respondent stands now guilty, and the burthen rests on himself to remove the guilt. *State* v. *Flye*, 26 Maine, 312.

Again, the clerk was a witness. He could have been interrogated. Presumptions cannot be used when better evidence is at hand to the government.

RICE, J. — The defendant objects that the Judge who presided at the trial, instructed the jury that if certain facts enumerated by him, were proved, it raised a presumption against the defendant which would render him liable, unless there was some proof to the contrary, thereby deciding an issue of fact, which should have been submitted to the jury.

A presumption is a probable inference, which our common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability; and there are almost infinite shades from the lightest probability to the highest moral certainty. 1 Phil. Ev. 156.

A presumption, in the proper and technical sense of the word, is much more limited in its nature, than presumptive or circumstantial evidence. A presumption, strictly speaking, results from a previous known and ascertained connection between the presumed fact, and the fact from which the inference is made, without the intervention of any act of reason in the individual instance; on the other hand, circumstantial evidence, that is, indirect evidence to prove a fact, may depend wholly on a process of reasoning, applied to the facts of the particular case, although the mind may never have experienced such a combination before. 4 Stark. Ev. 1246.

There are presumptions of law which are deemed absolute and conclusive proofs in themselves. There are also presumptions of law and fact which constitute proof, *prima facie*, subject, however, to be rebutted and controlled by other evidence. Presumptions may also arise, or more strictly speaking, inferences may be drawn from circumstances peculiar to a particular case when the facts existing tend to establish the fact sought to be proved.

The question for consideration is, whether the facts stated by the Judge, in his instructions to the jury, were, if proved, of such a character as to raise a presumption against the defendant so strong, that in the absence of proof to the contrary the jury were bound to convict, or whether these facts should not have been treated as circumstances from which the jury might or might not infer the guilt of the accused, as they should bear with greater or less force upon their minds.

That innocence is to be presumed till the contrary is proved may be called a presumption of the law, founded on universal principles of justice. 1 Phil. Ev. 157. This principle in favor of innocence is, it has been held, too strong to be overcome by any artificial intendment of law. 4 Stark. Ev. 1242.

In *Commonwealth* v. *Kimball,* 24 Pick. 373, which was an indictment for retailing spirituous liquors contrary to law, the Judge instructed the jury that "when the government have made out a *prima facie* case, it is then incumbent on the defendant to restore himself to that presumption of innocence in which he was at the commencement of the trial." The Court say, "the presumption of innocence remains in aid of any other proof offered by the defendant to rebut the prosecutor's *prima facie* case. The Court are of opinion that the jury should have been instructed, that the burden of proof was upon the Commonwealth to prove the guilt of the defendant, and that he was to be presumed innocent unless the whole evidence in the case satisfied them that he was guilty."

One of the most common cases for the application of the rule giving effect to presumptive evidence, and perhaps one of the strongest, is that in which a larceny is proved to have been committed, and the stolen goods are found, immediately afterwards, in the possession of the accused. In the case, *State* v. *Merrill,* 19 Maine, 398, C. J. Weston says, "in prosecution for larceny, when the goods are proved to have been stolen, it is a rule of law, applicable in those cases, that possession by the accused, soon after they were stolen, raises a reasonable presumption of his guilt. And unless he can

account for that possession consistently with his innocence, will justify his conviction. Such evidence is sufficient to make out a *prima facie* case, on the part of the government, *proper to be left to the jury.*

In the case of *State* v. *Flye*, for forgery, 26 Maine, 312, "the Court instructed the jury, that if it was proved that the order came into the hands of the defendant unaltered, and came out of his hands altered, the burthen of proof was on the defendant to prove that he did not alter it."

The Court say, "proof that the order came to the hands of the defendant unaltered and came out of his hands altered, unexplained, might raise the presumption that he made the alteration and make out a *prima facie* case for the State; and it might be very difficult to rebut or control this presumption. But this evidence was only presumptive, and not conclusive; the burthen was still upon the government as before, which the prosecuting officer does not controvert; the jury are bound to acquit unless from all the evidence, every reasonable doubt was removed.

The case finds that the clerk was put upon the stand by the respondent, but none of the evidence either for the government or the respondent is reported.

The facts detailed by the Judge, if proved would undoubtedly tend strongly to prove that the clerk acted as the agent of the defendant. They were circumstances from which, if unexplained, the jury might legitimately infer authority from the defendant to the clerk to act for him. They are not, however, of such a character, even if unexplained, as to raise a conclusive presumption, as the language of the instruction would seem to indicate. It was proper for the Court to explain to the jury the character and tendency of this testimony; its weight and effect was matter which should have been submitted to them for their determination.

The exceptions are sustained
and a new trial granted.

SHEPLEY, C. J., and WELLS and APPLETON, J. J., concurred.

Cram *& al. versus* Thissell *& al.*

Property may be wrongfully converted by two or more persons jointly, although the acts of one may have followed the acts of the others at successive periods of time, in producing the result.

Thus, where one unlawfully put his mark upon saw-logs, not belonging to himself, for the purpose of aiding another person to appropriate them wrongfully, and such other person, knowing that purpose, accordingly at a subsequent period took and used them, the conversion was *held* to be a joint one.

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

Trover for saw-logs.

The material facts appeared to be as follows: —

Shaw, one of the defendants, obtained a permit to cut logs on a specified tract of land. He procured the other defendants, Thissell, Emery & Co., to furnish supplies for his lumbering operation, assigning to them the permit for their security.

The plaintiffs, having authority to cut logs upon an adjoining lot, entered, through a mistake of the lines, into the tract permitted to Shaw, and there cut and hauled the logs in controversy. The mistake being discovered, Shaw told the plaintiffs that if they would suspend their operations upon his tract, they might retain the logs as their own; and the plaintiffs suspended accordingly. A short time after that arrangement was made, Shaw put his own mark upon the logs, claiming them as his own, because cut upon the tract permitted to him. "These were the only acts relied upon to prove a conversion *by him.*"

A few weeks after that marking of the logs, the other defendants drove and manufactured them. This is the only evidence of conversion "*by them.*"

The defendants contended that the evidence did not show a joint conversion by them all. Some request was made by the defendants for instruction on that point, which was refused. But no exception was taken to that refusal.

The Judge instructed the jury that, in order to recover against all the defendants, there must have been a joint conversion; and that if Shaw put his mark upon the logs for the

purpose of having them driven by the other defendants, as logs cut by himself, and if the other defendants drove them, understanding that they were so marked for that purpose, there was a joint conversion. To that *instruction*, the defendants excepted.

Cutting, for the defendants.

1. There was not only no joint conversion, but no conversion by *either* of the defendants.

Shaw's marking the logs was no conversion by him. For the plaintiffs were trespassers on land permitted to him. His promise that, if they would trespass no more, they might have the logs, was without consideration and of no effect. And yet that promise is the only foundation for the plaintiffs' claim to the logs. That claim failing, Shaw's title to the logs was perfect, and he committed no conversion.

2. The other defendants, having previously become assignees of the permit, could not be affected by Shaw's agreement with the plaintiffs. He had no authority to transfer any portion of the lumber; for if he might alienate a part, he might the whole, and thus defeat the security of those who had furnished his supplies.

Whatever, then, may be the effect of Shaw's promise as to himself, it could not bind them.

In connection with the evidence in the case, the instruction was wholly uncalled for and out of place.

The evidence as to the conversion, (and upon that point it is all reported,) no where discloses a single fact from which any inference could be drawn as to any *understanding* between Shaw and the other defendants.

There is *no evidence*, that either knew of the *acts* of the other.

There is *no evidence*, that Thissell, Emery & Co. ever knew of the plaintiffs' trespass; how then could they have any "understanding" as to Shaw's marking of logs which they knew nothing about; never knew that plaintiffs cut the logs.

They only had an understanding as disclosed by the testimony, that as assignees of the permit, they had a lien and

right to the possession of all logs cut on the permitted premises, and marked with Shaw's mark, which right only they exercised.

Weeks intervened between the acts of the one and the others.

Why then should the Judge, under these circumstances, institute an inquiry, and put the jury upon scent of inferences?

M. L. Appleton, for the plaintiffs.

WELLS, J. — It is contended in argument, that the plaintiffs had no title to the logs, for the conversion of which damages are claimed. But that objection is not made in the exceptions. It appears by them, that the counsel for the defendants contended, that the evidence did not disclose a joint conversion by all the defendants, and "requested the Court to instruct the jury, that in order to make the defendants guilty of a joint conversion, their acts must have been cotemporaneous." The Court instructed the jury, that there must be a joint conversion, and in substance, that the acts of the defendants for the purpose of effecting a conversion need not be cotemporaneous.

All persons, who direct or assist in committing a trespass or the conversion of personal property, acting in concert, are liable jointly. Their acts and purposes may all tend to the same result, though they take place at different periods. Their acts may follow each other at intervals of time, but in the end produce the injury contemplated. The putting of marks upon the logs for the purpose of aiding the other defendants in their conversion, would render Shaw jointly liable with the other defendants, who caused them to be driven and manufactured. And there does not appear to be any error in the instructions.

It is contended, that there was not sufficient evidence from which the jury could infer a joint conversion. But that question cannot be considered upon the exceptions, but only upon a motion for a new trial. *Exceptions overruled.*

SHEPLEY, C. J. and RICE, J. concurred.

HATHAWAY, J. *debutante.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1852.

COUNTY OF WALDO.

STARBIRD *versus* INHABITANTS OF FRANKFORT.

For an injury done to the wife through a defect in the highway, no action against the town can be maintained in the name of the husband alone.

In a suit for such an injury, the husband and the wife must join.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

ACTION OF THE CASE, brought in the name of a husband alone, to recover against a town for an injury sustained by his wife, through a defect in the highway.

The Chief Justice being of opinion that such an action was unmaintainable, the plaintiff submitted to a nonsuit, which is to be taken off, if the action, on proof of the facts alleged, is sustainable.

Knowles, for the plaintiff.

Kelley, for the defendants.

HOWARD, J. — The statute, c. 25, § 89, upon which this action is founded, has received a construction in the cases of *Reed* v. *Belfast*, 20 Maine, 246, and *Sanford* v. *Augusta*, 32 Maine, 536.

In the case last named, it was decided that all damages occasioned by an injury to the wife, through a defect in a highway, might be recovered against the town, in an action commenced in the names of the husband and wife. It follows from the same construction, that an action cannot be maintained upon the statute, by the husband alone, for damages occasioned by an injury to his wife. *Nonsuit confirmed.*

TENNEY, RICE and APPLETON, J. J., concurred.

GLIDDEN *versus* CHASE.

A levy of land on execution, greater in value, by the sum of fourteen cents, according to the appraisement, than the officer was authorized by his precept to take, is invalid.

For such excess, as there can be no apportionment of the land taken, the levy is wholly void.

It seems, that a levy is unsustainable, if the excess in value of the land taken be more than the value of any coin, which by statute is a legal tender.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

WRIT OF ENTRY.

The land had been levied and set off on execution to the demandant. Subsequently to the levy, the execution debtor conveyed it to the tenant.

Unless the levy was valid, the demandant is not entitled to recover.

To the levy two objections were taken; the one in relation to the notice given by the officer to the debtor, in which to appoint one of the appraisers; the other, because a greater amount of land, by fourteen cents, was set off than the officer was authorized by the execution to levy.

The case was submitted to the Court.

Paine and *Libbey*, for the demandant.

G. W. Crosby, for the tenant.

HOWARD, J. — The demandant is entitled to judgment, if the levy of his execution on the demanded premises, can be supported. It was made, as it appears by the return of the officer, for a sum exceeding the amount of the judgment, including the debt, costs and interest, and the charges of levy, by fourteen cents; and, consequently, more land was taken from the debtor than, at the appraised value, would satisfy the sums for which the levy could have been properly made.

It is not assumed that a creditor can legally take more land from his debtor, by levy, than may be sufficient, at the appraisement, to satisfy his execution, and all fees and charges of levy; but it is contended that the excess was so small, in the levy of the demandant, that it may be regarded as a trifle, which cannot affect the validity of the proceedings. *De minimis non curat lex* is a sound maxim of the common law, when properly applied, but it furnishes no positive rule of duty. It had its origin in necessity, and was not intended to excuse negligence or justify wrong, in any form.

Fractions which cannot be expressed in legal money of the country have been regarded as trifles. But a sum large enough to be paid in coin that may be a legal tender, and which constitutes a debt, and may be collected by legal process, cannot be regarded by the law as worthless and trivial. If such a sum be a trifle, "it will be difficult to draw the line, and say how large a sum must be, not to be a trifle," as stated by PARSONS, C. J., in *Boyden* v. *Moore*, 5 Mass. 371.

The excess, in the present case, was double the value of the smallest silver coin current by law, when the levy was made; and more than quadruple the value of the least silver coin made a legal tender before the time of redemption by the debtor had expired. U. S. Laws, March 3, 1851, c. 20, § 11. For such excess the levy must be void, and, as there can be no apportionment of the land taken, it must be wholly invalid. And in our opinion, the like consequences must follow, where the excess is more than the value of a coin which, by statute, is made legal tender. *Huse* v. *Merriam*, 2 Maine, 375; *Dwinel* v. *Soper*, 32 Maine, 119; *Pickett* v.

Breckenridge, 22 Pick. 297; *Boyd* v. *Page*, 30 Maine, 460; *Skinner* v. *McDaniel*, 5 Vermont, 539. In *Huntington* v. *Winchell*, 8 Conn. 45, the levies, which apparently exceeded the amount to be paid, were sustained. But upon an accurate computation, it appeared that the land fell short of the estimate, and the creditor did not obtain the full value of his judgment and costs, by a few cents. In *Spencer* v. *Champion*, 9 Conn. 537, it was held that the excess of fourteen cents did not invalidate the levy, upon the principle settled by the same court, in *Huntington* v. *Winchell*.

Levies of executions on real estate, which included officers' fees and charges, not authorized by law, have been sustained, upon the ground that the creditor had no control over the acts or fees of the officer, and ought not to suffer by his official misconduct. Such over taxation would be for the benefit of the officer solely, and for which the creditor could not be held responsible. Justice and general convenience require that such a levy should be upheld, although the officer would be answerable to the debtor for the excess of fees so taken; and if they were corruptly and wilfully demanded and received, he would be liable to be punished on indictment and conviction, or subjected to a forfeiture. R. S. c. 158, § 17; *Sturdivant* v. *Frothingham*, 10 Maine, 100; *Holmes* v. *Hall*, 4 Met. 419; *Burnham* v. *Aiken*, 6 N. H. 306.

In this view of the case, the objection that the levy was not made in conformity with the statute requirements, does not become material. *Demandant nonsuit.*

Shepley, C. J., and Tenney, Wells and Appleton, J. J., concurred.

Luce *versus* Stubbs.

To sustain an action of dower by the widow against the tenant of the freehold, a demand must be made *of him*, if within the State.

It is not necessary that such demand be made upon the land, of which dower is claimed.

Such demand may be proved by admissions of the tenant, or it may be inferred from facts and circumstances proved.

A paper, addressed to the tenant and subscribed by the widow containing, in rightful form, a demand of her dower, if seasonably received by him, will constitute a sufficient demand.

Proof that such a paper, signed by the demandant, was seasonably left at the dwellinghouse of the tenant, where it was read by some of the inmates, taken in connection with his admission, that the dower had been demanded of him, will authorize the jury to infer that the paper was received and its contents understood by him.

If the jury should draw such inference, a sufficient demand would be established, although not proved to have been originally made upon him in person.

On Report fom *Nisi Prius*, Shepley, C. J., presiding.

Action of Dower against the tenant of the freehold.

The controversy related to the sufficiency, though not to the seasonableness, of the supposed demand upon the tenant.

To prove it, Elijah Lermond testified, *that* two written papers were handed to him by the demandant's attorney, one of which he produced; *that* he saw the widow sign one of them; *that* he handed that one to William Luce, since deceased, to carry and deliver to the tenant, and saw him leave his house for that purpose; *that*, after being absent about half an hour, William Luce returned and signed the other paper, the one here produced; and *that* this was about the first of Sept. 1848.

[The paper produced was a demand of the dower in rightful form, describing the land, and signed by the demandant and addressed to the tenant. It was dated Aug. 30, 1848. The certificate of William Luce appended to it, was dated Sept. 6, 1848.]

Nathaniel Lincoln testified, *that*, in the month of August or September, 1848, he was at work for the tenant, and *that* about Sept. 1, 1848, he saw a paper lying upon a table in tenant's house, whose wife took and read it, the tenant not being in the house; *that* she laid the paper on the table; *that* he took it up and looked at it, and noticed it was a request to have widow Luce's dower set off; *that* he has heard the tenant say they had demanded her dower; *that* he asked the tenant if he intended to stand trial, whose answer was, that

he had a warranty deed, and was not troubled about it; *that* he read enough of the paper to know that dower was demanded of the lands described in the paper here produced; *that* he did not notice whether it was signed by any one, and did not know that the tenant saw it, or read it, or heard it read, and believes he could not read.

Upon this testimony, the Judge being of opinion that if the jury should find, that a paper was signed by the widow, a copy of which is produced, and that such *a paper was left at the dwellinghouse* of the tenant on Sept 6, 1848, it would be a sufficient demand of dower, the tenant consented to be defaulted, subject to the opinion of the Court whether that would constitute a legal demand; if it would, the default is to stand; and if it would not, it is to be taken off, and a nonsuit entered.

Palmer, for the tenant.

The Judge was of opinion that if the paper was left at the tenant's dwellinghouse, it was a sufficient demand. If that was not a sufficient demand, the default is to be taken off.

The R. S. c. 144, § 2, requires the demand to be made "of the person, who is seized of the freehold."

As a matter of philology, it is obvious that a demand of the person can be made only upon him in person. As a question of legal construction, the rule is equally with the tenant. [The counsel then recited and compared many statutes, from that of Merton downwards, and cited *Parker* v. *Murphy*, 12 Mass. 487; *Baker* v. *Baker*, 4 Greenl. 69; 1 Greenl. Cruise, tit. 6, c. 3, § 26; 2 Greenl. Ev. 642; *Burbank* v. *Day*, 12 Met. 557.]

Nothing but a demand actually made or served directly upon the tenant personally, "in bodily presence," and not by any mode of substitution, can avail. And it is not pretended that such a demand or service was made.

The question submitted to the Court is not, whether the leaving of the paper at the tenant's house, *together with the other evidence* in the case, would establish a demand. If such had been the ruling, we should have offered further testimony.

But, if the leaving the demand at the house was of itself sufficient, as the Judge supposed, the tenant had no case, notwithstanding he might have proved that the paper never came to him. It was *that* opinion which alone led us to consent to the default. If the opinion had been that, besides the proof of leaving the paper, the other evidence was necessary, the case would never have been defaulted. It is the correctness of that opinion *alone*, which is to be now adjudicated upon. If the opinion had been that the "other evidence" introduced would be necessary to make out the demand, the default would never have been agreed to, for we could have explained and overcome that "other evidence."

The question was not, and now is not, whether a demand was proved, which was mere matter of fact for the jury; but it was, and now is, whether the leaving a written demand at the dwellinghouse, was sufficient proof of a demand. In view of the authorities cited, we respectfully submit that we are entitled to a new trial.

Abbott and *Howes*, for the demandant.

HOWARD, J. — The demand of dower must be made "of the person who is seized of the freehold at the time of making the demand, if he be in this State, otherwise, of the tenant in possession;" and the action to recover dower must be commenced within one year, but not within one month after making such demand. R. S. c. 144, § 1, 2. The form and manner of making the demand is not prescribed by statute. It may be made by parole, and by one authorized by parole; and it is not necessary that it should be made upon the land of which dower is claimed. *Baker* v. *Baker*, 4 Maine, 67. It may be proved as an act *in pais*, by admissions of the party of whom it was made, or by positive and direct testimony, or it may be inferred from facts and circumstances proved.

The question raised by the report in this case is, as to the sufficiency of the demand of dower. There was evidence at the trial tending to show that a demand in writing,

signed by the demandant, and unobjectionable in form and substance, was left, by one whose agency is not disputed, at the dwellinghouse of the tenant, seasonably for the commencement of this action; that the writing was then read by the wife of the tenant, and a witness then at work for him, in his house, he not being in the house at the time; that it lay upon the table in the house; and that the tenant has said to the witness, "that they had demanded her dower," and that as he had a deed of warranty, "he was not troubled about it." Upon this evidence a jury would be authorized to infer that the tenant received the paper, and knew its contents at the time, and if they found that it was signed by the demandant, and seasonably left at the dwellinghouse of the tenant, it would constitute a sufficient demand of dower. Positive proof of a personal demand is not, in all cases attainable; as when the tenant is concealed, or not accessible, although in the State. A demand in writing, and signed by the demandant, may be regarded as made when it was received by the tenant, although not originally made upon him in person. In *Burbank* v. *Day*, 12 Metc. 557, the Court say, that when made upon two of the tenants, by leaving an attested copy at each of their dwellinghouses, it was not such a demand as the statute of Massachusetts required. There was no further evidence that those tenants received the demands or copies. But in this case, it may fairly be presumed from the evidence, that the tenant received the original demand, which upon the supposed finding of the jury, as stated in the report, would be sufficient.

The default must stand, according to the agreement, and judgment will be entered for the demandant.

Tenney, Wells, Rice and Appleton, J. J., concurred.

PAUL, *in error*, *versus* HUSSEY.

In a process to reverse a judgment, nothing can be assigned for error, which contradicts the record; nor can any evidence, even the deposition of the justice before whom the judgment was recovered, be received to discredit it.

Papers and documents, used and filed in a case, if not incorporated into the record, constitute no part of it.

The allegations of a justice's record, in matters within his jurisdiction, are entitled to the same credit, as are allegations contained in the records of the higher tribunals.

WRIT OF ERROR to reverse a judgment recovered by Hussey against Paul, before a justice of the peace, at Belfast, on March 1, 1851.

The error assigned was, *that* the writ in that action was made returnable and was entered on the 18th of January, 1851, at ten o'clock in the forenoon, when the parties appeared, and the action was continued two weeks, being to the first day of February; *that*, at the time fixed by the adjournment, the plaintiff in error appeared, but the justice was not present, nor in town during any part of the day, having left Belfast previous to the first day of February, and not having returned until the following week; yet the justice, after his return, and subsequently to the first day of February, entered in his docket a further continuance of four weeks, which was to the first day of March then next, on which day the plaintiff in error was defaulted, and the judgment complained of was entered.

The pleadings were as follows: —

"And now said Hussey, not waiving any objections to want of regularity and form in the proceedings of said Paul in this process, says that by reason of any thing by the said Paul above for error assigned, the judgment aforesaid ought not to be reversed or annulled, because he says, that the continuance of the action aforesaid, in which judgment was rendered as aforesaid, was made and entered at the request of the said Paul, the said defendant assenting thereto, all which was well known to said Paul, and that he had ample opportunity to be heard on the trial of said cause at the time when judgment

was rendered against him, but that he neglected so to do. And this he is ready to verify; wherefore he prays judgment, and that the judgment aforesaid may be affirmed and stand and remain in full force, vigor and effect.

"By *Wm. G. Crosby*, his attorney."

"And the said Paul, protesting against the above plea or replication of the defendant in error, as irregular and informal, as before says, that the continuance of the action aforesaid, on which judgment was rendered as aforesaid, was not made and entered at the request of said Paul, the defendant assenting thereto; nor was the same known to said Paul, nor had he, said Paul, any opportunity to be heard in the trial of said cause at the time when judgment was rendered against him, as defendant above has alleged; but that said justice, who rendered judgment, as aforesaid, was absent during the whole day of the first of February, to which time said action had been before continued, and did not return till the week following, by which said action was lost or discontinued, in manner and form as the plaintiff in error has alleged, and this the said Paul prays may be inquired of by the Court.

"By *Jos. Williamson*, his attorney."

The copy of the judgment set forth that the action was entered before the justice "on the 18th day of January, 1851, and continued or adjourned two weeks, being to the first day of February then next following, and continued or adjourned again by request in writing by the defendant's counsel on file, as by copy annexed, from that time a further time of four weeks, being to the first day of March then next following, and now the plaintiff appears; but the defendant although solemnly called, doth not appear, but makes default.

"It is therefore considered by me, said justice, that the plaintiff recover against the said defendant," &c.

The plaintiff in error offered the deposition of the justice, for the alleged purpose of showing that he was not in Belfast on the first day of February, and that he did not receive the written request for the second continuance, until the 3d of February, &c.

The case was then submitted to the Court for a decision "according to the law and the evidence before them."

Williamson, for the plaintiff in error.

W. G. Crosby, for the defendant in error.

RICE, J. — Objection is taken by counsel for the defendant, to the preliminary proceedings in this case, there being no writ of error, and no duly authenticated copy of a record of the judgment sought to be reversed.

By c. 269, of stat. 1852, those preliminary proceedings in error have been dispensed with. That Act, however, by its terms, applies only to cases commenced after its passage, and cannot therefore affect the present case, which was commenced in Jan. 1851. It has been held that in proceedings in error there should be a strict observance of the rules of law. *Simpson* v. *Wilson*, 24 Maine, 437. The proceedings are therefore defective. But inasmuch as the defendant has pleaded to the merits of the case, he may be deemed to have waived his objections to those defects.

The paper in this case which purports to be a true copy of the record of the judgment, recites that the "action was commenced on the 7th day of January, now last past, (1851,) and entered before me, said justice, on the 18th day of same January, and continued or adjourned two weeks, being to the first day of February, then next following, and then continued or adjourned again by request in writing of defendant's counsel, on file, from that time a further time of four weeks, being to the first day of March, then next following."

The plaintiff in error contends that the original action was not continued the second time as recited in the record, but by reason of the absence of the justice, was discontinued.

Errors in fact may be assigned which are not disclosed by the record. But it is a settled rule of law that nothing can be assigned for error which contradicts the record. *King* v. *Robinson*, 33 Maine, 114; Com. Dig. Pl. B. 16.

When the record of a domestic judgment states, that the defendant appeared by attorney, testimony that the attorney

was not duly authorized cannot be received, for it would contradict the record. *King* v. *Robinson*, 33 Maine, 114. When a record recites that a court was held according to custom, it is against the record to say there is no such custom. *Whistler* v. *Lee*, Cro. Jac. 359.

It is contended by the plaintiff in error that the deposition of the justice should be deemed a part of his record, being his statement under oath, and when thus taken with the transcript of his record, or added to it, the error assigned would appear. But it is not competent for a party in an appellate court to present a fact by affidavit, which the record does not disclose. *Powers* v. *David*, 6 Ala. 9. Papers and documents filed in the case but not incorporated into the record constitute no part of it. *Valentine* v. *Norton*, 30 Maine, 194.

Though no presumption is to be made in favor of the jurisdiction of a justice of the peace, yet when the proceedings show that he has jurisdiction, the facts disclosed by his records within that jurisdiction are presumed to be correct, and entitled to the same credit as if contained in the records of other competent tribunals.

The plaintiff in this case, if he has suffered by the wrongful acts of the magistrate, has misconceived his remedy. The judgment must therefore be affirmed.

Costs for defendant.

Shepley, C. J. and Howard and Appleton, J. J., concurred.

COUNTY OF KENNEBEC.

Lawrence and Wife *versus* Inhabitants of Mt. Vernon.

Whether the user of a road, by which it has become a public way, extended to the whole space between the fences, or only to the wrought part between the gutters, is a question for the jury.

Proof that a space had been fenced out more than twenty years, and that a strip, occupying a part of that space, had for more than twenty years been wrought

by the town and traveled by the public as a road, will not show, *as matter of law*, that the *whole of the space* had become, by user, a public highway.

In a suit for an injury, sustained by the upsetting of a carriage through a defect in the highway, evidence, that on former occasions, the driver had "appeared to be a competent driver," *seems* to be inadmissible.

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

Case for injury sustained by the wife, by being thrown from a wagon through a defect of the highway in Mount Vernon.

One Eaton was driving the wagon when the accident occurred. The defendants contended that in his driving, there was a want of the requisite care. The plaintiff called several witnesses, who testified that they had seen Eaton driving, "at other times before the accident, and that he appeared to be a competent driver on such occasions." This testimony was objected to but was received.

The plaintiffs contended, that the injury was occasioned by the horse taking fright at a pile of shingles. There was evidence tending to show, that the shingles at the time lay from three to four feet beyond and outside of the ditch which bounded the travel way, though the end of one bundle of them lay in the ditch. The plaintiffs introduced no record in evidence of the location of the way, but to establish its existence called several witnesses, who testified that the road had been traveled for more than twenty years before the day of the accident, and that the exterior fences were then where they had been for many years before; and one witness stated the fences to have been there for twenty-five years, and that several rods north of where the accident happened, he knew that materials had been taken from either side for repairs, and the stones taken from the traveled part were thrown up either side and back to the fences. The highway was fenced in the manner highways usually are, and between the fences was forty-nine feet space, and there were twenty-nine feet between the ditches, and ten feet from the ditch to the fence, on the side where the shingles lay. The defendants requested the Judge to instruct the jury that, if the plaintiffs have not proved that the shingles lay within the limits of the high-

way, they cannot, for this reason, maintain their action; and that, if the only proof of the existence of the highway is the proof of a user for more than twenty years, the way is no wider than the extent to which it was so used. The Judge instructed the jury that, if the shingles lay outside of the ditch as the witnesses stated, and were of a character to frighten horses passing over the highway so used, and did frighten the horse in the present case, while traveling within *the limits of the* highway so used, and thereby cause him to overturn the wagon in which the plaintiff was riding, and occasion the damage in the present case, the highway would be defective and out of repair; and the other facts necessary to support the action being proved, the defendants would be liable, although there was no evidence of any actual user of the highway beyond the ditch aforesaid."

The verdict was for the plaintiffs, and the defendants excepted.

H. W. Paine, for the defendants.

1st. The testimony of the witnesses, as to the competency of Eaton as a driver, was improperly admitted. — Because it was irrelevant, and, because it was opinion merely. *Scott* v. *Hale*, 16 Maine, 326.

2d. The Judge erred in instructing the jury, that the defendants would be liable, though there was no evidence of any actual user of the highway where the supposed defect existed. The evidence should have been left to the jury with instructions for them to find whether the user did not extend far enough to embrace the defect. *Sprague* v. *Waite*, 17 Pick. 359; *Hannum & ux.* v. *Belchertown*, 19 Pick. 311.

Morrell, for the plaintiffs.

There are two points presented by the exceptions. —

1. Was evidence admissible for the plaintiff to show, that Eaton had been observed to drive carefully on other occasions, and appeared to be competent on *such* occasions?

2. Were the instructions in regard to the user of the road and the liability of the town correct?

The first point is not relied upon by the counsel, apparently, and does not require notice.

On the second point, the instructions were, that although the shingles lay outside of the ditch, and outside of the wrought part of the road, that part actually used, yet they would be such an incumbrance as to render the road defective; and, that if the other facts necessary to make out a case, i. e. if the limits of the road were the fences, the defendants would be liable, although no actual user beyond the ditches was shown. These instructions met the case precisely, and are warranted by the evidence.

The requested instruction was not authorized by the proof.

1. It was unauthorized, because it required that the instructions should be given upon a hypothetical point.

2. Were the shingles within the limits of the highway?

The highway was fenced as highways usually are; and had been used as fenced for twenty-five years; there were forty-nine feet between fences, twenty-nine feet of which were between the ditches.

Near the spot, north, materials had been taken from either side of the way, and stones thrown back to the fences.

Did this evidence authorize the jury to find a way extending to the fences? R. S. c. 25, § 100.

"When fences have been erected or continued more than twenty years fronting upon or against any highway, &c., and from length of time or otherwise, the boundaries are not known, or cannot be made certain by the records and monuments, *such fences shall be taken to be the true boundaries thereof.*" By this rule, the shingles were within the road. 17 Pick. 309; 19 Pick. 311; 8 Metc. 584; 13 Metc. 118.

Here was evidence of over twenty years adverse and uninterrupted use by the public, which would give the town the right and subject it to the legal consequences of such way.

It was competent to prove the road by such use without resorting to the record. 18 Maine, 409.

APPLETON, J. — The existence of the road in traveling over which the accident which is the subject of this suit, occurred,

was proved by user alone, and whether that user extended beyond the actual travel, was a material fact upon the determination of which the rights of the parties might depend. The jury might find the user coëxtensive only with the actual travel, and if so, the alleged cause of the injury would not be within the road, as found by them. They might, upon the evidence, have deemed the road to extend beyond the traveled path so as to include the shingles, which the plaintiffs claimed to have been the cause of the injury, within its limits. The boundaries of the road as established by user were to be determined by them, and that issue should have been distinctly presented.

It is well settled that for any defect, however slight, the town is responsible, if damage occurs in consequence thereof without fault or negligence on the part of the person injured. But what is a defect and whether any defect however slight exists, is to be submitted to the jury. The law has not prescribed what imperfections in a road would constitute the defect referred to in the statute; it was a fact for the jury to settle, what condition would render it safe or otherwise." *Merrill* v. *Hampden*, 26 Maine, 234. So too, the question of ordinary care on the part of the person driving must depend upon the facts as they may be developed in each case, and is one entirely for the determination of the jury. In *Bigelow* v. *Rutland*, 4 Cush. 247, instructions respecting ordinary care, precisely like those given in this case in reference to defects in the road, were requested by counsel and refused by the Court, and such refusal was held in accordance with the law. The instruction, as given, withdrew the question as to whether there was a defect or not from the jury, and the Court determined absolutely, as matter of law, what should be considered as a defect. The Court should have left that question to the tribunal, to whom its decision exclusively belongs. *Morton* v. *Fairbanks*, 11 Pick. 368; *Percival* v. *Maine Mutual Ins. Co.* 33 Maine, 242.

Exceptions sustained. New trial granted.

SHEPLEY, C. J., and TENNEY, HOWARD and RICE, J. J., concurred.

STATE *versus* BONNEY.

Where A had testified for the State both upon a former and upon the present trial, and B, for the defendant, had testified to a conflict in the testimony of A, as given at the different trials, it is not competent for the State, in order to defeat the testimony of B, to use in evidence the bill of exceptions taken in the former trial, unless the same had been signed or written or assented to by B.

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

INDICTMENT, for having in possession at one and the same time, ten counterfeit bank bills, with intent, &c. Many legal points were taken, and much testimony introduced.

It appeared that the defendant had been tried and found guilty by the jury upon a former indictment; and that he filed exceptions, which were drawn in the handwriting of Mr. Paine, one of his counsel, who signed thereto the names of "Paine, Lancaster and Baker, attorneys."

In that former trial, one Abbot and one Soule were witnesses for the State. The same persons testified for the State in this trial. To show a conflict in their testimony, as given at the different trials, Mr. Baker, who assisted as one of the defendant's counsel on both occasions, was called by the defendant and testified. Thereupon the County Attorney, in order to show a misrecollection on the part of Mr. Baker, offered in evidence the aforesaid bill of exceptions, which was received, though objected to.

The verdict was against the defendant, who filed exceptions.

Paine and *Baker*, for the defendant.

The exceptions taken at the former trial were inadmissible as evidence.

The testimony of the witness Baker impeached Abbot, the State's witness. On what principle could the introduction of the exceptions contradict the evidence given by Baker, who neither drew them or signed or saw them? And surely they could in no way tend to prove the guilt of Bonney.

Vose, County Attorney, for the State.

The statements, given by Mr. Baker, as to what Abbot and Soule had testified on the earlier trial, was at variance with the report of their testimony in the bill of exceptions, which had his name appended to it as counsel, and must therefore have received his approval. The bill of exceptions was therefore admissible in evidence. It was his written statement against his testimony. But, at any rate it was immaterial, and could not injuriously have affected the defendant.

HATHAWAY, J. — The bill of exceptions, taken at the trial of the defendant on another indictment, was improperly admitted in evidence.

It was not admissible to contradict Baker, for the case finds that he neither wrote or signed it. No part of it was admissible, for that purpose, in any event, except the report of the testimony of Abbot and Soule, concerning which Baker testified.

Upon well established legal principles, the *whole* bill was inadmissible. It was the report of a criminal trial of the defendant, by which report, it appears, that he was found guilty. Its tendency must have been prejudicial to him with the jury. *Exceptions sustained and a new trial granted.*

SHEPLEY, C. J., and WELLS, J., concurred.

BAILEY *& al. versus* MCINTIRE *& al.*

In a suit brought before a justice of the peace upon a poor debtor's relief bond, the plaintiff cannot recover, if it appear that subsequent to the breach, he received and indorsed upon the execution all the means of payment which the debtor had when the bond expired.

ON FACTS AGREED.

DEBT, brought before a justice of the peace upon a poor debtor's six months relief bond. The statute of 1848, c. 85, § 4, provides that in such suits the "amount which the plain-

tiff may recover shall be the real and actual damage which has been sustained by the breach of the conditions of the bond and no more."

The debtor disclosed, but not until a few days after the six months expired. He disclosed, that he had four dollars in money. This was received after the disclosure by the plaintiffs' attorney and indorsed on the execution. At the expiration of the bond, "the debtor had no attachable property or means to pay the debt other than the said four dollars." The case was submitted to the Court.

Drummond, for the plaintiffs.

Heath, for the defendants.

HATHAWAY, J. — The case finds, that at the time the bond expired, the principal defendant had no attachable property or means to pay the debt other than disclosed, and that the property disclosed was received by the plaintiffs' attorney and indorsed on the execution. The action was brought before a justice of the peace. The plaintiffs have sustained no damage by breach of the conditions of the bond and can recover none.

The case comes within the express provisions of the Act of 1848, entitled "An Act additional for the relief of poor debtors." Chapter 85, § 4. *Plaintiff nonsuit.*

SHEPLEY, C. J., and WELLS and RICE, J. J., concurred.

WOOD *& al. versus* LITTLE *& al.*

It is believed that, both in England and in this country, a right to partition is incident to all real estate, held in joint tenancy or tenancy in common.

Upon a division, it is not necessary that the parts be made equal in size or value, inasmuch as the party whose share is less in value may be compensated in money, under the award of the commissioners.

It is not a valid objection to a petition for partition, that the principal part of the estate, (as for instance a cotton factory,) is not divisible into the parts prayed for, without destroying it for the purposes for which it had been erected and maintained, *provided* the division would not destroy it for other purposes.

ON FACTS AGREED.

PETITION for the partition of real estate.

Upon the estate sought to be divided there is a brick factory building for the manufacture of cotton, containing about 1800 spindles, and 50 looms, with other necessary and appropriate machinery for operating the same; the whole being carried by one water wheel about six feet in diameter, with a head and fall of water of about fifteen feet. There is also connected with the factory a machine shop, being a separate building of brick, the machinery in which is carried by a wheel about ten feet in diameter, which is turned by water taken from the factory dam. There is also an upper dam with a small building standing thereon; and a store and large dwellinghouse, called the boarding house, standing on the premises. Also a small brick building occupied as a counting room, with two other small buildings, and the residue of the land described in the petition is unoccupied.

The brick building and factory were erected for the special purpose of a cotton factory, and are fitted with a great variety of machinery suitable, and such as is exclusively used, for manufacturing cotton cloth, but which has not been used for that or any other purpose for the last two or three years. This machinery is in no way attached to or connected with said building, except that the same is set upon a common floor, and is fastened to the floor by screws and other fastenings, and all is propelled by the use of bands from the main water wheel; and the machinery may all be displaced and removed from the building, simply by casting off the bands and removing the fastenings. The factory is operated by the use of one common water wheel — which wheel is its sole motive power. The factory cannot be divided into the several parts prayed for in the petition without destroying the property for the purposes for which it was erected, and for which it has been maintained by the owners. But the factory can be divided as prayed for, without destroying the same, for purposes and uses *other* than those for which it was erected and has been maintained by the owners.

The Court is to enter such judgment as justice requires and the law permits.

May, for the petitioners.

1st. The property described in the petition is partible under the provisions of R. S. c. 121, § 1, 2, in the same manner it would have been at common law. We regard the case of *Hanson & al.* v. *Willard & als.*, 12 Maine, 142, as directly in point and decisive.

2d. The cotton factory, including the machinery, is a part of the realty, and would pass by a deed describing it as such, and so may be divided under our statute. *Farrar & al* v. *Stackpole*, 6 Maine, 154.

3d. If it should be found inconvenient or prejudicial to the interest of all concerned to divide the cotton factory, it may be set off to one of the tenants in common, under the provisions of R. S. c. 121, § 25. *Dyer* v. *Lowell*, 30 Maine, 217.

Morrell, for the respondents.

The property is not divisible. To destroy the *use* for the designed purposes, is to destroy the property. It is property which can be used only in common. Such is its essential condition. To strip that condition from it, destroys it. In *Hanson* v. *Willard*, 3 Fairf. 142, the Court says the property there in question might be divided, although at *great inconvenience*. The implication is, that property is not divisible, if a destruction of it would follow the partition. *Miller* v. *Miller*, 13 Pick. 237. The petitioners' argument, that the whole factory may be assigned to one of the co-tenants, upon his making compensation in money, does not relieve the case. For the petition asks that it be set off in parts. Division *by time* is not authorized by the statute. Neither can division be made by the profits. Where the *thing* and the *profit* is the same, a division of the profits must be regarded as a division of the thing. 3 Fairf. 146. But this estate is not of that character.

The possession of this estate, and the use of it to one party for a limited period, (a month or a year,) and so on to each of the parties, is not a *practicable* or *substantial* partition.

The processes of manufacturing are so various and complicated, involving such immense outlays and the employment of so many operatives and requiring such persistency in the undertaking, that the business cannot be begun and ended in a limited period, and again repeated at stated intervals.

RICE, J. — The only question presented for the consideration of the Court, is whether the property described in the petition is of such a character as to be susceptible of partition according to established rules of law.

The chief value of the property described in the petition consists of a cotton factory with its appropriate machinery. The case finds that "said factory cannot be divided into the several parts prayed for in said petition without destroying the property for the purposes for which said factory was erected, and for which the same has been maintained by the owners thereof. It is however agreed that said factory can be divided as prayed for aforesaid, without destroying the same, for purposes and uses other than that for which it was erected and has been maintained as aforesaid by said owners."

Such being the facts, the respondents contend that this property cannot be made the subject of partition by law. Parceners at common law were entitled to the writ of partition in all cases, except it was held that castles, necessary to the defence of the realm, from public considerations, were not subject to this process. By the provisions of c. 31 and 32 Henry VIII, the same rights to obtain partition were extended to joint tenants and tenants in common as had been enjoyed by parceners at common law.

In *Brown* v. *Turner*, 1 Atk. 350, it was held, that a saw-mill and mill-yard and materials for a saw-mill are not partible. The Court say, "such a partition would destroy the whole."

It is believed, however, that this right of partition is incident to the real estate held in joint tenancy or tenancy in common both in England and in this country.

It has been said that a decree for partition is a matter of right, and there is no instance of not succeeding in it, but

when no proof is adduced of title in the plaintiff. *Baring* v. *North*, 1 Ves. & Beu. 554.

In *Turner* v. *Morgan*, 8 Ves. 143, the Lord Chancellor said, the law says there is no inconvenience in the partition of a house, as in case of dower. The difficulty is no objection in this Court. That is laid down in *Fuller* v. *Gerard*, and appears more strongly in *Warren* v. *Raynes*, Amb. 589, where there was almost insuperable difficulty,

In *Morrill* v. *Morrill*, 5 N. H. 134, it was decided, that partition may be had of a mill privilege by assigning to each of the owners so much water as would run through a gate of certain dimensions.

The law gives tenants in common an absolute right to have their lands divided. *Leadbetter* v. *Gash*, 8 Iredell, 462.

The law has received a construction in our own State, in the case of *Hanson* v. *Willard*, 12 Maine, 142. That was a petition for partition of a mill and mill privilege, in which the same defence was made as in the case at bar. The Court, after a careful examination of the authorities, says —

"We come to the conclusion, that if the petitioner, as he alleges, is interested with other tenants in common, in the real estate described in his petition, he may claim of right to have partition made, and his share set off and divided from the rest, however inconvenient it may be to make such partition, or however much the other co-tenants or the common property may be injured thereby." This would seem to be decisive of the case. The law however does not require that the estate shall be divided into precisely equal shares either in size or value.

In England and many of the States, perhaps the most common mode of proceeding to procure partition is by bill in chancery. In these proceedings, the common practice is, where the property is of such a character as to be injured or greatly reduced in value by division, to decree a sale of the whole estate and divide the proceeds. Such was the rule of the civil law. Domat's Civil Law, § 2753.

The chancery powers of our Court does not include cases

of this character, but substantially the same equitable result may be reached, under our law, and by this process. § 25 of c. 121, R. S. provides; when any messuage, tract of land, or other real estate, shall be of greater value than either party's share of the estate to be divided, and cannot at the same time be subdivided among them without great inconvenience, the same may be assigned to one of the parties; and the party to whom the same shall be so assigned, paying such sum of money to such parties, as by means thereof shall have less than their share of the real estate, as the commissioners shall award; but in such case the partition shall not be established by the Court, until the sums so awarded, shall be paid to the parties entitled thereto, or secured to their satisfaction."

Though it was held in *Codman* v. *Pinkham*, 15 Pick. 364, under statute provisions similar to our own, that the entire estate cannot be awarded to any one of the tenants in common, but each must receive some portion thereof, yet commissioners are authorized so to divide the estate as to occasion the smallest practical amount of injury to the whole, and to equalize the parts, if necessary, by compensation in money. From the description of the estate, as given in the case, the Court are of opinion that such a division may be made without destruction to the property, or seriously impairing its value.

Judgment must therefore be entered for partition.

Wells, and Howard, J. J., concurred.

Shepley, C. J., and Hathaway, J., concurred in the result.

Turner *versus* Norris.

Although the unlawful excess of fees, charged by an officer for serving the writ of a prior attaching creditor, has absorbed the debtor's property to the injury of a subsequent attaching creditor, such subsequent attaching creditor can maintain no action against the officer for the injury.

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

Case, against an officer for official misconduct.

This action was submitted at a former term, to the determination of a referee, who made a report in the alternative. The report being presented, the presiding Judge ordered the same to be accepted in favor of the plaintiff. To that order the defendant excepted.

The referee reported as follows: —

The claim made upon the defendant, was that he had taxed and appropriated to himself, as fees and expenses, an unreasonable and unlawful sum, out of the proceeds of the sale of certain property of Hall & Turner, which, as a deputy sheriff, he had attached first upon a writ in favor of one Williams, and afterwards upon other writs in favor of other plaintiffs, and finally upon a writ in favor of this plaintiff, claiming the same as his costs, arising in the care and disposition of said property, and his services and expenses therein, taxed upon the writ of the said Williams, by reason of which the plaintiff alleged he had failed to obtain satisfaction of his execution against said Hall & Turner. It was admitted *that* the plaintiff recovered judgment against Hall & Turner, and obtained execution against them, which was seasonably put into the hands of the defendant, as a deputy sheriff; *that* the plaintiff did not obtain enough out of the attached property to satisfy his execution; *that*, but for the sum charged by the defendant as aforesaid, the plaintiff would have received a greater sum on his execution, than he did receive; *that* said Williams was the first attaching creditor; *that* the defendant charged the sum of $344,64, as costs and expenses arising out of his official services and charges in relation to said property; *that* that *sum was taxed in the bill of costs*, and allowed in the suit of said Williams, in which suit said Williams had judgment and execution; *that* Williams' execution included the said sum of $344,64, which execution was put into the hands of the defendant, as deputy sheriff, and was by him collected and satisfied out of the property attached as aforesaid; *that* the defendant retained and appropriated to himself the said sum of $344,64, as being due and belonging to himself on the account aforesaid; —*that* the

plaintiff claimed to recover of the defendant in this action the amount which he alleged to be the excess over and above what the defendant was by law or equity entitled to receive for the several items included in and covered by the sum of $344,64, taxed in the suit of said Williams as aforesaid; — that the defendant contended that the plaintiff could not by law recover in this action, because the allowance and taxation of said sum of $344,64, in the suit of said Williams and judgment and execution thereon, was conclusive upon the question of the right to make said charges and retain them by him, the defendant.

The referee thereupon awarded that the plaintiff recover the sum of one hundred and twenty dollars as debt or damage, by reason of overcharges, included in the sum of $344,64, with cost. But if the Court should be of opinion that this action cannot by law be maintained, then he awarded that the defendant recover costs.

Paine, for the defendant.

Lancaster, for the plaintiff.

There was official misconduct in the defendant. He took an excess of fees, as the award shows, to the amount of $120. The absorbing of that sum in the Williams execution took an equal amount from the property, out of which our execution would have been, and ought to have been satisfied. There was error in that judgment by reason of its including that excess of officer's fees. And that error we are now at liberty to show, for we had no right, in that suit, to resist the officer's charges. *Hunnewell* v. *Twombly*, 2 Greenl. 218. It is apparent that we have suffered injury from the defendant's misconduct. If not entitled to recover in this suit, there is at least one wrong without a legal remedy.

HATHAWAY, J. — Williams was the first, and the plaintiff a subsequent attaching creditor in suits against Hall & al. The defendant was the officer who served the writs and made the attachments, and into whose hands the executions, which

were issued upon the judgments recovered, were seasonably placed for collection.

The execution of Williams was satisfied out of the property attached.

The plaintiff's execution was returned unsatisfied in part, by reason of a deficiency of the property attached, which deficiency, the plaintiff alleges, was occasioned by the reason of defendant's making unlawful and unreasonable charges for his fees and expenses, for the service of the writ of Williams, which fees and expenses were taxed in the bill of costs, recovered by said Williams, and allowed, and included in his judgment.

The exceptions present the single question whether or not this action can by law be maintained, and we think it cannot.

The law makes abundant provision for the protection of the rights of subsequent attaching creditors. They may "petition the Court, in which such prior suits *are pending*, for leave to come in and defend against them in like manner as the party therein sued could or might have done." R. S. c. 115, § 113. A suit is *pending* until final judgment rendered therein. The subsequent attaching creditor has the same right to resist the recovery of unlawful costs, as of an illegal claim of debt. The charges of an officer for his fees, &c., which are taxed and allowed as in this case, appear by his return upon the writ. The plaintiff had the opportunity and the right to become a party to that suit by availing himself of the provisions of the R. S. c. 115, § 113, 114, 115 and 116. He did not, it seems, deem it advisable to pursue that course, and the judgment in favor of Williams, so long as it remains unreversed, is conclusive of its own correctness, as far as the plaintiff in this suit is concerned.

The exceptions are sustained, and judgment to be entered for the *defendant*, according to the alternative report of the referee.

Shepley, C. J., and Wells and Howard, J. J., concurred.

Rumsey *versus* Bragg.

If, before the examination of a witness, his incompetency on the ground of interest be known to the party against whom he is called, the objection must be taken before the testimony is given.

In such a case, if there be an omission to take the objection at the first examination, *it seems* too late to interpose it upon a recall of the witness to testify further.

A question to a witness, in cross-examination, *may* be precluded, if its relevancy to the issue be not made known to the Court.

To the refusal of a Judge to grant a postponement in a trial, it being a matter within his discretion, exceptions are not sustainable.

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

Assumpsit upon a promissory note, alleged to have been made by the defendant to P. S. Forbes or bearer, payable at a subsequent day. Upon the back of the paper Forbes had written over his signature the words, "I guaranty the within."

The defendant contended that the note was a forgery; asserting that, though he gave to Forbes a paper concerning a patent pump which Forbes had left at his house, it was essentially different in its contents from the note, offered in evidence.

The plaintiff called Forbes as a witness. He testified to the execution of the note, and was cross-examined by the defendant; whereupon the note was read to the jury. Among other inquiries he was asked by the defendant, if he went from the defendant's to Samuel Worth's to sell him a pump. The question was objected to and excluded. Witnesses were then called and examined by the defendant. In a subsequent stage of the trial, the plaintiff recalled Forbes. He was then objected to by the defendant, on the ground of interest in the event of the suit. The objection was overruled, and Forbes testified to facts contradictory to some statements of the defendant's witnesses.

The defendant then moved for a few hours postponement, that he might summon Samuel Worth, who would testify, that Forbes represented to him, that this defendant did not

give any note for the pump, but merely a writing to show that a pump was left there.

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

Lancaster & Baker, for the defendant.

[The counsel presented an extended and ingenious argument to show the incapacity of Forbes, as a witness, on the ground of interest. As that point was not decided by the Court, it is deemed unnecessary to insert the argument here.]

It was not too late to avail ourselves of the objection to the competency of the witness. *Butler* v. *Tufts*, 13 Maine, 302. It certainly was not too late, when he was recalled and testified to facts as important as those stated in his first examination.

The question put to the witness, whether he went from the defendant's to Samuel Worth's to sell him a pump, was admissible. It was, (as is perfectly apparent,) merely preliminary to further testimony.

The defendant also moved for a new trial.

Bradbury, for the plaintiff.

HATHAWAY, J. — The defendant objected that the witness Forbes, introduced by the plaintiff, was incompetent by reason of interest. It is immaterial whether he was so or not. The witness was introduced and examined in chief and cross-examined, and the note was introduced and read to the jury, before any objection was made to the witness. Forbes disclosed no interest by his testimony, which was not as apparent and well known to the defendant before he testified as afterwards.

When a party knows the incompetence of a witness and permits him to be thus introduced and examined without objection, he thereby waives his right to object to him as incompetent in the case.

An objection to a witness on the ground of interest, when it is known, should be made before he is examined in chief. It would be unreasonable that a party, knowing the incompe-

tence of a witness and making no objection to him, till he had learned by his testimony whether it would be beneficial or injurious to his cause, should then be permitted to avail himself of the objection at any time, which might best suit the exigency of his case, during the progress of the trial or the examination of the witness.

The defendant's objection to Forbes was too late. *Shurtleff* v. *Willard*, 19 Pick. 202. The defendant further objects that the Judge refused to permit him to inquire of the witness "if he went from the defendant's to Samuel Worth's to sell him a pump." The question was probably intended as introductory to something else, but its relevance to the issue is not perceived.

The refusal of the Judge to grant a postponement was in the exercise of a discretionary power, which belonged to him. And we do not perceive any good reason to disturb the verdict. *Exceptions and motion overruled, and judgment on the verdict.*

SHEPLEY, C. J., and WELLS and HOWARD, J. J., concurred.

LEIGHTON *versus* ATKINS.

To an action, by a surety against his principal, for money paid upon a judgment recovered against them jointly for the debt, a discharge in bankruptcy is no defence, if the judgment was recovered subsequent to such discharge; although the note had become payable, prior to the commencement of the proceedings in bankruptcy.

ON FACTS AGREED.

ASSUMPSIT.

The plaintiff was surety for the defendant upon a promissory note, which became payable in Aug. 1842. The note was sued in Oct. 1843, and judgment was recovered against them jointly by default in April, 1844. The plaintiff afterwards paid a part of the judgment and brings this action for a reimbursement.

The defendant, upon his petition of Sept. 1842, was de-

creed to be a bankrupt in Oct. 1842, and, in November, 1843, obtained a bankruptcy discharge from all his debts, provable under the Act of Congress entitled "an Act to establish a uniform system of bankruptcy throughout the United States. The case was submitted for nonsuit or default, as the rights of the parties may require.

Whitmore, for the plaintiff, cited, *Fisher* v. *Foss*, 30 Maine, 459; *Frost* v. *Tibbets*, 30 Maine, 188; *Pike* v. *McDonald*, 32 Maine, 418.

Clay, for the defendant.

Prior to filing the defendant's petition the note had become payable. It was therefore provable in bankruptcy. The case cited, of *Fisher* v. *Foss*, was in favor of the *original plaintiff*, and is therefore inapplicable to this case.

By the fifth section of the Bankrupt Act, it is provided, that "*sureties*, indorsers, bail or other persons, having *uncertain* or *contingent* demands against such bankrupt, shall be permitted to come in and *prove* such debts or claims, and shall have a right, when their claims become due, to have the same allowed."

This plaintiff was within the purview of that section. He was a *surety*, as the case finds, and if he had not paid the debt he had a right to *file his claim* and have the same allowed.

The fact that the note was afterwards sued and judgment obtained against the signers of the note does not change the relation of *these parties*. Leighton was *surety* on the note and liable to pay as well *before* the note was sued as afterwards.

The case of *Mace, in error*, v. *Wells*, 7 Howard, 272, is in principle similar to this. It was an action brought by the *surety* for *money paid* for the defendant.

The only difference is, that the surety, in that case, paid the note *without being sued.*

The decision in that case gave a construction to the Bankrupt Act, different from that generally adopted by this Court.

The principle is there settled, that the bankrupt's certificate

is a bar to the claim of a surety, for money paid upon a note or demand due, when the bankrupt filed his petition.

The cases of *Holbrook* v. *Foss*, 27 Maine, 441; *Dole* v. *Warren*, and *Pike* v. *McDonald et al.* 32 Maine, 94 and 418, are not overlooked. But it is respectfully contended that those decisions are not in accordance with the decision in *Mace* v. *Wells*, before the Supreme Court of the United States, which being the highest authority known to our laws, ought to have an authoritative weight.

HATHAWAY, J. — In the case of *Mace* v. *Wells*, 7 How. 272, upon which the defendant relies, no judgment had been recovered on the note paid by Mace; the foundation of his claim was payment of the original debt, which was provable in bankruptcy.

In the case at bar, the foundation of the plaintiff's claim is the payment of a *judgment* recovered against the defendant and his sureties, (of whom the plaintiff was one,) *after* the defendant's discharge, which judgment was *not* provable in bankruptcy.

The question presented by the case, has been decided by this Court, in *Holbrook* v. *Foss*, 27 Maine, 441, and *Pike* v. *McDonald*, 32 Maine, 418, and other cases cited by counsel in argument.

According to those decisions, a default must be entered.

SHEPLEY, C. J., WELLS, HOWARD and RICE, J. J., concurred.

COUNTY OF SOMERSET.

PATTEE *versus* LOWE, *Administrator.*

From the decision of commissioners of insolvency upon the estate of a person deceased, an appeal may be taken by a claimant, whose demand has been disallowed, if the appeal be claimed and notice of it given in writing *at the probate office*, within twenty days after the return of the commissioners.

There is no prescribed form, in which such notice is to be given. It is not rendered invalid by being addressed only to the register of probate.

When in a writ there is no return day, or when there is an erroneous one, the omission or error can be taken advantage of only on plea in abatement or on motion.

If, instead of filing such plea or making such motion, within the time fixed by the Rules of Court for such purpose, the defendant pleads the general issue, he will be deemed to have waived all objection as to the return day of the writ.

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

This suit, which is for money had and received, is the prosecution of an appeal, from a decision of the commissioners of insolvency upon the estate of Asa Pattee, deceased, the commissioners having disallowed the claim. The claim had been assigned, and the appeal is prosecuted by the assignee.

The report of the commissioners was made to the Judge of Probate on Dec. 12, 1849. On the 19th of the same December, the assignee filed in the probate office a paper, *addressed to the register*, notifying him that he claimed the right to appeal and did appeal from the decision of the commissioners. On Jan'y 17, 1850, a writ was issued against the defendant to recover the claim. The action was entered at the June term of the Court, 1850, and upon the docket of that term a general appearance was entered for the defendant.

The action was thence continued from term to term till the Sept. term, 1851, when the defendant pleaded non-assumpsit, and also by brief statement, that no notice of any appeal was filed in the probate office, as required by law; also

that this writ was not brought against the defendant till after three months from the return of the commissioners' report.

A witness testified that, in May, 1850, he saw the writ, at which time it was returnable to the then next term of the Court to be holden at Norridgewock in said county on the *first* Tuesday of June.

It now appears on inspection that the word *first* has been stricken out, and the word *second* inserted.

Upon that writ the officer indorsed a service as having been made on March 18, 1850, and another service as of May 27, 1850.

The case was submitted to the Court, upon an agreement, that if upon the papers and the evidence, the matters relied upon in the brief statement would not defeat the action, it was to stand for trial.

J. S. Abbott, for the defendant.

1. No proper notice of the appeal was lodged in the probate office. Such notice is to be directed, not to the register, but to the administrator.

2. Though *a* writ was made within the allowed three months, it was made returnable on the *first* Tuesday of June. By the return day being altered in May, it ceased to have effect as a writ dated Jan'y 17, 1850.

In legal intendment, it was then abandoned, and another writ was made, though written upon the same piece of paper, in May, 1850, and a new service was made by the officer. Before that writ was made the three months from the commissioners' return had expired.

Hutchinson, for the plaintiff.

APPLETON, J. — The claim of the plaintiff, which is prosecuted in this case by his assignee, having been disallowed by the commissioners of insolvency on the estate of Asa Pattee, the defendant's intestate, an appeal from such decision was claimed by the assignee, and the reasons for such appeal were duly filed. It is prescribed by R. S. c. 109, § 18, that "such appeal shall be claimed and notice thereof shall be given in writing at the probate office within twenty days

after the return of the commissioners." All which this section requires, is that the creditor appealing shall claim his appeal and give notice thereof at the probate office within a specified time. The same section makes provisions entirely different, when the appeal is taken by the administrator. It is objected in this case that no legal and sufficient notice was given. But the statute requires no special form, and were the technical subtleties of the common law to be required in probate proceedings, instead of facilitating, their introduction would tend to defeat the very objects of law. The notice given was in writing, was seasonably delivered to the register of probate at his office, and clearly states all the facts of which it is necessary the administrator should be informed, and substantially answers all the requirements of the statute. Being on file among the papers of the office, it is open to the inspection of all, who may be interested in its examination.

The plaintiff in interest, in the prosecution of his appeal, sued out his writ within the time designated by law, but, (as it seems,) made a mistake in its return day. The action was entered at the term, to which it was his intention it should have been made returnable, and the defendant entered a general appearance. The cause came on for trial at the term next following its entry, and the general issue was pleaded together with a brief statement.

It has been settled by repeated decisions that, when there is no return day or an erroneous one, advantage of such error can only be taken by motion or plea in abatement, and that if the party objecting neglect to make his motion or file his plea within the time fixed by the rules of Court for that purpose, and pleads the general issue, he will be deemed to have waived such defect, and the Court upon motion will allow the writ to be amended. *Ames* v. *Weston*, 16 Maine, 266; *Barker* v. *Norton*, 17 Maine, 416. Had the plaintiff therefore not altered his writ before its entry and had the defendant omitted all exceptions to the mistake apparent on its face, it is obvious that the Court would have authorized such an amendment, as was in fact made without its permis-

sion. Although the amendment was unauthorized, the defendant might waive all objections for such cause. He was under no obligations to act adversely to the correction of a mistake. If the defendant had intended to rely on the error existing originally in the writ, and by means thereof to defeat the plaintiff's suits, there was but one course for him to pursue. He should have treated the alteration as a nullity, and by motion or plea in abatement have called the attention of the Court to the writ in its original form; for as no leave had been granted to amend, the writ should have been deemed as if unaltered. *Maine Bank* v. *Harvey*, 21 Maine, 38; *Childs* v. *Ham*, 23 Maine, 74.

Instead however of taking any exception to the writ or to its unauthorized alteration by the plaintiff, the defendant entered a general appearance, and when subsequently the cause came on for trial, pleaded the general issue and filed his brief statement, alleging that the writ had not been sued out till after the expiration of the three months allowed by statute in which to bring the suit. The defendant now seeks to accomplish by means of the general issue and a brief statement, what can legally be done only by motion or plea in abatement. Having neglected at the proper time, and in the proper mode, to take advantage of defects, which, unless objected to at an early stage of the proceedings, the Court would have allowed to be amended, the defendant cannot now be permitted to revive lost and abandoned technicalities by brief statements or in any other way. The writ is to be considered in law, as it is in fact, the identical writ, which the attorney made with intent to prosecute the appeal taken in this case. The rights of parties have relation back to the time when the action was commenced. No bar to the plaintiff's rights had accrued from lapse of time. *Miller* v. *Watson*, 6 Wend. 506; *Heath* v. *Whidden*, 29 Maine, 108.

It is the opinion of the Court, that the action can be maintained. The cause is consequently, by the agreement of the parties, to stand for trial.

Shepley, C. J., and Howard and Rice, J. J., concurred.

ELLIS *versus* WARREN.

Exceptions, though not signed or written out before the rendition of the verdict, are constructively taken and allowed in the progress of the trial, before the jury retire for consultation.

When afterwards filed and certified, it is done *as of the times*, (during the trial and before the verdict,) when the *respective occasions* for taking them occurred.

If, in the District Court, before having offered any written exceptions for the signature of the Judge, one of the parties, after verdict, present a motion for a new trial, and procure an adjudication upon it, such proceedings are to be viewed as a waiver of the right to have his exceptions certified.

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

ACTION OF THE CASE.

Under instructions to the jury, a verdict was rendered for the plaintiff. The defendant, before having offered any written exceptions for the signature of the Judge, moved to have the verdict set aside and a new trial granted; which motion, after a full hearing, was overruled.

He thereupon filed exceptions to the instructions given to the jury, and the exceptions were certified by the Judge.

Warren, for the defendant.

J. S. Abbott, for the plaintiff.

SHEPLEY, C. J. — It is insisted, that this case is distinguishable from the case of *Cole* v. *Bruce*, 32 Maine, 512.

The record states, that the motion to have the verdict set aside, and a new trial granted, was made; and that it was overruled after a full hearing, before any exceptions were presented.

Exceptions, authorized by the statute, c. 97, § 18, are not usually drawn and presented for allowance, until after all proceedings in the action for that term have been closed. When duly authenticated, they operate as if made and allowed at the time, when they were taken. This appears to have been understood by the legislative department, for the provision is, that the trial shall proceed until a verdict is rendered.

The Judge, not being informed that the defendant would insist upon his exceptions, might properly consider and decide

upon his motion. If a bill of exceptions was subsequently presented, stating the facts correctly, the Judge might properly allow it, leaving the appellate court to decide, whether it could entertain the case.

The Judge could not, however, legally entertain and act upon the motion, without considering the exceptions, which had been taken but not drawn, as waived or abandoned.

The defendant cannot now be permitted to allege, that the Court, at his request, acted illegally and without authority upon his motion, and that his exceptions having been presented and certified afterward will therefore lie.

Case dismissed from the docket of this Court.

TENNEY, HOWARD and HATHAWAY, J. J., concurred.

COBURN *& al. versus* KERSWELL.

The statute giving to laborers a lien upon lumber, extends only to the securing of payment for their "*personal services,*" and does not include the use of teams and their needful apparatus.

Where a laborer, having a lien upon lumber for his personal services, accepted a negotiable note for the amount, prior to the passage of the amendatory Act of 1851, such note must be considered a payment, and therefore a discharge of the lien.

ON FACTS AGREED.

REPLEVIN for 100 saw-logs.

They grew upon the plaintiffs' land, and were cut and hauled by one Cross, who in doing it employed Plummer & Chapin to assist him. They accordingly worked for him, furnishing a six-ox team, sleds, rigging, &c. For their wages and for the labor of the team and the use of the sleds and rigging, they brought an action against Cross, and recovered a judgment of $233,66, upon which an execution was issued.

One Burns also labored for Cross in cutting and hauling the logs. For that labor, Cross gave his negotiable note to Burns, and upon that note Burns recovered judgment against Cross for $106,32, upon which an execution was issued.

Upon the writs in those actions, the officer returned that he had attached the logs. The executions were delivered to this defendant, a deputy sheriff, who seized the logs in question. They were seized before arriving at their place of destination. Whereupon this writ of replevin was brought.

The defendant justified under the lien, given by the statute to Plummer & Chapin and to Burns, for their services in cutting and hauling the logs.

Coburn & Wyman, for the plaintiffs.

Leavitt, for the defendant.

It is contended by the plaintiffs, that the statute gave a lien to the laborer only to the extent of his *personal services*, and that by embracing in their judgment against Cross the amount due for the use of the team, sleds, &c., Plummer & Chapin have waived their lien in full.

True, the statute speaks of "personal services." But we submit that the plaintiffs' construction of those words is all too limited. It would be hardly supposable, that the Legislature intended to furnish security merely for what a man's own hands have physically done. The statute had a higher purpose. Its object, doubtless, was to give security for all the appliances by which a laborer has benefited the property. Such lumber cannot be got to its "place of destination" without the aid of teams. Of that condition the Legislature well knew. Their object was to furnish a substantial benefit to the laborer, one reaching to all the services he has rendered, by which the lumber has increased in value.

The plaintiffs also insist, that the taking, by Burns, of a negotiable note was a payment and discharge of his lien claim. If such a construction could have obtained, prior to the Act of 1851, amendatory of the lien-statute, the difficulty has been removed by that Act, which provides that "no such action or lien shall be defeated by reason of the plaintiff's having liquidated the amount due and received a promissory note therefor." That Act being merely amendatory of the Act of 1848, extends back to all liens, given by the original Act.

HOWARD, J. — The logs replevied were attached to secure supposed liens of laborers, accruing under the provisions of the statute of 1848, c. 72. The defendant, as an officer, had seized them on executions in order to perfect the liens. It is agreed that the logs were cut on land of the plaintiffs, and that they are their property, unless the defendant can hold them by virtue of the liens and proceedings mentioned. The provisions of the statute referred to, which are material to this case are, 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 amount stipulated to be paid for his personal services, and actually due." And that any person having a lien may secure it by attachment. § 1 and 2.

Plummer & Chapin labored for Cross, an operator on the plaintiffs' land, as the case finds, in cutting and hauling a portion of the logs, "furnishing a six-horse team, sleds, rigging, &c.; and for their wages, and for the use of the team, sleds, rigging, &c., furnished by them, they recovered judgment against Cross for the sum of $206,40, debt and costs, for which they claim the lien on which the defence in part is placed. The statute authorized a lien for their *personal services* only, which could not include the use of the team or its appropriate appointments. By mingling the claim for which they could have enforced a lien, with that to which no such privilege could attach, and taking judgment for the whole in gross, they must be regarded as having waived the right to any lien. There cannot now be a separation of the claims merged in one judgment, and for no portion of the judgment can a special privilege be successfully asserted.

Cross settled with Burns, the other laborer, for his personal services in cutting and hauling the same logs, by giving him his negotiable note for the amount. On this note Burns recovered judgment, and claims to have secured a lien for the amount, as for personal services, by attachment of the

logs. But the note operated as payment for the services, and defeated the lien.

The Act of 1851, c. 216, was passed after the commencement of this suit, and after the recovery of the judgments, upon which the defendant relies to support the liens in question. It provides that no "such action or lien shall be defeated by reason of the plaintiff's having liquidated the amount due, and received a promissory note therefor, unless it shall have been expressly taken in discharge of the amount due and of said lien." This provision is prospective in its operation. It could not renew a lien which had been discharged before the statute was created, without impairing the obligation of contracts, and infringing rights secured by the constitution.

The defence, therefore, fails upon every ground assumed, and judgment will be entered for the plaintiff, according to the agreement of the parties.

SHEPLEY, C. J., and TENNEY, RICE and APPLETON, J. J., concurred.

STATE *versus* HARTWELL *& als.*

On charge of an offence, the punishment of which is beyond the jurisdiction of a justice of the peace, he may, on proofs which satisfy him that the offence has been committed and that there is probable cause for believing the accused to be guilty, require the accused to recognize, with sureties, for his appearance before a court of higher jurisdiction.

In such case, the recognizance must exhibit so much in relation to the imputed offence, as to show authority in the justice to require it.

Thus, it must show that *the offence had been committed*, and that there is *probable cause for believing the accused to be guilty of it.*

A recognizance is void, if it show merely that "*there is good cause to suspect*" *the accused to be guilty.*

There is no presumption in favor of the jurisdiction of a justice of the peace.

ON DEMURRER.

SCIRE FACIAS upon a recognizance taken before a justice of the peace. Oyer was asked, and the recognizance was

read. The condition of it was, that, "whereas the said Samuel Hartwell, the principal defendant, has been brought before the subscriber, one of the justices of the peace in and for the county of Somerset, by virtue of a warrant duly issued upon the complaint on oath of William McLellan, charging the said Samuel Hartwell with having committed the crime of larceny, and upon examination of the facts relating to said charge, it appearing to me that there is good cause to suspect the said Samuel Hartwell to be guilty of said offence; and the said offence not being cognizable by me and he thereupon having been required to recognize with sufficient sureties for his personal appearance at the next District Court for the Middle District, to be held within and for said county of Somerset, on the first Tuesday of May next, and for his keeping the peace and being of good behavior until the sitting of said Court. Now, therefore, if the said Samuel Hartwell shall personally appear at the Court aforesaid and answer to such matters and things as may be objected against him, and more especially to the charge contained in said complaint, and shall abide the order and judgment of said Court and not depart without license, and shall in the meantime keep the peace and be of good behavior, then this recognizance shall be void, otherwise remain in full force and virtue.

"M. L. Justice of the Peace."

Whereupon the defendant demurred, and specified the following causes of demurrer: —

1. It is not shown that the justice, who took the recognizance, had any jurisdiction of the offence charged against Hartwell, or had any legal right to require or take the recognizance.

2. The justice did not find or adjudicate that any offence had been committed.

3. The justice did not find or adjudicate that there was probable cause to believe that Hartwell had been guilty of the offence charged.

4. It does not appear that the offence charged was not within the final jurisdiction of the justice.

5. It does not appear that the justice conducted the examination or took the recognizance within the county of Somerset.

6. The conditions of the recognizance were unauthorized by law.

7. The recognizance was entered into by said Hartwell under duress.

There was a joinder in demurrer.

J. S. Abbot, in support of the demurrer.

Evans, Att'y General, and *Stewart*, County Att'y, *contra*.

RICE, J. — It is necessary that the jurisdiction of justices of the peace should appear in their proceedings in order to sustain them. *State* v. *Magrath*, 31 Maine, 469. As the jurisdiction of justices of the peace is given and limited by particular statutes only, and nothing can be presumed in favor of such jurisdiction, the recognizance should contain a recital of so much of the cause as would show that it was embraced within the justice's cognizance. *Libbey* v. *Main & al.* 2 Fairf. 344.

To authorize a magistrate to require an accused person to give bail for his appearance to answer before a court of superior jurisdiction, for an alleged offence, the punishment for which is beyond the jurisdiction of such magistrate, it is necessary that it should appear that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty. R. S. c. 171, § 17.

Until these facts are made to appear on an examination before a magistrate, on process issued in due form of law, there is no authority on the part of the magistrate to require bail.

In the case at bar, the recognizance, which is set out in full in the pleadings, recites "that whereas the said Samuel Hartwell has been brought before me, &c., by virtue of a warrant duly issued upon complaint on oath of William McLellan, charging the said Hartwell with having committed the crime of larceny, and upon examination of the facts relating to said charge, it appearing to me that there is good cause to suspect the said Hartwell to be guilty of the offence," &c.

The magistrate did not find that the crime of larceny *had been committed*, either within his jurisdiction or elsewhere. Nor did he find that there was probable cause *to believe* the prisoner guilty. He only found, so far as appears by his record, that there was "good cause *to suspect*" the said Hartwell to be guilty of said offence.

This was not sufficient to authorize the magistrate to require bail. There are several other alleged defects in the recognizance, but as those already noticed are fatal it is unnecessary to examine them.

The judgment must be that the State take nothing by the writ. The defendants are entitled to costs.

SHEPLEY, C. J., and WELLS, HOWARD and HATHAWAY, J. J., concurred.

INHABITANTS OF BRIGHTON *versus* WALKER *& als.*

A deponent, before giving his deposition, is to be sworn to testify the truth, the whole truth and nothing but the truth, relating to the cause for which the deposition is to be taken. R. S. c. 133, § 15.

A caption, which certifies that "the deponent was first sworn according to law to the deposition by him subscribed, does not show a compliance with the statute requirement. Per SHEPLEY, C. J., WELLS and RICE, J. J.; — HOWARD and HATHAWAY, J. J. dissenting.

In an action upon the bond given by a collector of taxes, parole evidence is admissible to show that bills of assessment with legal warrant, were committed to the collector.

Such evidence, in connection with the collector's admission that a balance of the tax remained in his hands, will support such an action.

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

DEBT on bond, given by the collector of taxes for the year 1844, with sureties, for the faithful collection of the taxes to him committed, and for payment of the same to the treasurer. Plea, performance.

To show the admission by the collector that a portion of the taxes which he had collected, yet remained in his hands, the plaintiffs offered a deposition, of one Waterhouse, which was objected to for the reason that the caption was insufficient.

The portion of the caption upon which the objection was founded, was the words, "Jan'y 1, 1853, the aforesaid deponent was first sworn according to law, on this first day of January, 1853, to the aforesaid deposition by him subscribed this day."

The objection was overruled, and the deposition received.

It was testified by other witnesses, that the bills of assessment of all taxes required by law and by votes of the town to be assessed, with legal warrant, were duly committed to the collector, and that in 1852 he admitted that he owed the town, on the tax bills, $138,28, and that he had $110 of that balance in his hands, which he had offered to pay, and was ready to pay.

The case was submitted to the Court, upon the stipulation, that, if the action is maintainable upon the foregoing evidence or so much of it as was legally admissible, the defendants are to be defaulted.

D. D. Stewart, for the plaintiffs.

J. S. Abbott, for the defendants.

RICE, J. — The first question for consideration is, whether the deposition of the witness, Waterhouse, was admissible. The caption recites that "the deponent was first sworn according to law on this first day of Jan'y, 1853, to the aforesaid deposition, by him subscribed this day."

The R. S. c. 133, § 15, requires, that a deponent before giving his deposition, shall be sworn to "testify the truth, the whole truth, and nothing but the truth, relating to the cause or matter for which the deposition is to be taken." In this respect the deponent is treated in the same manner, and required to take substantially the same oath, as a witness upon the stand.

That the Court may determine whether a deponent has been duly sworn, the 17th section of the same statute requires the magistrate to state in the caption when the oath was administered.

It is contended that the words "was first sworn according to

law" necessarily imply, that he was sworn in the manner prescribed by the statute before giving his deposition. This is not so. A party who makes oath to the truth of facts, set out in an affidavit, is as truly "sworn according to law," as is the witness who is sworn in chief upon the stand, or the deponent to whom the statute oath is administered before giving his deposition.

The deponent, in this case, was sworn to the aforesaid deposition by him subscribed. This language clearly imports, that the deposition was written and subscribed by the deponent before the oath was administered. He thereby simply verified the facts contained in the statement subscribed by him. In other words it was only his affidavit. The law requires something more than this. It requires from the deponent, before he shall be permitted to testify on oath, not only, that the testimony to be given shall be true, but that he will testify the *whole truth* and *nothing but the truth* relating to the cause or matter for which his testimony is to be taken. This deposition should, therefore, have been rejected.

The plaintiff also introduced the deposition of Daniel Jones, who testified, that he was one of the assessors for the town of Brighton during all of the year 1844, and that said assessors made out and committed to Peter Walker, collector of said Brighton for said year, the bills of assessment of all taxes by law required to be assessed, and those raised by all votes of said town for said year 1844, together with a warrant in due form of law for collecting the same.

That on or about Sept. 28, 1852, he heard Peter Walker, one of the defendants, tell Daniel Danforth, at the post-office in Brighton, that he was ready and willing to admit that he owed the town of Brighton on the tax bills of 1844, $138,28 on settlement, and that said Walker had in his hands $110 of said money, that he had offered to pay over this last sum and was then ready to do it. The bond in suit was given by Walker to secure the discharge of his duty as collector of the town of Brighton for the year 1844.

From that portion of the evidence received at the trial,

which is admissible, we think the plaintiffs are entitled to recover, and judgment is to be entered accordingly as per agreement.

SHEPLEY, C. J., and WELLS, J., concurred.

HOWARD and HATHAWAY, J. J., concurred in the result.

ATKINSON *& al. versus* CROOKER *& al.*

Upon motion to accept an award of referees, the onus is upon the opposing party to impeach it.

An award, which had been recommitted for correction in form only, may be returned in a new draft or in the original draft with the corrections.

The presumption in such a case is, that the referees conformed to the direction of the Court.

In the absence of evidence to impeach the award so returned, it will be accepted.

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

The action had been submitted, by rule of Court, to referees. Their report awarded to the plaintiffs $5290,77, damage.

Below the signatures of the referees, were minutes written as follows: —

Referees' fee, taxed at $100, to be paid, one half by plfs., and one half by dfts.	Damage,	$5290,77
	Cost of reference,	41,87
	$100, half to be paid by the defendants.	50,00
		$5382,64

The award was offered for acceptance, and was objected to, and recommitted for correction in matter of form only.

It now came up in a new draft, the original not having been returned. The defendants objected; 1st. that the original ought to have been returned, that the Court might see whether the referees had conformed to the directions. 2d. That the award does not purport to be an amended one. 3d. That the referees' fees should be stated in the body of the award. R. S. c. 138, § 11; *Smith* v. *Smith*, 32 Maine, 23.

The plaintiffs, against objections seasonably taken, introduced parole proof that the award was altered only in matter of form. The case was submitted to the Court.

Paine and *Foster*, for the plaintiffs.

J. S. Abbott, for the defendants.

RICE, J. — The report of referees is in proper form. There is no suggestion of improper conduct, error or mistake on the part of the referees, nor that the fees by them charged were excessive or unreasonable. The report as originally presented was defective in form and was recommitted for correction in that respect, and returned to Court in a new draft. Complaint is made that the referees did not return their original report so that it might appear by comparison whether the referees had complied with the instructions of the Court. The evidence introduced shows that the corrections made by the referees were in matters of form only. This testimony is objected to as incompetent. If stricken out, the result must be the same, as the presumption, in the absence of the proof, would be that the referees had done their duty. The burden is on the objecting party to impeach a report of the referees. If the objection had been taken that the referees had taxed exorbitant or unreasonable fees, the Court would have recommitted the report, with instructions that their fees be set out specifically, to the end that it might determine whether they were reasonable. *Report accepted.*

SHEPLEY, C. J., and WELLS, HOWARD and HATHAWAY, J. J., concurred.

JONES *versus* ELLIOTT *& als.*

A justice of the peace has authority to renew an execution at any time within two years from the expiration of his commission, although at the time of doing it, he may be rightfully exercising the duties of an executive officer.

In the renewal of an execution, a justice of the peace acts, not judicially, but ministerially.

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

DEBT on a poor debtor's relief-bond.

The bond was taken to procure the debtor's arrest upon a pluries execution, issued by a justice of the peace.

It was shown that the justice, after rendering the judgment, and before the expiration of his justice commission, was appointed to the office of jailer; and that while in that office and within two years after his appointment to it, he issued the execution upon which the arrest was made. The case was submitted to the Court.

O. D. Merrick, for the plaintiff.

E. E. Brown, for the defendants.

The power of the justice to issue an execution is a *judicial* power. It ceased upon his acceptance of his appointment as jailer, which is an *executive* office. Const. of Maine, Art. 3, § 2; 3 Maine, 484; R. S. c. 104, § 9 and 10; 7 Maine, 14; 28 Maine, 188; 1 Arch. & Chris. Black. 359.

HATHAWAY, J. — A justice of the peace, in issuing an execution on a judgment rendered by him, acts ministerially, not judicially, and his power to renew executions is continued for the term of two years after his *judicial* power under his commission expires. R. S. c. 116, § 28.

In the case at bar the execution was a *pluries*, issued by the justice within two years after he had been appointed jailer.

It is therefore immaterial whether the offices of justice of the peace and jailer are incompatible or not. The justice had authority to renew the execution, either by virtue of his commission or the statute.

As agreed by the parties a default must be entered.

SHEPLEY, C. J., and WELLS and HOWARD, J. J., concurred.

WOODCOCK *versus* PARKER.

Courts, have control over their own records of a suit until final judgment be rendered.

A Court, in its discretion, may bring forward, from a previous term, any uncompleted action, and alter the docket entry pertaining to it, as justice may require.

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

The case came up from the District Court on exceptions by the defendants, and was submitted to the Court for a decision, under admission by the parties, that the facts were as stated in the exceptions.

Hutchinson, for the plaintiff.

Stewart, for the defendant.

HATHAWAY, J. — In this action, the Court having ordered that the writ should be filed by the middle of the vacation, and at the next term having been iuformed, that the order had not been obeyed, on the defendant's motion directed a nonsuit.

At the next succeeding term, on affidavit of the plaintiff's attorney, that the writ had been sent to the clerk to be filed as ordered, and the writ being found on file, the action was brought forward, by order of Court, and the nonsuit taken off; and to this order of the Court exceptions were taken by the defendant.

Final judgment had not been entered on the nonsuit.

Every Court of record has power over its own records and proceedings, as long as they remain incomplete, and until final judgment has been rendered, and until that time it is the established practice in such Courts to regard all actions, whether on the docket of the existing or a former term as within the jurisdiction and control of the Court. *Lothrop* v. *Page*, 26 Maine, 119.

The order by virtue of which the action was brought forward and an improvident entry corrected, was entirely proper, and a default must be entered as agreed by the parties.

SHEPLEY, C. J. and WELLS, HOWARD and RICE, J. J., concurred.

MILLAY *versus* BUTTS.

Possession of personal property is sufficient evidence of ownership, until controlled by evidence of a superior title.

This principle, however, has no applicability to a case in which the only evidence of possession is to be deduced from the evidence of ownership.

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

TRESPASS against a deputy sheriff, for taking the plaintiff's chattels. The defendant justified the taking by virtue of an execution against one James Millay. The plaintiff introduced evidence tending to prove his ownership and possession of the property. There was no evidence of the possession, or right of possession in the plaintiff, excepting that which tended to show his ownership.

The defendant introduced evidence, tending to show that the plaintiff had disclaimed the property.

The plaintiff objected that the return upon the execution was defective, and could not avail the defendant, as a justification for the taking.

The plaintiff contended that, if he had proved possession of the property in himself, at the time of the taking, the burden of proof was on the defendant to show that the property belonged to James Millay.

The Judge instructed the jury that the burden was upon the plaintiff, to prove his ownership, and that if he failed to establish that fact, the defect in the return of the execution could be of no avail to him.

The verdict was against the plaintiff, and he excepted.

Bronson, for the plaintiff.

1st. Possession of personal property is sufficient for the maintenance of an action against a wrongdoer. *Brown* v. *Ware*, 25 Maine, 411.

2d. If defendant justifies, the burden of proof is on him. *Greene* v. *Dingley*, 24 Maine, 131.

3d. The instruction to the jury was wrong, inasmuch as it changed the burden of proof, from the defendant to the plaintiff, against the well settled principles of law. The case

finds that the plaintiff introduced proof tending to show the possession of the property in himself, at the time of the taking. If so, the presiding Judge should have instructed the jury, that if the plaintiff had the possession, the burden was on the defendant to prove that the property was the property of James Millay, and that the same was legally taken on an execution against him.

Abbott, for the defendant.

SHEPLEY, C. J. — The suit is trespass for taking certain personal property. For the plaintiff it was insisted, that if he had proved to the satisfaction of the jury possession of the property at the time of taking, the burden of proof was upon the defendant to satisfy them that it was the property of James Millay. The Court refused so to instruct.

Possession of personal property is sufficient evidence of title, until there be proof of a superior title. *Brown* v. *Ware*, 25 Maine, 411. The requested instructions might have been legal and appropriate, if there had been testimony in the case, to which they could have been applicable. But the Court does not err in refusing such instruction, when there is no such testimony. The exceptions state, that there was "no other evidence of the possession or right of possession in the plaintiff excepting that tending to show, that he was the owner thereof." This is equivalent to a statement, that there was no proof of possession, unless he was to be regarded as in possession, because he was the owner of the property. The instruction given upon such a state of facts was correct, that the burden of proof was upon the plaintiff to satisfy the jury, that he was the owner of the property. He could not have been aggrieved by a refusal to instruct in a manner, that would have been legal and appropriate, if there had been testimony introduced, to which the instructions might have been applicable.

It is not now insisted that the instructions respecting an alleged defective return of the officer were not correct.

Exceptions overruled.

WELLS, HOWARD, RICE and HATHAWAY, J. J., concurred.

INHAB'TS OF CORNVILLE *versus* INHAB'TS OF BRIGHTON.

A manuscript book cannot be received as evidence to decide in a conflict of testimony between witnesses respecting the date of an occurrence, if none of the entries on the book were made by either of the witnesses.

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

ASSUMPSIT, for supplies furnished for one Berry and his wife and children. Berry had a derivative settlement in Brighton. The defence was that, after having become twenty-one years of age, he acquired a settlement by five years continuous residence in Cornville. Upon this question, witnesses were examined on both sides, and there was a conflict in their testimony. For the sole purpose of fixing dates in relation to Berry's residence, the plaintiffs offered a book of accounts kept by one Barker. It was objected to by the defendants, but was admitted and used as evidence. To its admission the defendants excepted.

The specific facts, necessary to a full exhibition of the legal principles involved, are presented in the opinion of the Court.

Hutchinson, for the defendants.

Leavitt, for the plaintiffs.

SHEPLEY, C. J. — It became a material question at the trial, whether Benjamin N. Berry had gained a settlement in the town of Cornville by a residence of five successive years. Witnesses had been introduced in defence, who had testified, that they saw Berry at work at Joseph Barker's in Cornville in 1831, and at various other times during the following years till the fall of 1836. "The plaintiffs introduced evidence tending to show, that Berry went to said Barker's to live in 1832 and not in 1831, and consequently did not reside there five years, as it was agreed by both parties, that he left said Barker's in the fall of 1836." Berry had testified "that he lived at said Barker's from the March after he was twenty-one the previous February six or seven years." Joseph More had testified, that he worked for Barker four months in the first part of the season of 1830, and part of the spring and sum-

mer of 1831 and that he did not recollect seeing Berry there. Joseph Barker had testified, that he was unable to tell, what year Berry commenced to work for him, that the first time he could be sure of his working for him was in the spring of 1832.

Under these circumstances the "plaintiffs offered the account book of Joseph Barker, upon which were sundry charges against the aforesaid James More; and also charges against the said Berry commencing in 1834 and continuing along at irregular intervals to 1837. Also upon said book were certain memoranda made by said Barker at irregular intervals. This book was offered by the plaintiffs to fix dates in reference to Berry's residence at Barker's. The defendants objected to the introduction of said book. The Court overruled the objection and admitted the book for the purpose, for which it was offered, exclusively." The book is referred to as part of the bill of exceptions.

It does not appear to have been admitted to fix the date of any particular occurrence. Upon examination it is not found to contain any memorandum or charge fixing the time or the year when Berry first commenced to work for Barker, which appears to have been the question in controversy, respecting which dates were important. No memorandum or charge respecting Berry is found earlier than May, 1834, and yet Barker and other witnesses for the plaintiffs had testified, that Berry worked for Barker in 1832. The book therefore had no direct tendency to fix the date, when Berry first commenced to work for Barker, or to fix any other important date except the time, when More worked for Barker. It does contain charges against More during the years 1830, 1831, 1833 and 1835, and it might have an effect with the jury to corroborate the testimony of More and impair that of Berry. A book of accounts cannot be legal testimony to decide in a conflict of testimony between witnesses, respecting the date of an occurrence, when neither of the witnesses made any entry upon the book. No case has been referred to or no-

ticed, which would authorize the admission of the book under the circumstances, in which it was admitted in this case.

Exceptions sustained, verdict set aside, and new trial granted.

WELLS, HOWARD, RICE and HATHAWAY, J. J., concurred.

HILTON *versus* HOUGHTON *& al.*

By R. S. c. 160, § 26 and 28, a penalty is incurred for doing "any work, labor or business" on the Lord's day, and before sun-setting; works of necessity or charity excepted.

To sign and deliver a promissory note upon the Lord's day, before sun-setting, is a violation of the statute; and a note so signed and delivered is therefore of no validity.

But by the signing of such a note on the Lord's day, and before sun-setting, its validity is not impaired, if it be not delivered on that day.

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

ASSUMPSIT, on a promissory note, dated Oct. 22d, 1848, and made to the plaintiff, by Chester Houghton, as principal, and by the other defendants as sureties.

A note corresponding with the declaration was offered by the plaintiff, and in connection with the deposition of one Metcalf, was read to the jury.

It appeared *that*, on the morning of the day of the date of the note, it being the Lord's day, the plaintiff sent for Chester Houghton, to call upon him, "that they might settle up their business;"—*that* Chester accordingly went to see the plaintiff;—*that*, afterwards on that day, about the middle of the afternoon, Chester went to the house of one Crosby, carrying with him the note now in suit, having the sureties' names upon it;—*that* he there put his own name upon it, above the names of the sureties, in the presence of Crosby, who then wrote his name upon it, as subscribing witness;—*that*, neither the plaintiff or either of the sureties was present;—*that* afterwards, upon some week day, Chester Houghton, in the absence of the sureties, delivered the note to the plain-

tiff, who then gave up to him a note, held by the plaintiff against Chester, upon which there were no sureties.

Two objections were taken to a recovery upon the note; — 1*st*, *that* it was made on the Lord's day, and before sunset of that day.

2*d*, *that* the attestation of Crosby was a material alteration of the note, by which its validity was defeated.

The case was submitted to the Court, with jury powers as to inferences of fact.

John S. Abbott, for the plaintiff.

Webster, for the defendants.

Shepley, C. J. — The suit is upon a promissory note made by defendants, and payable to plaintiff.

The first objection made to a recovery, is, that it was made on the Lord's day.

It appears to have been written and the defendants' names to have been subscribed to it on that day, when the plaintiff was not present, and to have been afterwards delivered to him on a week day, when he delivered up another note in exchange for it.

The statute, c. 160, § 26, declares it to be unlawful to "do any work, labor or business" on the Lord's day.

The note did not become a valid contract or a part of the business transaction until it was delivered. The plaintiff does not appear to have been a party to the execution of it on the Lord's day. The objection cannot prevail. *Bloxsome* v. *Williams*, 3 B. & C. 232.

Another objection is, that a material alteration has been made in the note since it was executed.

It appears to have been written and to have been subscribed by the two sureties, and to have been taken by the principal to the house of the attesting witness, where it was subscribed by the principal and by the attesting witness, at his request, in the absence of the sureties.

There was no alteration of the note after it became a valid contract, by delivery to the plaintiff. In this, and in other

respects, the facts are quite different from those proved in the case of *Brackett* v. *Mountfort*, 2 Fairf. 115. The note cannot be regarded as invalid on account of a material alteration, for it is now, so far as it respects the principal, in the same state in which he caused it to be made.

The attestation of the witness not having been limited by him to the signature of the principal, would be applicable, apparently to all the signatures. The fact, that it was not made to all of them, might be proved, and their contract would not be affected by that attestation.

Their right to be protected by the statute of limitations, would remain the same.

The declarations of the principal defendant, respecting his reason for having the note made on the Lord's day, and respecting illegal interest, are not receivable as evidence.

Defendants defaulted.

WELLS, HOWARD, RICE and HATHAWAY, J. J., concurred.

JAMES M. WOOD *versus* ESTES & SAUNDERS, AND *versus* MALBON, HILTON, WOOD, LOTHROP & BROWN, *as Trustees.*

The Act of 1849, c. 117, does not authorize the introduction of new testimony, in this Court, in trustee processes brought here by exceptions from the District Court.

It was designed merely to test the correctness of the District Judge, in his adjudications *as to matters of fact*, upon the evidence before him.

In a trustee process, the taking of a chattel mortgage from the principal defendant to secure a debt due from him to the mortgagee, though the chattel be of greater value than the amount of the debt, will not bind the mortgagee as trustee of the mortgager, if, prior to the service of the process, he have made a sale and transfer of the debt and mortgage.

In the case of goods mortgaged, the surrender of them by the mortgagee to the mortgager, prior to the service of the trustee process, furnishes no pretence for holding the mortgagee as trustee of the mortgager.

Though a person may have received the goods of a co-partnership in payment of a debt, he will not be held as trustee, in a suit against the firm, unless it appear that the debt was not jointly due from the co-partners.

A mortgagee of goods is not chargeable as trustee of the mortgager, if he have neither had possession of the goods nor exercised control over them.

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

The questions for consideration relate to the chargeability of the trustees. They answered respectively that they had no other business relations with the principal defendants than those stated in their disclosures. The Judge ruled, that they were not liable as trustees. To that ruling the plaintiff excepted.

The substance of the disclosures is presented in the opinion of the Court.

Stewart, for the plaintiff.

We move for leave to introduce new testimony as to the facts. The statute of 1849, c. 117, authorizes this Court, when adjudicating upon trustees' disclosures on exceptions, to reëxamine the whole case, both as to fact as well as law, and opens to the full Court "the whole matter as to the liability of the supposed trustee, including the fact and the law." The exceptions are merely the mode in which the case is to be brought before this Court. When here, the Court will give its aid to every measure needful to obtain a full presentation of the merits of the case.

Shepley, C. J. — The statute referred to does not reach a case like this. It was intended to meet a particular difficulty. By the previous statute, the adjudication of the District Court, *as to matters of fact*, was conclusive. The Act of 1849 allowed this Court to pass upon such matters of fact, as well as upon the law. But the facts, upon which the District Judge passed, cannot be varied by new testimony. The exceptions are only to try the correctness of his decisions, as to the law, and as to the facts upon the evidence before him.

Stewart. — I had supposed the object of the law makers was not so much to find out whether the Judge below was correct, as to allow causes to be decided upon their merits. But upon the exceptions as they stand, I beg leave to offer the following views: —

Co-partnership debts must all be paid out of the partnership funds, before creditors of the individual partners can be permitted to appropriate any part of them toward their de-

mands. *Smith* v. *Barker*, 10 Maine, 458; *Commercial Bank* v. *Wilkins*, 9 Maine, 28; *Douglass* v. *Winslow*, 20 Maine, 89; *Fisk* v. *Herrick*, 6 Mass. 271.

Where a creditor of one partner obtains the property of the partnership on his separate debt, either by contract or sale on mense process or execution, he may be held as trustee of the partnership by a partnership creditor. *Pierce* v. *Jackson*, 6 Mass. 242; Minot's Digest, 549, § 32.

One partner has no authority to pledge or mortgage the partnership goods for his own separate debts. Story on Part. § 132, note.

"The act is an illegal conversion of the partnership funds, and the separate creditor can have no better title to the funds than the partner himself had." *Rogers* v. *Batchelor*, 12 Peters, 229, 232; Story on Partnership, 220.

"And it makes no difference in such case, whether the separate creditor had or had not knowledge at the time, of the fact of the fund being partnership property." *Rogers* v. *Batchelor*, before cited; Story on Partnership, before cited.

"The true question is, whether the title to the property has passed from the partnership to the separate creditor." *Rogers* v. *Batchelor*, before cited; Story on Partnership, before cited.

"In all such cases, the transaction by which the funds, securities and other effects of the partnership have been so obtained by a separate creditor of one partner, will be treated as a nullity." Story on Partnership, § 132.

The burden of proof is upon the holder of a partnership security for a private debt, to show the consent of all the partners. Story on Partnership, 216; *Chazournes* v. *Edwards & al.* 3 Pick. 5; *Darling* v. *March*, 22 Maine, 184.

Where goods have been taken from the possession of a person summoned as trustee by an attaching officer, before the trustee discloses, he is still liable as trustee, he having a claim over upon the officer. *Parker* v. *Kinsman & trustee*, 8 Mass. 486.

J. S. Abbott, for the trustees.

SHEPLEY, C. J. — To secure the payment of certain sums due to Jotham S. Malbon and Elijah Wood, Estes made three notes of $200 each, in the name of Estes and Saunders, and at the same time executed a mortgage in their names of the goods then in a store occupied by Estes, as collateral security for the notes. This was done on December 4, 1848.

Malbon was authorized to sell the goods mortgaged, and sold to the amount of about $180. About $100 of this amount was sold to Estes, for which Malbon did not receive payment. He states that he received about $70 for the goods thus sold. On January 6, 1849, he sold and conveyed his interest in the notes and mortgage to Estes and Brown and received therefor the amount, as he states, due to him from Estes, being about $467. He allowed in part payment the $70 received for goods sold; received $100 in a note of Estes and Brown payable to Estes' wife, to pay her for that sum before loaned by her to him; and received their note, with Nathaniel Hilton as surety, for the balance due to him of about $304. Service of the trustee process was made upon him on January 29, 1849. At that time he had no goods of Estes and Saunders, unless he should be held accountable for the goods, which were sold by him, while he continued to be a mortgagee. For those sold to Estes he cannot be held accountable. He received no pay for them. They were retransferred to the same member of the firm of Estes and Saunders, from whom they were received. It amounted to no more than a relinquishment of any claim to them by virtue of the mortgage. Nothing was thereby taken from the partnership fund.

When Malbon states in his disclosure, that Estes owed him about $467, it is manifest upon an examination of the whole disclosure, that he did not mean to be understood to say, that the amount was due from Estes alone as a sole debtor. For he subsequently states that $336,17, part of that sum, arose out of a liability assumed for Estes and Allen to Fisk and Dale. The disclosure does not exhibit the manner in which Estes became indebted to him for the difference between that

sum and the $467. It may have been due to him from Estes and Saunders, as the other amount was from Estes and Allen. It not appearing to have been the private debt of a partner, for that amount Malborn might retain the partnership property or its proceeds without being liable to any imputation of fraud upon the creditors of the firm. That amount being greater than the amount received for goods of the partnership sold by him, he is entitled to be discharged.

Elijah Wood, the other mortgagee, states, that he transferred all his interest in the notes and mortgage to Estes and Brown before the service of process upon him, and received in payment of the amount due from Estes to him a note made by Sullivan Lothrop, and that none of the goods mortgaged came into his possession. It does not appear, that the note of Lothrop was given for a debt due to Estes and Saunders. It does not therefore appear, that any goods or funds belonging to the firm of Estes and Saunders came to the possession of Wood, and he is entitled to be discharged.

Nathaniel Hilton appears to have been made an assignee of the mortgage to secure him for becoming surety for Estes and Brown on their note to Malbon. He does not appear to have had possession of or to have exercised any control over the goods, and he must be discharged.

Brown did not hold whatever interest he acquired in the goods as a trustee of Estes and Saunders. He held it as a purchaser for a valuable consideration, and, as he states, without any knowledge, that the mortgage had been made to secure any debt due from Estes alone to Wood or Malbon. Being, so far as appears, a *bona fide* purchaser through others from one of the partners, he cannot be held as trustee of the firm. *Exceptions overruled.*

WELLS, HOWARD and HATHAWAY, J. J., concurred.

COUNTY OF LINCOLN.

Linscott *versus* Trask.

Possession of personal property is *prima facie* evidence of title.

Upon proof of such possession, if uncontrolled by other evidence, a suit at law for the property against one who takes it away, may be maintained.

But possession may be shown to be of a subordinate and qualified character, insufficient for the support of such a suit.

Where instruction to the jury assumes a fact to have been granted or proved, which was an issuable fact and in dispute upon the evidence, and material to a right decision of the question before the jury, exceptions are sustainable.

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

Assumpsit.

The plaintiff was the wife of John Linscott. He died. The defendant is the executor of his will. While he and the heirs were at the mansion house one day, soon after the death, the plaintiff delivered to him $100 in gold. He afterwards claimed that it belonged to the estate, and she brought this action to recover it back. A witness for the plaintiff testified that the defendant said that he received the money of her, and carried it into the room where the heirs were, and said "here is a hundred dollars which your mother-in-law has given to me, which she claims as her own."

A witness for the defendant testified that the plaintiff and defendant came together into the room where the heirs were, bringing the money with them, when she said she would entrust it with the defendant and "abide by the will of the Judge of Probate to decide who should have it;" and that the "heirs" agreed to it.

Much testimony was introduced by the defendant, from which he urged that the jury should infer that the money belonged, not to the plaintiff, but to the estate.

On this evidence, the counsel in the defence contended, as the law of the case, *that* it was incumbent on the plaintiff to prove affirmatively that the money was her own property,

separate from, and irrespective of her husband; *that* on this point, as the money was found in the house of the husband, occupied by himself, wife and some of the heirs, she had not such exclusive possession as would lay the burthen of proof on the defendant; *that* the presumption of law is, that the money belonged to the estate of the husband at the time.

But the Judge held otherwise, and instructed the jury that the plaintiff's possession of the money, claiming it as her own, was *prima facie* evidence of property in herself; and if not repelled and overcome by the other evidence in the case, entitled her to recover; *that* having received the money from the widow to keep for her, she was entitled to recover, unless the defendant could show, the burthen of proof being on him, that it was not her property, but belonged to the estate of John Linscott.

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

Other points of defence were taken, upon which evidence was offered. But neither that evidence nor the ruling upon it need to be stated.

Lowell, for the defendant.

Ruggles, for the plaintiff.

The instruction was correct. The evidence all shows that the defendant received the money from the hands of the plaintiff, and the Judge only instructed that that possession was *prima facie* evidence, and that it was liable to be overcome by other proof. The jury have found that there was no other evidence sufficient to do so. Every thing was rightfully submitted to the jury, and they have passed upon it, and given a verdict according to the justice of the case.

Appleton, J. — No principle is more fully settled by the uniform weight of authority, than that possession is *prima facie* evidence of title, and that upon proof of that fact, the party proving it is entitled to vindicate any violation of his rights thus established. Possession indeed may be considered the primitive proof of title and the natural foundation of

right. But while this is conceded, such possession may be so qualified, that it shall be insufficient to sustain a claim or a defence. Though mere possession may be enough to entitle a plaintiff, whose rights have been infringed, to remuneration, yet if it appear, that his possession was merely that of servant, this qualification may defeat his right to recover, such possession being deemed that of the master. So if the possession is shown to be that of a wife, an administrator or trustee, the proof of such fact may negative the presumption of personal right arising from mere possession, and thus affect and control the general principle and its application.

The plaintiff in this case was the widow of John Linscott, and shortly after his decease placed in the hands of the defendant, who was his executor, one hundred dollars. Whether the money was her own, or belonged to the estate of her late husband, and whether she deposited the money in her own right and to be returned to her, and the defendant so received it, or whether the defendant received it as money of which the title was in doubt, to be returned to the plaintiff, if her claim should be made out, otherwise to be administered upon in the due course of law, were all matters in dispute.

That the plaintiff had been in possession of the money was not denied. The question was as to what was the nature and character of that possession. So it was conceded, that the defendant had received this sum from the plaintiff. The circumstances under and the purposes for which the money was given and received were in contestation. If there was nothing to qualify the fact of possession, the plaintiff's right to recover could not be questioned. If the delivery of the money was merely a deposit, the plaintiff's right of action would at once arise on demand. If on the other hand the widow held the money, wrongfully or improperly withdrawn from the assets of her deceased husband, she could not maintain her suit against the administrator rightfully administering upon it. Or if the money was left with the administrator to await the legal result of any tribunal having jurisdiction, or on any other special terms, the plaintiff must abide the conditions upon which the deposit was made.

The presiding Judge instructed the jury, "that the plaintiff's possession of the money, claiming it as her own, was *prima facie* evidence of property in herself, and if not repelled and overcome by the other evidence in the case, would entitle her to recover, and that having received the money from the widow to keep for her, she was entitled to recover unless the defendant could show, (the burden of proof being on him,) that it was not her property, but belonged to the estate of John Linscott." Whether "the plaintiff had possession of the money claiming it as her own," and whether, if she had, the defendant "received the money from the widow to keep for her," were both issuable facts, upon which a jury were bound to weigh and compare the evidence, and thence to determine the rights of the parties. The instructions given assumed both these facts as proved by the plaintiff; and if they had been proved or admitted to have been proved, the law was unquestionably correct. The error is, that they were the points especially disputed by the parties, and therefore the jury should have been left to pass upon them. The nature and character of the plaintiff's possession, the circumstances under and the purposes for which the defendant received the money, should have been submitted to the jury with alternative instructions corresponding to the different aspects of the case. The case of *Williams* v. *Plumridge*, 30 E. C. L. 488, is strongly in point.

Exceptions sustained and new trial granted.

SHEPLEY, C. J., and TENNEY and HOWARD, J. J., concurred.

MILLER *versus* MARSTON.

The law furnishes to the keeper of a livery stable no lien for the boarding or doctoring of horses at his stable.

ON REPORT from the *District Court*, RICE, J., presiding.

REPLEVIN, for a mare, sleigh, harness and buffalo robes.

The articles belonged to the plaintiff, and were by him placed in the care of the defendant, who was the keeper of a livery stable in Bath.

The mare remained and was boarded at that stable from August, 1849, to April, 1850. Between those dates, the plaintiff drove her to Portland, and when he returned, directed the defendant's hostler to "take the mare and use her well." The testimony showed that "the next morning she was found to be rather stiff; well used up; not lame but stiff; and that the defendant doctored her, and got her up in good shape." For the doctoring, the defendant's bill was $5,00; his whole bill for boarding and doctoring was about $100.

The plaintiff demanded the property described in the writ. The defendant refused to surrender it, claiming to have a lien upon it for the security of his bill.

The case was reported to this Court for a decision of the legal question, "whether the defendant had such a lien upon the property as to authorize him to hold the possession of it against the plaintiff, as security for the payment of the defendant's bill."

Gilbert, for the plaintiff.

Tallman, for the defendant.

HOWARD, J. — The defendant, as keeper of a livery stable, claims a particular lien, by operation of law, upon the property replevied, for the board of the plaintiff's mare in controversy.

A lien upon personal property, at common law, is founded on possession, actual or constructive, and the right to detain the property until some claim, in which the lien originates, is satisfied or discharged. It involves the right to an uninterrupted possession, while it exists, and is lost, or waived when possession is voluntarily surrendered.

The owner of a horse put at livery has the right to use and possess it at all times; and hence it is, that the keeper has no lien upon it for the keeping. The nature of the contract between the owner and keeper is such that the elements of a lien are wanting.

The doctrines of particular liens, as applicable to innkeepers, and those who are bound to receive goods, and to bailees for hire, who by their labor and skill impart additional value to the goods, have never been extended by the common law to keepers of livery stables, or agistors of cattle. *Chapman* v. *Allen*, Cro. Car. 271; the case of an Hostler, Yelv. 67, f. n. 1; *Yorke* v. *Greenaugh*, 2 Ld. Ray. 868; *Bevan* v. *Waters*, 3 Car. & Payne, 520; *Jackson* v. *Cummins*, 5 Mees. & Welsb. 342; *Grinnell* v. *Cook*, 3 Hill, 485, 491; Story on Agency, § 361, 367.

If the defendant had taken the horse to be kept and cured, as in the case of *Lord* v. *Jones*, 24 Maine, 439; or to be kept and trained for a race course, (as in *Bevan* v. *Waters*, 3 Car. & Payne, 520,) or for some other special purpose besides the keeping, he might have been entitled to a lien. But in this case there was no proof that the defendant was to keep the plaintiff's mare for any special purpose, or in a manner different from his ordinary mode of keeping horses in his livery stable. The charge for "doctoring her," may have been reasonable; but it was for incidental services rendered in the usual course of keeping, and without any special contract therefor, and cannot create a lien by contract, by usage, or by the particular circumstances of the case.

But if the defendant had a lien upon the mare for her keeping, he cannot, on that account, detain the sleigh, and harness, and robes, replevied. A particular lien for the keeping must be restricted to the thing kept. It is a claim *in rem* which the keeper cannot extend to other property.

A default must be entered, according to the agreement.

Shepley, C. J., and Tenney, Rice and Appleton, J. J., concurred.

MACOMBER *& al. versus* WRIGHT, *and against the following persons as trustees, viz:—*

BAISE, NASH & WRIGHT, *partners in trade at Bowdoinham, under the firm-name of Baise, Nash & Co., and* NASH & TANK, *partners in trade, in Bowdoinham, under the firm-name of Nash & Tank.*

In a process of foreign attachment, one member of a co-partnership cannot truly declare that *he* had no goods, effects or credits of the defendant, *if* the *co-partnership* had any.

One member of a co-partnership having so declared, and no interrogatories being put to him, he is entitled to be discharged.

When a person is summoned as trustee, who resides *out of* the county, he is entitled to the benefit of R. S. c. 119, § 27, although he be a member of a co-partnership whose place of business was *within* the county, and although all its members were summoned as trustees.

When one, summoned as trustee, appears by attorney, and files a declaration that he had not any goods, effects or credits of the defendant, the declaration, though not sworn to, is to be considered as true, and he will be discharged, *unless* the plaintiff chooses to proceed further in the examination.

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

PROCESS OF FOREIGN ATTACHMENT.

Three of the trustees were co-partners in trade, doing business in Bowdoinham in *this* county, under the firm-name of Baise, Nash & Co.

Two of the trustees were co-partners in trade doing business in the same place under the firm-name of Nash & Tank. Nash was a member of both co-partnerships, and his residence was in the *county of Cumberland.* He appeared by attorney at the return term of the writ. It was then agreed by the plaintiffs that the trustees might disclose at the next term, February, 1849, as of the return term. At said February term, Nash, by his attorney, filed a declaration that *he* had no goods, effects or credits of the defendant. At a subsequent term it was ruled that he be discharged with costs. To this ruling the plaintiffs excepted.

Gould, for the plaintiffs.

Russell, for the trustee.

SHEPLEY, C. J. — The members of two partnerships were summoned as trustees. Hervey Nash was a member of each. He resided in another county and appeared by his attorney and filed a declaration, that he had no goods, effects or credits of the principal defendant in his hands and possession at the time of the service of the writ upon him. He was discharged and allowed costs.

One error alleged is, that he should not have been discharged, because he answered for himself only and not for the partnership; and that the partnership may be adjudged to be the trustee of the principal.

No suit can be maintained in favor of or against a partnership in the partnership name. The persons composing it must sue and be sued; and a judgment can only be rendered against them. Each member is responsible for all the debts and liabilities of the partnership. They are his debts and liabilities. Each partner is not only a joint owner and possessor of all the goods and effects of the partnership, but he alone may dispose of them all. A suit against one member alone may be maintained on a claim against the partnership, unless he pleads in abatement the non-joinder of the other members. A plaintiff, when all the members are summoned as trustees, as they should be, may require disclosures to be made by all, but the answer of one, if truly made, will usually determine the liability of the others arising out of the transactions of the partnership.

Hervey Nash could not therefore answer truly, that he had no goods, effects or credits of the principal, if the partnership, of which he was a member, had any. As the plaintiff did not propose to proceed further to examine him upon oath, he was properly discharged.

Nash, it is said, was not authorized to make a declaration by his attorney, because the place of business of the partnership was alleged to have been within the county; and the partnership was summoned.

As before observed a partnership can be summoned only by a process against the persons composing it. And they

must appear and answer. Neither the plaintiff nor the Court can determine that a particular member shall make a disclosure for the partnership.

When one of the members resides in another county, he becomes entitled to the benefit of the provisions of the statute, c. 119, § 27, which are not limited to any particular character, in which the person is summoned.

It is further alleged, that Nash was not entitled to recover costs, because he did not submit himself to examination upon oath.

He was not required by the statute to submit himself to examination upon oath in the first instance.

The statute authorized him to appear by his attorney and declare, whether he had any goods or effects of the principal.

The following sections provide, if the plaintiff shall proceed no further, such declaration shall be considered to be true; and if he thinks proper to examine the trustee on oath, his answers may be sworn to before a Judge of any Court or a justice of the peace. *Exceptions overruled.*

TENNEY, RICE and APPLETON, J. J. concurred.

NEAL *versus* PAINE *& als.*

When an unimpeached document has conclusively established a defence, the introduction of other documents for the same purpose is immaterial. Instructions upon them, however erroneous, can form no available ground of exceptions, if, in fact, the excepting party sustained no injury from them.

The application, which a poor debtor under arrest makes for the issuing of a citation to his creditor, must be signed.

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

DEBT, on a poor debtor's six months relief bond.

Plea, *non est factum.* Brief statement, that the principal obligor had taken the oath prescribed in the condition of the bond.

The case shows that the defendant introduced the certificate of discharge upon the taking of such oath issued in

due form by two justices of the peace and quorum, "selected according to law." This, if unimpeached, constituted a full defence. The defendants, however, proceeded further, and introduced the citation to the creditor, issued upon the application of the debtor.

The plaintiff proved, (the defendants objecting,) that the application was not signed, when the citation was served, but was signed by defendants after that service was made.

Upon this branch of the case, the Judge ruled, *that* it was not necessary that the application should be signed by the debtor; *that*, if the application was procured to be written out by him, before the citation was issued, it was sufficient in law, though unsigned; and *that* the signing of it by him, after the service of the citation, would not invalidate the defence.

The plaintiff also attempted to prove, (the defendant objecting,) that Warren Rundlett, being that one of the said two justices of the peace and quorum, who was selected by the debtor, was the sole attorney of the debtor in the original suit, and that he filled up the blanks in the printed forms upon which the application and citation were drawn.

The Judge ruled that these facts, if proved, would invalidate the proceedings upon which the defence was placed.

The jury returned a verdict that the bond was the deed of the defendants, but that its condition had been performed.

To the said rulings of the Judge the plaintiff excepted.

Hubbard, for the plaintiff.

Rundlett, for the defendants.

Shepley, C. J. — The suit is upon a bond made to procure the release of the principal from arrest on execution. The defence is, that one of the conditions had been performed. The exceptions state, that "the defendants put into the case, the certificate of discharge in due form of law, of two justices of the peace and quorum for said county, selected according to law."

Under instructions, quite as favorable to the plaintiff as the law would authorize, respecting the interest of one of

the justices, the jury must have found, that he was disinterested.

It has long been the established construction of the statutes, that the justices are made the judges of the regularity of the preliminary proceedings; that their judgment upon them as exhibited in their certificate is conclusive; and that no testimony can be legally admitted to prove that judgment to have been incorrect. A defence fully authorizing the verdict appears therefore to have been exhibited.

The defendants also introduced the application of the debtor to a justice of the peace, and his citation to the creditor, and the return thereon of service by an officer. These documents were not necessary to the defence; and their introduction appears to have occasioned the principal contest in the case and the instructions alleged to have been erroneous.

It appears to have been the intention of the framers of the statute, that all the proceedings for this purpose should be exhibited by written documents duly authenticated; and the application of the debtor should therefore be made in writing and be by him subscribed.

When a document introduced proves a fact conclusively, if its validity be not impaired or destroyed by other testimony, the introduction of other documents for the same purpose, is wholly immaterial. The rights of the parties could not thereby be varied, and any rulings or instructions respecting them would be alike immaterial; and however erroneous they may have been, if a party has not been injured by them, they can form no legal cause of complaint; and exceptions taken to them must be overruled.

If the application was not subscribed by the debtor in due season, that objection might have been made before the justices; and for any unlawful alteration of a document, after it has passed from a party and been the foundation of other proceedings, the law will afford sufficient remedy.

Exceptions overruled.

WELLS, HOWARD and APPLETON, J. J., concurred.

Cole *versus* Sprowl.

It is no valid objection to a plaintiff's right to recover, that, by the declaration of his writ, he claimed more than he has proved, or more than he could rightfully demand, or that he has presented his claim on different grounds in different counts.

Although a public nuisance is to be prosecuted for by the public, yet if it have occasioned to an individual any special damage, not common to others, he may maintain a suit for the injury.

If one grant a right of passage in an existing road over his own land, and the limits of the road are not defined in the grant, its locality, as established and traveled prior to the grant, may be proved by parole.

The existence of a pile of lumber upon a particular spot, at the time of such grant, does not necessarily determine that the road had not previously been established over that spot.

An owner of land may, by his acts *or* declarations, without deed, dedicate it to the public for a road or way.

To give effect to such a dedication, no particular ceremony is requisite in the making of it; nor does the law prescribe any particular length of user by the public.

A valid dedication involves the actual appropriation and use of the land by the public, with the voluntary assent of the owner, and a concession of such of his rights as are incident and necessary to the use.

Such dedication may be inferred from facts and circumstances, and so may the assent of the owner of the land, and the acceptance by the public.

By such a dedication, the owner is estopped to reclaim the land, to the injury of those who have, in good faith, acquired rights in reference to it, dependent upon its enjoyment.

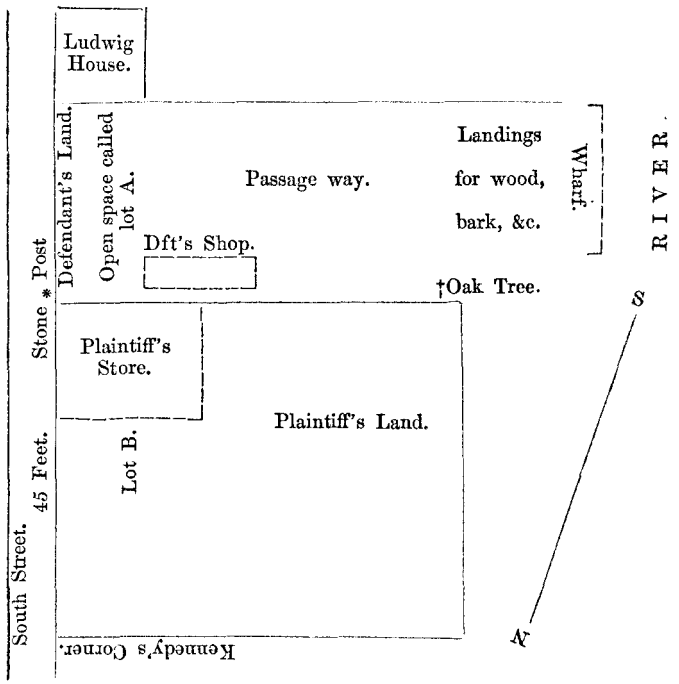
If, by a grant of land, bounded on a road, there is conveyed a right of passage upon such road, it is not a rule of law to be laid down by the Court, that the grantee can use the way for no other purposes than it had been used for by the grantor.

For obstructing the plaintiff's right of way or for unlawfully excluding the light from his doors and windows, the damages are to be assessed, not to the time of the trial, but to the date of the writ.

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

Case, for erecting a mechanic shop, so near to the plaintiff's ancient messuage as to obstruct its doors and lights, thereby reducing its rentable value; and also for obstructing a way, to which the plaintiff was entitled, for teams and carts, upon the south side of said messuage. The declaration contained two counts.

The following chalk sketch will sufficiently exhibit the localities.



Until 1841, all the lands in question were owned by William Sprowl. On March 10th of that year, he sold the lot B, fronting upon the west side of South street, extending from Kennedy's corner, forty-five feet, "to a road leading toward the wharf;" thence running south seventy degrees west, fifty-five feet, to an oak tree, thence south eighty-seven degrees west, &c. back to the first bound.

Its north bound on the street is the Kennedy corner, and the south line is at the stone post.

Upon this lot the plaintiff erected a large brick store, called in the declaration his ancient messuage.

The lot A, called the "open space," is owned by the defendant, having come to him by devise from William Sprowl. It was upon this lot, owned by himself, that the defendant built the mechanics' shop complained of. The shop came within three and a half feet from the plaintiff's store.

The plaintiff claims 1st, that by the operation of the deed from William Sprowl, extending the lot "to the road leading toward the wharf," he became entitled to a right of way in that road, and that the defendant, by erecting the shop upon it, invaded that right; —

2d, that there had been a dedication of the road to the public, and that the erection of the shop was a violation of right, and injurious to the plaintiff.

There was testimony to prove, and also to disprove, that a road running along on lot A, from South street, toward the wharf, had been used and traveled; that the road had passed over the whole of the open space, lot A, between the plaintiff's line and the Ludwig house, except the distance of 18 to 25 feet next to said house; that for some distance toward the wharf the road had been limited to from 9 to 12 feet. There was testimony tending to prove, that all the lot A had long been used for a landing connected with the wharf, and that wood and lumber were piled upon it in places during all seasons of the year, for which the owner received wharfage and landage; also, to prove that the land, on which the shop stands, was covered with wood piled there when William Sprowl conveyed in 1841, the piles extending nearly to South street; also testimony tending to prove, and to disprove, that the defendant, and the former owner of lot A, had, by their acts and declarations, dedicated the land to the public as a way or road.

The defendant contended that the deed, under which the plaintiff holds, did not, by any implication, convey any right of way by using the words, "to a road," especially because, not an inch beyond that one point of contact, the stone post, was the road made the boundary of the lot conveyed.

The defendant also contended that the open space was a landing connected with his wharf and making part of the wharf lot, for the piling of wood, bark, timber and other articles designed to be taken to vessels lying at the wharf, and that he received pay for the use as a landing place; that the space not occupied by the piles was a mere private way

for the accommodation of his landing place and wharf, whereby he made a profit to himself, and was not a public road or thoroughfare.

The defendant also contended, that if the plaintiff, under the deed from William Sprowl, took any right of way in the *wharf road*, it was the road as used when that deed was given; but if not so, still the plaintiff could not prescribe in what direction it should run, after starting from the stone post, for the deed did not bound him by the road, but by a specific course, which might or might not coincide with the road; and that, as there always, to this hour, has been a sufficient road kept open, starting from the stone post, passing south of the shop, the plaintiff cannot complain that the shop infringed his right of way.

Several requests were made for instructions to the jury, among which the 2d, 3d, 4th, 6th, 8th and 10th were as follows; viz: —

2, *that* the word "*to*" in the deed is a word of *exclusion*, unless by necessary implication it was used in a different sense; *that* the terms found in a deed are to be construed in reference to the apparent purpose for which they were employed; *that*, in this case, the words "45 feet to a road leading towards the wharf," being used for the purpose of *description* of the lot, the word "*road*" is employed as a monument, and the terms "*to a road*" are regarded terms of exclusion and so nothing passed, but what is included within the boundaries expressed in the deed; *that* this construction is particularly applicable here, provided the jury find that the road leading towards the wharf was not adjoining or contiguous to the southern line of the plaintiff's lot, but distant therefrom, after leaving the stone post, so that the second course in Sprowl's deed did not bound the south side of plaintiff's lot by said road; and *that* under this legal construction, and such a finding, this plaintiff would have no cause of action against the defendant, for placing a building on his own land, west from the stone post, and south of the line from the post to the oak tree.

In support of the doctrine of this request, the counsel cited 17 Mass. 447; 14 Mass. 55; 13 Maine, 201; 11 Pick. 193. He also urged that the case at bar was distinguishable from those of *Van O'Linda* v. *Lothrop*, 21 Pick. 292, and *Sutherland* v. *Jackson*, 32 Maine, 80, because in those cases the parties were bounded by streets in one case and by the plan of a street in the other; there being in this case neither of such boundaries.

3, that the plaintiff's right to a road over the defendant's land accrues to him, if at all, by way of estoppel, the defendant being estopped by the terms of the deed "*to a road*" to deny the existence of a road *there;* but *that* estoppels are construed strictly, and never enlarged or extended by implication; and *that*, inasmuch as the deed, at most, calls for a road only at the *end* of the first line, (at the stone post,) if the jury find that there existed, at the time complained of in the plaintiff's writ, at *that place*, the same road leading towards the wharf, unobstructed by the defendant, then the demand of the estoppel was satisfied, and Cole could claim no more. 4 Kent's Comm. 261, and notes.

4, that the word *road* in the deed denotes simply a right of way over the grantor's other lands. A right to pass and repass over it for the same purposes for which it was used by the grantor at the time of the conveyance; *that* the language, "*to a road leading towards the wharf,*" sufficiently indicates that it was a wharf road, and such a wharf road as existed at the time of the conveyance, but *that* it is left for the jury to find the width, character and uses of the road, and its actual location upon the surface of the earth, after leaving the stone post; *that* if the jury find that "the road leading towards the wharf," at the time of the conveyance of 1841, was a well known road, well defined and clearly marked on the surface of the earth, that in leaving South street it proceeded from the place of the stone post, by a southerly sloping direction, passing wholly to the south of the place of the defendant's shop, towards the wharf, and that the shop is not in said road or any part of it; and *that* the same road, over the same general

locality, has been continued substantially as at the time of the conveyances, repaired and amended from time to time, as necessity and convenience required, and is as easy of access, as safe, suitable and convenient to pass and repass as it was then, this action for the obstruction, by defendant's shop, of "*the road leading towards the wharf*" cannot be maintained. *Atkins* v. *Boardman & als.* 2 Metc. 457; *same parties*, 20 Pick. 291; *Boynton* v. *Rees*, 8 Pick. 329; *Pierre* v. *Fernald*, 26 Maine, 436.

6, *that*, if "the road leading towards the wharf" was not, at the time of the conveyance, adjoining or contiguous to the south line of the plaintiff's lot, from the stone post to the "oak tree," but on leaving the point of the stone post, the road diverged to the south and distant from said south line, the deed would not confer on the plaintiff "the right" to pass and repass with teams and carts of the plaintiff, on and around the south side of the plaintiff's brick building as alleged in his writ.

8, *that* the right claimed by the plaintiff cannot have been acquired by dedication, unless it has been proved by evidence of *acts* on the part of the owner of the soil, that defendant, or Wm. Sprowl, understandingly and intentionally dedicated such right of way; and *that* evidence of a dedication may be rebutted by other acts on the part of defendant or Wm. Sprowl, indicating, that they only intended to permit persons to pass *there*, over their land, when not occupied for other purposes, and not to dedicate a right of way to the public; and *that* the use and occupancy, by themselves, of the land, or by others under them, for a compensation, by covering it with piles of wood and plank, and continuing the same for long periods of time, occupying at their pleasure, and for their own convenience, would be acts going to rebut and disprove a dedication to the public, or to the plaintiff and those under whom he claims.

10, *that* the question is *not* how *wide* the jury might think it best and most convenient to have a road, but their inquiry should be what was in fact the width of this road opposite

the plaintiff's lot at the time of the conveyance of *March* 10, 1841, and *that* the defendant is not required to furnish a wider road than the one existing and in general use at and about the time of that conveyance.

These requested instructions were refused.

The defendant then further requested instruction to the jury, *that*, to constitute a *dedication*, it is necessary, not only to show by acts and declarations the intention of the owner to give up his lands to public use, but there must have been an acceptance of the dedication by the public; and *that* the dedication and acceptance must have been before March 10, 1841, or before the shop was put on the land.

This instruction was given by the Judge, with the difference, that he used the words acts *or* declarations instead of acts *and* declarations, and also added that an acceptance by the public might be inferred from the public use of the land for a road or way.

In support of the defendant's views upon the matter of dedication, he cited the following authorities. — 3 Kent's Com. 7th Ed. p. 450–3, title Easements, and notes and cases cited in the notes; *Post* v. *Pearsall*, 22 Wend. 425, 482; *Pearsall* v. *Post*, 20 Wend. 119; *The matter of the thirty-second street*, 19 Wend. 128; 2 Greenl. Ev. p. 622–3–4–5, § 662 and 664, and authorities cited n note 1 on page 623, and in note 1 on page 625; *Hobbs* v. *Lowell*, 19 Pick. 405–6; *Larned* v. *Larned*, 11 Metc. 421, [usually cited as opposed to defendant's doctrine, — it is not so;] *Munsen* v. *Hungerford*, 6 Barb. 265, 272 and 3; *Wright* v. *Tukey*, 3 Cush. 290.

The jury were instructed, *that* the plaintiff, by a correct construction of the conveyances under which he claimed title, was bounded upon a road at the corner of his lot upon South street adjoining the open land; *that* the road referred to in those conveyances must be considered as commencing on South street, there adjoining the plaintiff's land; *that* the road from that point towards the wharf was not determined by those conveyances or by the law, but was to be defined and established by the testimony; *that* they would, from the

testimony, ascertain and determine where the road referred to in the conveyances had been used and established before those conveyances were made; *that* if they should be satisfied, that the place where the defendant's building has been erected, was covered by wood piled upon it at the time of the conveyance, dated March 10, 1841, that fact would not necessarily determine, that the road had not before that time been established there, and been encumbered by the wood; *that* owners of land might dedicate it by their acts or declarations to the public use for a way or road; *that* it was not necessary that it should have been used as a road for any particular time to make it an effectual dedication, if satisfied that it was the intention of the owners to make such an appropriation of the land, and that they had done it, and that it had been commonly used for that purpose. There were other instructions, not presented in the Judge's report or necessary to be here considered.

The verdict was for the plaintiff, and is to be set aside, and a new trial granted, "if the reported instructions or refusals to instruct were erroneous."

The plaintiff claimed that the recovery should embrace the damage he had sustained up to the *time of the trial.* The Judge instructed the jury that, if the verdict should be for the plaintiff, it should only embrace the damage sustained up to *the date of the writ.* The verdict was for the plaintiff, the damage being assessed at $53. To this instruction the plaintiff excepted.

Ruggles, for the plaintiff.

Lowell, for the defendant.

Howard, J. — The existence of "a road leading towards the wharf" was not directly denied; but the particular location and boundaries of such road, whether it was contiguous to the land of the plaintiff, or so distant from it that the defendant's land intervened; and whether the defendant and the former owner of the land had by their acts and declarations dedicated the land to the public as a way or road, were

all matters contested at the trial, and submitted to the jury upon instructions which, in part at least, were not objected to by the defendant. We can pass upon those instructions only, which are stated in the report, and if in giving or refusing any of these there is error, then there is to be a new trial.

It is no valid objection to the plaintiff's right to recover, that he claimed more than he proved, or more than he could legally demand, or that he presented his claim on different grounds in different counts in his declaration. Substantially, he claimed damages of the defendant for his constructing a shop upon the road, before mentioned, so near to the plaintiff's brick store standing upon his own land, as to deprive him of the use of the road and store. There can be no doubt of his right to recover, if the facts were proved as stated in his declaration; for the shop would constitute an invasion of his rights, causing special damages to him, not common to others, for which an action would lie; although, as an obstruction to a public way, it might also be a public nuisance. Coke Litt. 56, a; *Williams' case*, 5 Coke, 73; 3 Bla. Com. 219; *Sutherland* v. *Jackson*, 32 Maine, 80.

The instructions given embracing the construction of the conveyances under which the plaintiff claims, respecting the boundary of his land at the corner of South street, by the road leading to the wharf, and the directions to the jury to ascertain and determine from the testimony where the road referred to had been used and established, before the conveyances, appear to have been required, and they were manifestly correct. The fact that wood was piled upon the place where the defendant's shop has been erected, at the time when the conveyance from William Sprowl was made, did not necessarily determine, that the road had not previously been established there. The wood might have then encumbered the road temporarily, without serving to mark its course or bounds. The instructions on this point were unexceptionable.

Dedications of land by the owner for highways and pub-

lic purposes, generally or specially, without deed or writing, are familiar to the common law of England. The doctrine is founded upon general principles that adapt it to the common law as adopted in this country. It involves the actual appropriation and use of the land, by the public, with the voluntary assent of the owner, and a concession of such of his rights as are incident and necessary to the use. It assumes the fact of dedication, and the acceptance and use by the public, for the purposes for which it was made. When a dedication has been established its continuance will be presumed until the contrary is shown. By thus appropriating his soil, the owner will be estopped to reclaim it, or revoke the dedication, to the injury of those who have acquired rights in reference to it, in good faith, depending upon its enjoyment. *Rex* v. *Lloyd*, 1 Camp. 260; *Lade* v. *Shepherd*, 2 Strange, 1004; *Stafford* v. *Coyney*, 7 Barn. & Cress. 257.

No particular ceremony is required to make a dedication, nor is any time prescribed by law, as essential to securing the enjoyment. Dedications of land may be presumed from facts and circumstances proved; and so may the assent of the owner of the land, and the acceptance by the public. *Jarvis* v. *Dean*, 3 Bingh. 447; *Rex* v. *Barr*, 4 Camp. 16. In *Cincinnati* v. *White*, 6 Peters, 431, the doctrine of dedication was examined by Mr. Justice Thompson, and treated as not a novel doctrine in the common law in this country. *Hobbs* v. *Lowell*, 19 Pick. 405; *Wright* v. *Tukey*, 3 Cush. 290; *Pearsall* v. *Post*, 20 Wend. 111; S. C. 22 Wend. 425; *Dwinel* v. *Barnard*, 28 Maine, 564.

The instruction, "that the owners of the land might dedicate it by their acts or declarations to the public use for a way or road," is not objectionable. It is not essential that the *act* of dedication should be proved, but the *fact* must be established by competent evidence. The declarations, as well as the acts of the owner, may be evidence of the fact, and the best evidence of his intention to make the appropriation of his land to public use.

The first request is not stated; the second asks for instruc-

tions on an abstract proposition, not apparently applicable to the case. For, whether the "words *to*, *from*, or *by*, in a deed," are terms of exclusion or not, does not seem to have been material to the issues presented. Whether the shop was constructed on the "road leading towards the wharf," so as to cause the particular damages claimed, or upon the defendant's land not covered by the road, were questions of fact, which might be resolved in the same manner, upon the evidence, whether the road was wholly or partially excluded from the premises conveyed by the deed of William Sprowl; and whether the premises were bounded by the road to a greater or less extent. The jury had received sufficient instructions to enable them to ascertain and determine the direction and location of the road, and the bounds of the premises conveyed, whether on or near to it, and the denial of this request was not erroneous.

The third request assumes that the plaintiff's right to the road referred to, accrued to him by way of estoppel, only, and that if the road was unobstructed at a particular point, at the time of the alleged obstruction, then the action could not be maintained. But the Court could not have instructed the jury as a matter of law, that the plaintiff's right thus accrued, or that the road did not lie contiguous to the whole length of his lot on the southern side, at the date of the conveyance of William Sprowl, under whom the parties now claim. If the road as established before that time, was then contiguous, it could not have been changed afterwards, but by competent authority. Neither the grantor nor the defendant was competent to alter the location, or to limit the estoppel by change or substitution, after the conveyance.

The fourth request was properly refused. The presiding Judge could not have stated, that the word *road* as used in the deed of Sprowl denoted only a right of way over his other lands, "for the same purposes for which it was used by the grantor at the time of the conveyance," without assuming the province of the jury. Nor could he have instructed them that the language of the deed by legal construction

sufficiently indicated that "a road leading towards the wharf," was a "*wharf road*," if such a road has any peculiar properties or uses, as the request seems to indicate. The language would be alike applicable to a private way, a town way, or a public highway. The last paragraphs of this request embrace propositions already sufficiently noticed.

The fifth request is not stated in the report; and the sixth embraces points upon which sufficient instructions were given. It does not appear that the doctrines of prescription, or rights acquired by adverse possession or use, were applicable, or material, as the case was presented to the jury.

The seventh request was granted, and the jury were instructed accordingly, "that a right to pass and repass over the defendant's open land around the south side, and west end of the plaintiff's brick building, as alleged in his writ, could not have been acquired by dedication."

The response to the eighth request in the instructions given on the subject of dedication was sufficient, and is satisfactory. The ninth request is omitted in the report, and the tenth was answered by the instructions previously given.

The plaintiff could recover damages to the date of his writ only, in accordance with his claim, and the instructions given, and his exceptions must be overruled.

Judgment on the verdict.

TENNEY, RICE and APPLETON, J. J., concurred.

McLELLAN *versus* REED *& al.*

If a vessel be let on hire to be used and sailed without charge for repair or other expense to the owner, he will not be liable for supplies and outfits, procured by the hirer.

This rule is equally applicable, whether the contract of hiring be or be not known to the party furnishing the articles; and whether the person letting the vessel be owner of the whole or only of an undivided part.

ON FACTS AGREED.

ASSUMPSIT for supplies and outfits for the little schooner

Boxer upon a fishing voyage. She was owned, one third by Reed and the residue by John Hodgdon and Jackson Hodgdon, the other defendants. Reed let his part, for six months, to John Hodgdon, under a written contract by which the hirer was to pay a stipulated price, and to use and sail the vessel *in the fishing business* without any expense to Reed "upon the hull, sails, rigging, cables, anchors, boats, or any other expense whatever." To this contract the parties respectively bound themselves under a penalty of one hundred dollars.

Jackson then took command of the vessel, and he and John sent her on a fishing voyage. In these proceedings Reed took no part.

Jackson and John purchased articles of the plaintiff on credit, to the amount of $514,19. Of this amount, $76 were necessaries, and were applied as such, for the vessel; $87 were advances to the crew; the residue was for outfits, including salt. In making these purchases, John represented himself to be agent for the vessel and owners, and gave to the plaintiff the following paper, signed by himself and Jackson. "This is to certify that we agree to be accountable for the owners for outfits for schooner Boxer and crew, the coming season."

The plaintiff charged the account to "schooner Boxer and owners." He subsequently received $35 and $215, from John Hodgdon, which he credited upon the account.

John Hodgdon having deceased, his name has been stricken from the writ. Jackson has been defaulted.

The case was submitted to the Court; and a discontinuance as to Reed is to be entered with costs, if he is not liable.

Tallman, for the plaintiff.

Except for the letting of the vessel by Reed, he would be clearly liable to the plaintiff. But of that letting the plaintiff had no knowledge. The decisions that a charterer is *pro hac vice* to be considered as the owner, do not apply in this case. And such decisions have been sufficiently extended. The better rule would be that, when one of two innocent persons must suffer, the party who occasions the loss, should be answerable for its consequences. Those cases have usually

occurred when the *whole* vessel had been chartered, and, perhaps, invariably when the possession was in some person not named in the register as owner. In such cases, there may be some reason for showing *that, in fact,* an agency exists, before founding a liability upon it; and *that* the master is in fact an agent of the owner, before his acts can charge the owner. So when a stranger to the title has the possession and control of a vessel, it is necessary to show that he is in fact agent of the owners, before they can be called on to fulfill his engagements relative to the vessel. This is the utmost extent to which the doctrine has as yet been extended.

In the case at bar all the defendants are owners of the vessel and were so at the time of the furnishing these supplies, and being so, each is deemed the agent of the others, as to the ordinary repairs, employment and business of the ship, in the absence of any known dissent." Story's Agency, § 40. They are thus deemed agents because they are part owners and are also general agents for the particular vessel. Each part owner then holds out to the world that they are agents, and the law therefore compels them to guaranty the acts of each. Whether they have or not exceeded their private instructions, can have no operation on third persons without notice. Story on Agency, § 298.

The owner is bound by the contracts of the master, notwithstanding any private agreement. Part owners are agents by law. Any one may avoid liability by showing that he derived no benefit of the ship, and had no possession of her. It is however no defence that the particular voyage was unauthorized or expressly forbidden. *Hardy* v. *Sprowl*, 29 Maine, 259.

In the case at bar, Jackson and John Hodgdon did the trading. John represented himself as agent for the vessel and owners, as well as part owner; in that capacity, together with Jackson, he gave on the 10th of April, a certificate that the owners would be accountable for the outfits of the schooner. Both of them repudiated the agreement, and this they had a right to do, though under liability to the forfeiture

of $100 as a penalty. By that repudiation, the contract of letting became a nullity, and Reed, therefore, became accountable as before. In *Packard* v. *Sloop Louisa*, 2 Woodbury & Minot, 55, Justice WOODBURY says, — "There must have been no knowledge of the facts, or the repairs be very durable or the charter must have contemplated it, if the owners are liable for repairs when the master has hired the vessel, and orders them." This is the sound and correct doctrine. It accords with the views and understanding of commercial men and the former universal custom.

This principle, applied to this case, must do substantial justice to the parties.

Further, there was no such letting as to exonerate Reed, upon any of the decisions on which he relies. He never relinquished control of the vessel, for he directed in what business she should be employed. He insisted and obtained a stipulation, that she should go into the fishing business only. The right in the *hirer* to direct the voyage, has been much relied upon in the decisions. In *Lyman* v. *Redman*, 23 Maine, 295, it is said "It is the entire control and direction of the vessel, (by the hirer,) and the surrender by the owners, of all power over her, for the time being," which will exonerate them. Reed relied on Hodgdon's indemnity, not on any exemption by the rules of law.

Paine, for the defendant, Reed.

RICE, J. — The law may be deemed settled, that where a vessel is let or hired, whether by written charter or parol contract, and the possession is transferred to the hirer, and he sails her at his own expense, and has the entire control, such hirer is to be deemed the owner for the time being, and as such, so far as third parties are concerned, succeeds to all the rights and liabilities of the general owner. 3 Kent's Com. 136; *Skolfield* v. *Potter*, Davis, 392; *Thompson* v. *Snow*, 4 Maine, 265; *Cutler* v. *Thurlo*, 20 Maine, 213; *Taggard* v. *Loring*, 16 Mass. 336; *Thompson* v. *Hamilton*, 12 Pick. 425; *Cutler* v. *Windsor*, 6 Pick. 339; *Perry* v. *Osborn*, 5 Pick. 422.

Reed executed his charter party and delivered possession of his interest in the schooner, to John Hodgdon, on the 7th of April, 1847, at Boothbay. The supplies for which this action was brought, were delivered on board of said schooner at Bath to the order of Jackson Hodgdon and John Hodgdon. The first articles charged in the bill were not delivered by the plaintiff until the 13th of April, some six days after the date of the charter party, and of the delivery of the vessel to Hodgdon. With the purchase of those supplies Reed does not seem to have been in any way connected.

It is contended, however, that inasmuch as he was the general owner, and had given no notice of the letting, he is still liable for the supplies furnished by the plaintiff. Story on Agency, § 298; *Rich* v. *Coe*, 9 Cow. 636.

However the rule of law may have been held, in former times upon this point, the course of judicial decision is now admitted to be in favor of exempting the owners from the liability for ordinary supplies while the vessel is employed under such a contract. *Skolfield* v. *Potter*, Davis, 393; *Reeve* v. *Davis*, 1 Adol. & Ellis, 312. Such is the law in this State. *Cutler* v. *Thurlo*, 20 Maine, 213.

The contract for hire in this case was distinct, and the control of the vessel on the part of the hirer, for the purposes for which she was hired, was absolute, and commenced at the time the charter party was executed and the delivery was taken.

According to the agreement of the parties, plaintiff is to discontinue as to Reed, and he is entitled to his costs.

Shepley, C. J., and Wells, Howard and Hathaway, J. J., concurred.

Swanton *versus* Reed *& al.*

For materials used in the repair of a vessel, which had been let on hire for a voyage or for a stipulated time, the general owner is not liable, provided such materials are procured and applied to the vessel by the hirer under a charter party by which he agreed to make the repairs in payment for the hire.

The rule is the same though the contract for such letting and reparing be by parole, and though it be unknown to the material-man, and although the repair be of a permanent character.

ON FACTS AGREED.

ASSUMPSIT against the several owners of the schooner Boxer, for materials used in repairing her.

The defendants, Benjamin Reed, John Hodgdon and Jackson Hodgdon, were owners of the schooner.

On March 1, 1848, Reed verbally chartered his third to John Hodgdon for fishing during the term of eight months. The hire was to be paid by John Hodgdon, partly in money and partly by a set of new sails, a new anchor and cable and other specified repairs to be put upon the vessel without charge or expense to Reed.

John Hodgdon *took possession* of her on the same day, *March* 1, 1848, and on the 3*d of the same month* procured of the plaintiff 314 yards of duck, of which he made the new sails contracted for.

On March 10, 1848, a charter party was drawn up in due form, and signed and sealed by the parties. Though dated on March 10th, it recites "this charter party indented, made and concluded upon *this first day of March*, 1848," &c. John Hodgdon sailed and used the vessel, during the eight months, for his own benefit, and received the fishing bounty.

The plaintiff had no knowledge of the charter contract, and charged the duck to the schooner Boxer, and brings this suit to recover for the same against the general owners of the vessel.

Jackson Hodgdon was defaulted. John Hodgdon died pending the suit.

If Reed is not liable, a discontinuance as to him is to be entered, with cost.

Tallman, for the plaintiff.

In most of its particulars, this case is like that of *McLellan* v. *Reed*, [see *ante p.* 172.] As to those particulars, the Court is respectfully referred to the argument there made for the defendant.

The sails, anchor, cable, &c. were of the character of per-

manent repairs, to increase the value of the vessel long after the charter party should expire. The plaintiff, in furnishing the materials for the sails, knew nothing of the charter party. And if he had, the fair presumption is, that Reed knew of the purchase, and assented to it, at the expense of the vessel. *Packard* v. *Sloop Louisa*, 2 Wood. and Minot, 55.

The agreement that Hodgdon should pay for the repairs, was merely between him and Reed. Suppose that immediately after procuring the duck, Hodgdon had been prevented from using the vessel. In that case Reed would have been clearly liable. Such contracts, without notice to third persons, can give no protection against a general owner for permanent repairs.

Paine, for the defendant, Reed.

Rice, J. — This case was argued with *McLellan* v. *Reed*, and presents substantially the same legal questions.

The terms of the charter were agreed upon and the vessel delivered to the hirer, John Hodgdon, on the first day of March, 1848. The written charter party was not executed until the 10th of the same March. It is contended that the vessel was held under the parole agreement until the 10th of March. A vessel may be chartered by parole as well as in writing. *Taggard* v. *Loring*, 16 Mass. 336; *Thompson* v. *Hamilton*, 12 Pick. 425.

When the ship is out of the employment of the owner, the charterer, whether under a parole or written contract, is held for supplies, and not the owner. *Perry* v. *Osborn*, 5 Pick. 422. And so also for materials for repairs. *Reeve* v. *Davis*, 1 Adol. & Ellis, 312; *Cutler* v. *Thurlo*, 20 Maine, 213. And this is reasonable, for the person furnishing the supplies may easily ascertain who is the owner, for the time being, to whom the supplies are made, and if his credit is not satisfactory he may decline dealing. 5 Pick. 422; 1 Adol. & Ellis, 312, before cited.

A contract for the hire of Reed's interest in the vessel having been made on the first of March and the vessel then delivered under that contract, the fact that this contract or

one of similar purport was executed in writing on the 10th of the same month does not change the result.

The contract stipulates that the charter shall be paid, part in cash, and part in repairs upon the vessel. Hodgdon was not thereby made the agent of Reed in purchasing the materials necessary for the repairs, nor is Reed liable therefor. He must therefore have judgment for his costs.

SHEPLEY, C. J., and WELLS, HOWARD and HATHAWAY, J. J., concurred.

THEOBALD *versus* COLBY.

The defendant has a *right at law*, to withdraw an account which he may have filed in set-off.

Upon this right he may insist, although the putting of the set-off before the jury might prove the existence of mutual and open accounts between the parties, and though the withdrawal of it would expose the plaintiff's claim to the statute of limitations.

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

ASSUMPSIT, commenced in May, 1850, on account annexed, for medical services rendered by the plaintiff's intestate. The items charged commenced in 1815 and extended to September, 1843.

Plea, Limitation. The defendant seasonably filed an account in set-off, consisting of charges for services and articles, rendered and furnished in 1844 and 1845.

When the case came up for trial, and before the plaintiff had offered any testimony, the defendant moved in writing for leave to withdraw his set-off account. This was objected to by the plaintiff, and the motion was refused. The defendant then gave notice that he should not rely upon the set-off account.

The plaintiff, after giving evidence in support of his account, read to the jury, as evidence, the set-off account and admitted it to be correct, though the reading of it was objected to by the defendant.

The Judge instructed the jury that the plaintiff had the right to use the set-off account, as tending to show that there were mutual and open accounts between the parties, not barred by the statute of limitations. There were also other instructions. The defendant excepted.

Foote, Jr. for the defendant.

Ingalls, for the plaintiff.

1. Permission to withdraw the set-off account was at the discretion of the Judge.

2. The refusal to permit the set-off account to be withdrawn was of no injury to the defendant. It operated in his favor to the amount of his account, which the jury allowed, as may be found by a computation.

3. The two accounts, taken together, proved the existence of mutual and open accounts. The withdrawal of one of them would destroy that proof. This would produce injustice. *Davis* v. *Smith,* 14 Maine, 337; *Cogswell* v. *Dolliver,* 2 Mass. 217.

HATHAWAY, J. — The first question presented in this case is whether or not the defendant, having duly filed his account in offset, may withdraw it as matter of right before proceeding to trial.

The right of a defendant in such case is similar to a plaintiff's right to become nonsuit. A set-off may be withdrawn in analogy to suffering a nonsuit. *Muirhead* v. *Kirkpatrick,* 5 Watts and Serg. 506. And the plaintiff may become nonsuit, as of right, at any time before trial. *Haskell* v. *Whitney,* 12 Mass. 47–8. At common law, he might become nonsuit at any time before the verdict. 7 Watts, 496; 9 Watts & Serg. 153. Ch. 115, § 48, of the Revised Statutes, which prohibits the plaintiff from discontinuing his action, without the defendant's consent, when a set-off has been filed, deprives the plaintiff of the right, which he had before, to discontinue his action at his pleasure, but although he cannot discontinue, he may abandon it, and leave the defendant to prosecute the suit to recover his set-off. That statute leaves the defendant's pre-

existing rights unimpaired; it increases but does not diminish them.

It would be quite severe to compel a defendant, who might be unprepared to prove a claim which he had filed in offset, and for which the plaintiff had given him no credit, to have it made a part of the case against his will, whereby his claim, which he asked only to withdraw, would be conclusively adjudicated upon without his consent. Such is not the law. The defendant had a right to withdraw his set-off, *Cary* v. *Bancroft*, 14 Pick. 318, and the refusal of the Judge to permit him to withdraw it was erroneous.

The view taken by the Court, of this question, renders it unnecessary to examine the case further.

The exceptions are sustained and a new trial granted.

SHEPLEY, C. J., and WELLS and HOWARD, J. J., concurred.

PAINE *& al. versus* MARR.

Against an occupant of land, whose possession has been of such a character, and continuance, as to entitle him to betterments, trespass *quare clausum* will not lie for acts done during such possession.

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

TRESPASS *quare clausum*, for cutting timber on lot No. 18. The defendant by brief statement pleaded title in himself, setting up no claim to betterments.

The plaintiff introduced sundry deeds to establish title in himself. Evidence was introduced by the defendant tending to show that he, and those under whom he claims, had occupied a considerable part of the lot, and made improvements upon it. Of the character and duration of that occupancy, there was conflicting testimony. No evidence was offered as to the increased value of the land, arising from such improvements. The Judge instructed the jury: —

1. As to the character and length of possession and improvement which confer upon the occupant of land a right to betterments.

2. That the action is unmaintainable if, when the suit was commenced, the defendant had acquired a right to betterments.

The verdict was for the defendant.

To the second instruction, the plaintiffs excepted.

Gould, for the plaintiffs.

The second instruction was erroneous. The testimony is not reported. The instruction therefore is to be considered as an *abstract proposition*, and if not true under *all circumstances*, the exceptions should be sustained.

1. Though the defendant may have been in possession, prior to the commencement of this suit, yet if the plaintiff had *re-entered* for the purpose of taking possession, and thus *purged* the disseizin, subsequent to the six years possession, and the defendant had cut upon the land after such *re-entry*, an action of trespass might be maintained therefor. Yet under such circumstances the defendant would be entitled to betterments by § 47, of c. 145, R. S. *Bull* v. *Clark*, 2 Metc. 587.

2. There was no evidence that the land was increased in value; and betterments can only be claimed where there is proof of *increased value.*

3. This was an action of *trespass.* No question about betterments was involved in it, and the instruction given was inapplicable, and calculated to mislead the jury.

F. Allen, for the defendant.

Hathaway, J. — The question presented by the exceptions, is, whether or not a tenant of land claiming title, and having a possession thereof, which gives him a lawful right to "*betterments*," according to our statutes, is liable as a trespasser *quare clausum* for acts, which had been done by him upon, and to the land, during the time of the possession (of it,) by which his right to betterments became matured.

It is very clear that the tenant is not a trespasser in such case. R. S. c. 145, § 23 and 47; *Chadbourne* v. *Straw & al.* 22 Maine, 450. *Exceptions overruled, and judgment on the verdict.*

Shepley, C. J., and Wells and Howard, J. J., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1853.

COUNTY OF OXFORD.

TRUE *versus* ANDREWS *& al.*

Upon a note, given by co-partners, to which the limitation bar has once attached, no subsequent acknowledgment promise, or payment made by one co-partner, can create any liability upon the other, to pay the note.

ON FACTS AGREED.

ASSUMPSIT by the indorsee of a note, made in 1838, by the defendants, Abraham Andrews & Stephen Andrews, as co-partners. In 1847, Stephen Andrews paid $25, upon the note, which was subsequently indorsed to the plaintiff.

Whitman, for the plaintiff.

Hastings, for the defendants.

WELLS, J. — It is contended by the plaintiff, that the payment made by Stephen Andrews, one of the partners, should be regarded as a new promise by both of them, and takes the

case out of the statute of limitations. And such was the law prior to the passage of the Revised Statutes.

But by c. 146, § 20, one joint contractor does not lose the benefit of its provisions by an acknowledgment or promise made by another. And by the twenty-fourth section of the same chapter it is provided, "If there are two or more joint contractors, or joint executors or administrators of any contractor, no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any payment, made by any other or others of them."

Parties are to be regarded as joint contractors whether the contract results from their individual and separate acts or from the act of one having power to bind the others. No exception is made in the statute in relation to partners, and as they are joint contractors, they are embraced within it. It appears to have been the intention of the Legislature to take away from a joint contractor the power of reviving the contract against another, by any acknowledgment, promise or payment, so as to deprive him of the benefit of the statute.

The result is, that the payment made by Stephen Andrews had no effect upon the rights of Abraham, and a nonsuit must be entered. *Pierce* v. *Tobey*, 5 Metc. 168.

Plaintiff nonsuit.

Shepley, C. J., Tenney and Appleton, J. J., concurred, Howard, J., concurred in the result.

Inhabitants of Livermore *versus* Inhabitants of Phillips.

By an Act of 1842, a part of the town of Berlin was annexed to the town of Phillips, and as to the residue of Berlin, its incorporation was annulled.

This Act, so far as affects the settlement of persons who had resided in Berlin, is to be considered as a *division* of that town, and not merely as an *annexation* of a part of it.

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

Assumpsit, for supporting an illegitimate pauper child whose mother, at the time of its birth, March 3, 1831, resided and had a legal settlement in the town of Berlin.

In the fall of the same year, the mother, with the child, removed to Phillips, and continued to reside there until 1847 or 1848.

By an Act of March 17, 1842, a portion of Berlin was "set off from Berlin and annexed to and made a part of the town of Phillips;" and as to the residue of Berlin, the Act of its incorporation was repealed. The town of Phillips was authorized, in the name of the town of Berlin, to collect all the taxes due to Berlin, and required to pay all the debts due from it, except one quarter of its State tax.

The last residence, which the pauper's mother had in Berlin, was in that part of it, which became a part of Phillips.

In 1847 or 1848, she and the pauper removed to Livermore, where they continued to reside, until the death of the latter in 1851. The pauper was never emancipated, but always lived with, and under control, of the mother.

The case was submitted to the Court for a legal decision.

Walton, for the plaintiffs.

Illegitimate children "follow and have the settlement of their mother at the time of their birth." The settlement of the pauper was, therefore, once in Berlin. The Act of 1842 *divided* the town of Berlin, and annexed to Phillips that part in which the pauper's settlement and last residence had been. That annexation fixed the settlement in Phillips. R. S. c. 32, § 1, 4th clause; *Smithfield* v. *Belgrade*, 19 Maine, 387; *Belgrade* v. *Dearborn*, 21 Maine, 334. Otherwise she must have lost one settlement, without gaining another, which is a result unallowed by our laws. R. S. c. 32, § 2.

May, for the defendants.

1. The pauper, being illegitimate, follows and has the settlement of the mother. R. S. c. 32, § 1 and 2.

2. The mother had her settlement in Berlin. The pauper's settlement must be Berlin, unless she gained another in her own right, for she could gain no new one *derivatively* from the mother. *Sidney* v. *Winthrop*, 5 Maine, 123; *Biddeford* v. *Saco*, 7 Maine, 270; *Fayette* v. *Leeds*, 10 Maine, 409.

3. The pauper, being unemancipated, could gain no settlement in her own right. *Milo* v. *Kilmarnock*, 11 Maine, 455; *Fayette* v. *Leeds*, before cited.

4. By the statute of March 17, 1842, a part of Berlin was annexed to Phillips, and it was that part, on which the pauper and her mother had resided, but on which they did not reside at the time of the passage of said statute. This is the case of the *annexation* of a part of one town to another, and not the case of a *division* of a town; and it has the same effect as the incorporation of a new town. Stat. of Mass. passed in 1793; R. S. c. 122, § 1 and 2; *Hallowell* v. *Bowdoinham*, 1 Maine, 129; *New Portland* v. *Rumford*, 13 Maine, 299; *New Portland* v. *New Vineyard*, 16 Maine, 69.

5. Such persons only as dwell and have their home on the territory annexed, *at the time of the annexation*, have their settlement transferred to the new town. Statutes before cited; *Lexington* v. *Burlington*, 19 Pick. 426.

6. Neither annexation or incorporation will have any effect in changing the settlement of a pauper, who is incapable of gaining a settlement in his own right. *Milo* v. *Kilmarnock*, 11 Maine, 455, before cited.

7. The pauper in this case, then, stands in the same position as if the Act incorporating Berlin had been repealed, without any provision being made as to the settlement of its paupers.

8. The cases, *Smithfield* v. *Belgrade*, and *Belgrade* v. *Dearborn*, cited by the plaintiffs, when rightly considered, do not conflict with these positions, while these positions are fortified and strengthened by the cases of *Groton* v. *Shirley*, 7 Mass. 156; *Great Barrington* v. *Lancaster*, 14 Mass. 253; *Fitchburg* v. *Westminster*, 1 Pick. 144; *Sutton* v. *Dana*, 4 Mass. 117.

Shepley, C. J. — Whether the pauper had a legal settlement in the town of Phillips must depend upon the construction of the Act approved on March 17, 1842, by which the former town of Berlin was annihilated without any provision made for the future support of its paupers.

If the former town of Berlin be considered as divided, as well as annihilated by the Act, the settlement of the pauper was thereby transferred to the town of Phillips, by the first clause of the statute, c. 32, § 1, mode 4. If it be not considered as divided, and that part of it united with the town of Phillips be regarded as an "annexation" to that town in the sense, in which that term appears to have been used in the decided cases, the settlement of the pauper will not have been thereby transferred to the town of Phillips. It may not be easy to reconcile all the cases, which speak of "division" and "annexation" with reference to the settlement of paupers. And it may be difficult to approve of all the *dicta* contained in them.

No statute has in terms provided, that a settlement may be gained by the annexation of part of one town to another. There has long existed a provision, that when a new town was incorporated, composed of one or more old towns, the persons having a legal settlement in the old towns and resident in the new at the time of its incorporation, should have settlement in the new town.

In the case of *Groton* v. *Shirley*, 7 Mass. 156, it was decided, that the annexation of a part of one town to another should have the effect of an incorporation of a new town, upon the settlement of the persons then resident upon the part annexed, and having a legal settlement in the town from which it was taken.

This rule of construction has been continued. *Fitchburg* v. *Westminster*, 1 Pick. 144; *Hallowell* v. *Bowdoinham*, 1 Greenl. 129; *New Portland* v. *Rumford*, 13 Maine, 299; *New Portland* v. *New Vineyard*, 16 Maine, 69. To annex is to unite one thing to another. There is no reference made to any effect, which might thereby be produced upon that, with which the thing united might have been before connected. But the word "annexation" appears to have been used in the legal sense; and in the decided cases to designate the act of separating a part of a town from it and uniting it with another

town. No case has been noticed in which the term was used as one of importance, where it did not appear, that the town, from which the part annexed was taken, was left as an existing corporation. If this be the sense in which the term annexation has been used, the facts reported in this case do not exhibit an act of annexation in the legal sense; for no corporation was left, from which part of Berlin was taken and united to Phillips.

It is doubtful, whether the definition of the phrase used in the statute, "upon the division of any town," intimated in the case of *Hallowell* v. *Bowdoinham*, will prove to be entirely satisfactory. It is there said, that it "seems to have in view such a division of a town as shall produce two or more towns composed of the same territory, which formed the original town."

"Division" is the separation of any entire body into parts. It does not include the idea of preservation of any previous organization, form or shape. There is no indication, that the word was used in the statute in any unusual or technical sense. If a town should by Act of the Legislature be separated into two or more parts and those parts should be incorporated, or without it, organized into plantations, the Act incorporating the town being repealed or annihilated, would the town be divided? If one part were incorporated into a plantation and the others were left without it, would there be no division? Would it be necessary, that the two or more parts should either have any political organization if their respective parts were otherwise designated? If not, can it be incorrect to speak of a town as divided, when it has been separated into two parts, because one of them was left without organization and the other was united to another town? In such cases there might be difficulty with respect to the settlement of those persons not included in any new or other town; but would that be sufficient to determine, that the town was not divided in the sense of the statute?

The Act of March 17, 1842, does not seem to exhibit the

aspect of an Act providing for the separation of a part of a town and the annexation of it to another town.

The town of Berlin appears to have been divided or separated into two parts. One of these parts was left without any organization. The other, which appears to have included all the settled part, was united to the town of Phillips, which was authorized to collect all the taxes due to the former town of Berlin and required to pay all the debts due from it, except one fourth part of the State tax, which was left to be paid by the remaining part of Berlin.

The use of the phrase, "and annexed to and made part of the town of Phillips," cannot control the construction of the Act; for all parts of it, and all its provisions are to be examined to ascertain its true character and the intention of the Legislature. So completely absorbed was all the settled part of Berlin in the town of Phillips, that the latter was authorized to use the corporate name of the former to collect all debts due or to become due to the town of Berlin. Such "annexations" as this are not unfamiliar to the ear, but they do not appear to be of that character, which by judicial construction have been considered to have on the settlement of paupers the like effect as the incorporation of a new town.

Defendants defaulted.

TENNEY, WELLS, HOWARD and APPLETON, J. J., concurred.

COUNTY OF YORK.

HUTCHINSON *versus* CHADBOURNE.

As a general principle, in the law of evidence, a party offering to prove a fact by a deed, must produce the deed and prove its execution.

To this principle, in certain classes of cases "touching the realty," the thirty-fourth Rule of this Court has created an exception.

By that Rule, in those classes of cases, office copies of deeds of land are made admissible as evidence.

But that Rule does not authorize the introduction of such copies as evidence, when "*the realty*" is not the *subject matter* of the suit.

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

Trespass against the sheriff, for the act of his deputy in attaching a stock of goods on June 13, 1851.

The officer justified the attachment of the goods as the property of one Charles W. Boothby, against whom he held several writs for service.

The plaintiff introduced evidence to show, that he purchased the goods of Boothby on June 2, 1851. The defendant contended, that that purchase was fraudulent and void as to the creditors of Boothby. As a part of his evidence tending to show that fraud, the defendant proposed to prove that Boothby had fraudulently conveyed several lots of land to other persons, and offered office copies of the following deeds from said Boothby, viz; one to Nathaniel T Boothby, dated June 2, 1851, recorded June 3, 1851; and two to Jeremiah M. Mason, one dated July 8, 1850, recorded July 10, 1850, and the other dated Nov. 22, 1850; also office copies of three deeds of land from Thomas M. Pierson to Charles W. Boothby. These copies were objected to by the plaintiff, but were admitted.

The verdict was for the defendant and the plaintiff excepted.

Shepley and *Hayes*, for the plaintiff.

The plaintiff was not a party or privy to the conveyances of the land. The admission of the copies was therefore erroneous.

The action is not one, "touching the realty." The defendant introduced the copies of deeds, not for the purpose of tracing title to land, but to satisfy the jury that Charles W. Boothby had valuable property on a certain day, and that he divested himself of this property, and so to create a presumption of a fraudulent intention. These copies were offered to prove independent facts, and were inadmissible for such purpose.

"It is a general principle of the law of evidence, that the party offering to prove a fact by deed, must produce the origi-

nal and prove its execution. This principle is, however, so far relaxed by the 34th rule of this Court, as to permit, under certain circumstances, office copies of deeds pertinent to the issue, from the Registry of Deeds, to be used without proof of their execution, when the party offering such office copies in evidence, is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee, or his heirs. But this is permitted only in actions touching the realty, and for reasons given in *Woodman* v. *Coolbroth*, 7 Greenl. 181. In all other cases, the general principle above alluded to, remains unimpaired, unless it be shown that the instrument has been lost by time or accident, or is in the possession of the adverse party, in which cases its production may be dispensed with, but its contents and execution must still be proved."

Such is the language of the Court in *Kent* v. *Weld*, 2 Fairf. 459, and seems to be decisive of this point.

Eastman and *Leland* for the defendants.

1. It was the duty of the plaintiff to present his exceptions in such a manner as to exhibit plainly and distinctly his grounds. "Every point intended to be made, should be presented to the Judge at the trial explicitly." It is not enough for a party to say he excepts to the introduction of evidence, he should specify the reasons of his objecting. True, the plaintiff objected to the office copies, yet the case does not find that he objected, because they were *office copies*. From all that appears he only objected *generally*. *Emery* v. *Vinal*, 26 Maine, 303; 3 Gill. S. Carolina, 198; *Elwood* v. *Deipendorf*, 5 Barb. 398; *Glidden* v. *Dunlap*, 28 Maine, 384; *Comstock* v. *Smith*, 23 Maine, 202.

2. The office copies were properly admitted. *Eaton* v. *Campbell*, 7 Pick. 10; *Scribner* v. *Swift*, 13 Pick. 527; *Turbee* v. *Welsh*, 17 Mass. 165; *Ward* v. *Foster*, 15 Pick. 187.

Shepley, C. J. — The action is trespass commenced against the defendant as sheriff for the acts of one of his deputies, in making an attachment of a stock of goods as the property of Charles W. Boothby, on June 13, 1851.

The plaintiff claimed the goods as a purchaser of them from Boothby on June 2, 1851. The defendant, acting for the attaching creditors of Boothby, alleged that purchase as against them to have been fraudulently made. To contribute to the proof of it he was permitted to read an office copy of a deed of real estate, conveyed on the same June 2, by Charles W. Boothby to Nathaniel T. Boothby; and office copies of two deeds of real estate from Charles W. Boothby to Jeremiah M. Mason, and of three deeds of real estate from Thomas M. Pierson to Charles W. Boothby. Objection was made by the counsel for plaintiff to their introduction.

By the thirty-fourth rule of this Court, office copies of deeds pertinent to the issue, may be read in evidence without proof of the execution of the deeds, "in all actions touching the realty" by one not a party to the deed, nor claiming as heir, nor justifying as servant of the grantee or of his heirs.

In the case of *Kent* v. *Weld*, 2 Fairf. 459, it was decided, that such office copies could be admitted only in actions touching the realty; and that in all other actions the general principle of the law of evidence prevailed, that a party offering to prove a fact by deed must produce it and prove its execution.

Testimony of a proper description tending to prove, that Charles W. Boothby made a fraudulent conveyance of property at or about the same time to another person, would have been admissible to exhibit a general design on his part to defraud his creditors, and therefore to render it probable, that the sale in question was made in part accomplishment of that design. *Aldrich* v. *Warren*, 16 Maine, 465; *Hawes* v. *Dingley*, 17 Maine, 341.

It did not appear, that the plaintiff was present, when the conveyance was made to Nathaniel T. Boothby or that he had any knowledge of it at the time of the sale made to him. It could therefore have no other influence upon his rights than to exhibit the general design of his vendor. He could not personally be subject to any unfavorable inference to be

drawn from it, because he did not introduce testimony to explain a transaction, respecting which he had no knowledge. *Exceptions sustained, verdict set aside and new trial granted.*

TENNEY, HOWARD and APPLETON, J. J., concurred.

GOODWIN *versus* CHADWICK.

In an action by the indorsee against the maker of a negotiable note, the indorser, if not interested, is not precluded, by any rule deduced from *public* policy, from testifying to the original execution and validity of the note.

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

ASSUMPSIT by the indorsee against the alleged maker of a negotiable note, indorsed by the payee "*without recourse.*"

The signature of the defendant was denied.

To prove the signature, the plaintiff released the indorser and offered him as a witness. The defendant objected to him, as being inadmissible on the ground of public policy. He was however admitted, and the defendant excepted.

Shepley and *Hayes*, for the defendant.

Ever since the case of *Churchill* v. *Suter*, 4 Mass. 156, it has been settled on *grounds of public policy*, that the payee of a promissory note, who has indorsed it, is not a competent witness for the defendant, in a suit by the indorser against the maker, to testify to any facts affecting the original liability of the maker. *Adams & als.* v. *Carver & als.* 6 Greenl. 390; *Lane* v. *Padelford*, 14 Maine, 94; *Clapp* v. *Hanson*, 15 Maine, 345; *Abbott* v. *Mitchell & al.* 18 Maine, 354; *Davis* v. *Sawtelle*, 30 Maine, 389.

While the law, by a rule demanded by public policy, thus deprives a *defendant* of the testimony of a witness, who may know that the note in suit never was signed by the defendant, why should a *plaintiff* be permitted to have the benefit of such a man's testimony, to prove the execution of such a note?

If public policy must prohibit a man, who has given cur-

rency to a negotiable note by his indorsement, from testifying that it was not executed by the party whose name appears as that of the maker, fair dealing and equal rights under the law to parties litigant would seem to require the exclusion of testimony from the same witness, showing that the note *was* executed by the alleged maker. "Right and justice" ought to be administered equally and impartially, as well as "freely and without sale," &c.

It is not seen why a witness who is not allowed to testify for the defendant in an action, that the note in suit was *not* signed by him, should be permitted to testify for the plaintiff that the note *was* signed by the defendant?

It is believed that none of the many cases, decided upon the admissibility of such a witness, have turned upon the question of policy. They have all turned upon the question of interest.

Eastman and *Leland*, for the plaintiff.

HOWARD, J. — Generally, a party to a bill or note, if not interested in the event, and not otherwise disqualified, is a competent witness in a suit between other parties to the instrument. But in this State, the payee of a negotiable promissory note, who has indorsed it, "*without recourse*," is held to be an incompetent witness to prove it originally void. This rule of law, supposed to be founded in public policy, favoring the security and circulation of negotiable paper, has been adopted and settled too long, and too firmly, to be now changed without serious inconvenience to the public. *Deering* v. *Sawtel*, 4 Maine, 191; *Chandler* v. *Morton*, 5 Maine, 374; *Clapp* v. *Hanson*, 15 Maine, 345; *Abbott* v. *Mitchell*, 18 Maine, 354; *Davis* v. *Sawtelle*, 30 Maine, 389; *Berry* v. *Hall*, 33 Maine, 493.

The same rule has been sustained by the Supreme Court of the United States. *Bank* v. *Dunn*, 6 Peters, 51; *Bank* v. *Jones*, 8 Peters, 12; *United States* v. *Leffler*, 11 Peters, 86, 94; *Henderson* v. *Anderson*, 3 Howard, 73; *Smyth* v. *Strader*, 4 Howard, 404. It has been adopted in Mas-

sachusetts and Pennsylvania, and rejected in New Hampshire and New York, and received and denied in other States respectively. See Chitty on Bills, (11th American from 9th London edition,) 669, notes 1 and 2, and cases there cited from the Reports of the different States.

Since the decision in *Jordaine* v. *Lashbrooke*, 7 T. R. 599, the rule has been in England, that a party to an instrument, whether negotiable or not, if not disqualified in other respects, is a competent witness to prove any admissible facts affecting the rights of other parties to the instrument. The doctrine there, and in those States where the rule of exclusion has been rejected, is an extension of the rule as adopted in this State. There, the witness offered in this case, would have been competent to testify generally; and here, under a more restricted rule, he was competent to prove the execution, but not to impair the original validity of the note. *Abbott* v. *Mitchell*, 18 Maine, 354; *Rice* v. *Stearns*, 3 Mass. 225.

Exceptions overruled.

SHEPLEY, C. J., and TENNEY and APPLETON, J. J., concurred.

COUNTY OF CUMBERLAND.

STATE *versus* LEIGHTON.

The penal provision of statute of 1850, c. 159, art. 10, § 13, for the protection of schools, is applicable to private schools regularly established and in operation for instructing in the art of writing.

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

COMPLAINT before a municipal court. The case came to this Court by appeal. The complaint charged that the defendant willfully disturbed a private school, kept in a district school-

house, by one Lambert, for instructing in the art of writing. The evidence tended to prove that such a school was kept in the school-house of the district of which the defendant was a resident, and that the defendant willfully disturbed that school, in the manner forbidden by the statute of 1850, c. 193, art. 10, § 13.

The jury were instructed, that the provisions of that section were applicable to a private school for instruction in writing, regularly organized and established and in actual opation, and the defendant excepted.

S. Fessenden, for the defendant.

1st. The writing school was not a school within the meaning of the statute. It was not a town or public school, set up in the regularly constituted limits of the district as established by the town.

2d. It was not set up in behalf of the district by the school district agent, nor could such a school be so set up and supported out of the money apportioned to the district by the town.

3d. The teacher was not subject to any examination before the superintending school committee; had no such certificate from the superintending school committee of the town, as the statute requires teachers to obtain as to capacity and morals, in order to keep such a school as this statute contemplates and protects. The school was not under their supervision or control, as is required in relation to schools established under the statute. The committee were not bound by law to visit such school, or select for it any books or make any return or report of it; the teacher was in no manner answerable to the committee, could not be dismissed by them for misconduct or incompetency, nor could any of his scholars be expelled by them; he was not subject to any of the forfeitures, mentioned in the statute. A private writing school, set up by the mere authority of the teacher himself, is not among the schools and institutions of learning enumerated, authorized or protected by this statute.

The statute enumerates all the schools, which it was de-

signed to protect. The phrase "other place of instruction," only means a building or place, other than a school-house, in which a public school may sometimes be kept.

4th. The agent could not lawfully let or hire the school-house to Lambert, in which to set up this writing school. Lambert was not rightfully or lawfully there; he was not an inhabitant of the district, was a mere trespasser upon property which belonged to the defendant in common with the rest of the inhabitants.

5th. If this statute protects this writing school, it must equally protect dancing schools, caucuses, puppet shows, dancing bears, or any exhibitions, however vile, which the veriest traveling imposter may set up.

6th. There is no need of a construction, which should enfold this vagrant writing master within its embrace. It ought to be satisfactory to him that the other laws of the State give to his business all the protection, afforded to farmers, merchants and mechanics of the land in their respective departments of business.

Deane, County Attorney, for the State.

HOWARD, J. — By the Act of 1850, c. 193, "to provide for the education of youth," art. 12, § 1, the seventeenth chapter of the R. S. and other statutes upon the subject of education, were repealed. By that Act the general duties of towns, the formation, powers and obligations of school districts, the duties and authority of superintending school committees, and school agents, and the duties and qualifications of instructers, including those of the "presidents, professors and tutors of colleges, and of the preceptors and teachers of academies, and all other instructers of youth, whether in public or private institutions," are prescribed and enjoined, in general, but comprehensive terms. The whole subject of education, public and private, primary and liberal, seems to have been before the Legislature, at the passage of that Act, and to have been regarded in the most particular, as well as in a more enlarged acceptation. By art. 10, § 13, of the

same Act, a penalty is provided for the willful interruption or disturbance, by any person, of *any teacher or pupils, in any school* kept in "*any school-house or other place of instruction.*" This provision appears to have been intended to secure the privileges of imparting and receiving education to all, without distinction or interruption.

A private school for instruction in writing embraces a branch of education usually taught in public schools, and recognized by law, and is clearly within the purview and protection of the statute to which reference has been made. The argument which excludes such schools from such protection, will also exclude colleges, academies, private schools of all descriptions, and institutions of instruction of every sort, with the exception of town or district schools. But the terms of the Act will embrace all schools for instruction, contributing to education in an enlarged signification, and we do not perceive any reason or authority for restricting the operation of the statute to a single class of schools. The language of the Act, the object in view, and the propriety and reason of the thing, all tend to the same conclusion.

Exceptions overruled.

TENNEY, WELLS and APPLETON, J. J., concurred.

DANE *& al. versus* TREAT.

The Judge has the right to direct in what stage of the case, a party shall introduce his testimony; and to enforce a notice upon him that, if he stop, he will be precluded from afterwards presenting further evidence of a cumulative character.

A party, after having once stopped in the introduction of his testimony, has the right, in any subsequent stage of the case, to introduce further evidence, though merely cumulative in its character, *unless* before having stopped he was notified that *such* testimony would not subsequently be received.

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

ASSUMPSIT for some patented machinery, put by the plaintiffs into the defendant's mill.

The defence was, that the defendant had never accepted the machinery, and that, in fact, it was of no value.

After the introduction and examination by the plaintiffs of many witnesses, the defendant moved for a nonsuit, which the Judge declined to order. The defendant then called several witnesses, and after having examined them, announced that he should "stop here."

The plaintiffs then read three depositions, tending to show that the machinery was of value.

The defendant then offered to read two depositions, to show that it was of no value. The plaintiffs objected to the admission of these depositions, "*at this stage of the case*, as they offered cumulative testimony only on a point which the defendant had raised, and to support which he had introduced evidence, before announcing that he should stop in the defence." The objection was sustained. The depositions were excluded, and the defendant excepted.

Poor & Adams, for the defendant.

Fox, for the plaintiffs.

WELLS, J. — It appears by the exceptions, that the defendant introduced testimony pertinent to his defence, and rested his case, announcing that he would stop. The plaintiffs then read several depositions responsive to the defence, and as appears by the exceptions, a part of the same testimony also tended to support the ground taken by them in the opening of their case. The defendant then offered depositions containing cumulative testimony in addition to that previously introduced by him, and they were rejected.

It has not been the practice in this State to preclude a party, that has once stopped in the introduction of his evidence, from presenting further testimony of a cumulative character, or even upon some new point pertinent to the issue. Nor is it perceived that justice or convenience requires a change of the course heretofore pursued.

The adoption of such a rule would have shut out the plaintiffs from the benefit of some of the facts stated in their de-

positions after they had once stopped, and the defendant had entered upon his defence, for some of the same facts contained in their depositions were not only calculated to answer those of the defendant, but were also cumulative, and in corroboration of what they had previously proved. The presiding Judge would undoubtedly have power to direct a party when to introduce his testimony, and to enforce a notice to him, that if he stopped, he could not afterwards be permitted to present any further testimony. Such power is necessary to the proper order and guidance of a trial. But a party might very well understand, that the ordinary course would be followed, unless such notice was given. The defendant therefore, ought to have been permitted to introduce his depositions. *Exceptions sustained.*

SHEPLEY, C. J., and TENNEY and APPLETON, J. J., concurred.

ROGERS *versus* LIBBEY.

In a subsequent action between the same parties, it is competent for either party, in order to raise an estoppel, to prove, by parole, what was the ground of decision in the former suit, when the same is not apparent by the record.

An estoppel is created, if the ground, relied upon in the second suit, was directly decided in the first.

Assumpsit for use and occupation, although the plaintiff's title be established, cannot be sustained, except upon proof, express or implied, that the defendant recognized such title and occupied under it.

ON REPORT from the *District Court*, COLE, J.

ASSUMPSIT.

A house, built upon land owned by a third person, was occupied by the defendant. While he was so occupying, it was sold upon an execution against him, in 1847, and with his knowledge, was purchased by the plaintiff. The defendant continued to occupy it, refusing to pay rent to the plaintiff, and alleging that the ownership was in one Sweetser.

In 1849, the plaintiff brought trover against the defendant

for the conversion of the house. At the trial of that suit, the defendant introduced evidence to prove that the house was the property, not of the plaintiff, but of Sweetser. The verdict and judgment were for the plaintiff.

The present suit is for the use and occupation prior to the commencement of the suit in trover. The defendant offered the same evidence, which he used in that action, in relation to the ownership. It was objected to on the ground that the title had been already settled in that action, between the same parties, in which, (as the defendant admits,) the evidence now offered was used by him.

The defendant also contends that this suit is unmaintainable, on the ground that the relation of landlord and tenant never existed between the parties, and that no promise to pay can be implied.

By consent of parties, the case was reported for the adjudication of the Court upon the legal questions, 1st, whether, by the former verdict and judgment, the defendant is estopped to deny the plaintiff's title; and 2d, whether, from the facts stated, the law will imply a promise by the defendant to pay for the use and occupation.

Poor & Adams, for the plaintiff.

1. The defendant is estopped, by the former judgment, to deny the plaintiff's title. *Chase* v. *Walker*, 26 Maine, 555.

2. The defendant having enjoyed the use and occupation of the plaintiff's property, the law will imply an undertaking on his part to pay a reasonable compensation. *Slade* v. *Morley*, Yelverton, 21; Chit. on Con. 6, and note; *Bowes* v. *Tibbetts*, 7 Maine, 459; *Weston* v. *Davis*, 24 Maine, 375; 2 Greenl. Ev. 108; 3 N. H. 384.

A. W. True, for the defendant.

1. The defendant is not estopped to deny the plaintiff's title. Estoppel must be certain *to every intent.* It is not *the recovery*, but *the matter alleged* by the party, and *upon which the recovery proceeds*, which creates the estoppel. It must be the matter of fact put in issue. Co. Litt. 352, a; 1 Greenl. Ev. 22; Bou. Law Dict. (Estoppel,) Matter of record; 4

Kent's Comm. 261; *Outram* v. *Morewood*, 3 East, 355; *Boies* v *Witherell*, 7 Greenl. 162.

How can we be precluded to prove title in a third person, under whom we occupied? Would not such proof shut out any implication of a promise by us to pay the rent to the plaintiff?

Neither in the former suit nor in this, did the defendant set up title in himself. The judgment there did not settle the title. Sweetser is the true owner, and we must pay rent to him.

2. The relation of landlord and tenant never existed between these parties. There was no privity of contract. The defendant always denied the plaintiff's title. There is nothing from which to imply a promise.

The action of trover, in itself, admits the plaintiff's possession to have rightfully obtained.

HOWARD, J. — The plaintiff brought trover for a dwelling-house, against the defendant, and recovered upon the general issue. It is admitted, that the defendant then contested the title of the plaintiff, and alleged and attempted to prove that it was in Sweetser, under whom he claimed to occupy; that the whole matter was submitted to a jury who found for the plaintiff, and that judgment was rendered accordingly for him, in this Court. To this suit, which is for rent of the same house prior to the time of the conversion, the defendant now alleges and offers to prove, the same matter in defence, and the first point presented by the report is, whether he is estopped to deny the title of the plaintiff.

The judgment of a Court having jurisdiction, is conclusive between the parties, upon the matters submitted, and they are estopped to present them again for decision, in another suit *inter se*. And it is competent for a party to prove by parole the grounds of decision, when not apparent of record, in order to raise the estoppel. *Outram* v. *Morewood*, 3 East, 365; 1 Phillip's Ev. 242–246; *Chase* v. *Walker*, 26 Maine, 555; *Garder* v. *Buckbee*, 3 Cow. 125; *Wood* v. *Jackson*, 8 Wend. 31–47; *Adams* v. *Barnes*, 17 Mass. 365.

The defendant is, therefore, estopped to deny the title of the plaintiff to the dwellinghouse, at the time of the conversion.

But we are satisfied that this action cannot be maintained. By the facts agreed, it does not appear, that the relation of landlord and tenant ever existed between the parties. The action of trover was for the *conversion* of the dwellinghouse, and does not assume that the defendant came wrongfully by it, but supposes that he might have come by it lawfully. By bringing that action, the plaintiff must be regarded as waiving all supposed trespasses and wrongs caused by the occupation of the defendant prior to the conversion. There is no proof of an express promise to pay for the rent or use of the building during that time, and none can be implied from the facts and circumstances proved. 1 Chit. Pl. 148; *Cooper* v. *Chitty*, 1 Burr. 31. *Plaintiff nonsuit.*

SHEPLEY, C. J., and TENNEY, WELLS and APPLETON, J. J., concurred.

COUNTY OF FRANKLIN.

HAYDEN *versus* BARTLETT.

Ordinarily, the measure of damage in trover for unrestored property is the value of it at the time of its conversion, with interest.

To a statement, made by the Judge to the jury, of what facts, in his view, the evidence proved, exceptions do not lie.

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

TROVER for a pair of steers. The plaintiff had the steers in a pasture by the road side. The defendant's drove of cattle passed along the road, and the plaintiff's steers were soon afterwards missed. There was evidence tending to show, that they had gotten into the drove. The defendant requested instruction to the jury, that in order to recover for them,

the plaintiff must prove a conversion. This instruction was given, together with a remark by the Judge, that "there was no doubt the defendant sold the steers, if they were in the drove, as there was no evidence that they had been turned out."

The Judge also instructed the jury that, if the verdict should be for the plaintiff, the damage should be the value of the steers at the time of the conversion, with a sum as damage for the detention equal to the interest on the value from that time.

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

Webster, for the defendant.

Cutler, for the plaintiff.

HOWARD, J. — A party cannot except to instructions given at his request. Those upon the subject of proof of conversion, in this case, were desired by the defendant, and they were clearly correct.

The remarks of the presiding Judge, accompanying those instructions, had reference to the state of facts assumed, or appearing at the trial, and could not have misled the jury, or in any manner affected the rights of the defendant unfavorably. If considered as an expression of his opinion, or a commentary upon the facts, it embraced no directions to the jury, and afforded them no rule of action, and is not subject to exceptions. It was not any opinion, direction or judgment, or any order, ruling, decision or decree of the Judge, involving a question of law or equity, to which exceptions could be alleged. R. S. c. 96, § 17; Stat. 1852, c. 246, § 6, 8, 11; *Clapp* v. *Balch*, 3 Maine, 216; *Gilbert* v. *Woodbury*, 22 Maine, 246; *Bank* v. *Johnson*, 24 Maine, 490; *Loud* v. *Pierce*, 25 Maine, 233; *Carver* v. *Jackson*, 4 Peters, 80.

The measure of damages in *trover*, is ordinarily, in this State, and in the United States generally, where there has been no restoration, the value of the property at the time of the conversion, with interest from that time. The instruc-

tions appear to have been in accordance with this well settled rule, and were not erroneous. *Greenfield* v. *Leavitt*, 19 Pick. 3; *Johnson* v. *Sumner*, 1 Met. 179; *Baker* v. *Wheeler*, 8 Wend. 505; *Stevens* v. *Low*, 2 Hill, 132.

Exceptions overruled.

SHEPLEY, C. J., and TENNEY and APPLETON, J. J., concurred.

STATE *versus* THURSTIN.

In an indictment, every material fact necessary to constitute the offence charged, must be set forth with certainty as to the time.

An indictment against a man for adultery, is unsustainable if it neither charge that he was a married man or that the female, at the time when the offence was alleged to have been committed, was a married woman.

An indictment was found in October, 1852, charging, that the defendant on the 25th of March, 1851, committed the crime of adultery with E. W. the wife of S. H. W., she being a married woman and the lawful wife of said S. H. W.; — *Held*, that the indictment did not sufficiently allege that she was a married woman, when the alleged offence was committed.

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

INDICTMENT found at the Oct. term, 1852, for the crime of adultery. It charges that the defendant, at Avon, "on the 25th day of March, 1851, did commit the crime of adultery with one Emeline Whitehouse, the wife of one Solomon H. Whitehouse, she, the said Emeline Whitehouse, being a married woman, and the lawful wife of him the said Solomon H. Whitehouse."

Upon the opening of the case for trial, the defendant's counsel objected to the sufficiency of the indictment. If the Court shall be of opinion, that the indictment is sufficient, the case is to stand for trial; otherwise a *nolle prosequi* is to be entered.

May, for the defendant.

The indictment attempts to charge adultery, but fails to allege that crime. It no where charges, that the defendant was a married man. Nor does it charge, that, *at the time of*

committing the alleged offence, Emeline Whitehouse was a married woman.

The allegation that she was a married woman, relates to the time of finding the indictment, at which time she may perhaps have been the married wife of Solomon H. Whitehouse, though nineteen months before, viz. on the 25th of March, 1851, she was unmarried. *State* v. *Godfrey,* 24 Maine, 232; *State* v. *Philbrook,* 31 Maine, 401; *Moore* v. *Commonwealth,* 6 Metc. 243; *Commonwealth* v. *Reardon,* 6 Cush. 78.

Evans, Attorney General, for the State.

HOWARD, J. — Every material fact which serves to constitute the offence charged, should be alleged and set forth in the indictment, with precision and certainty as to time and place. A general averment that the accused had committed a particular crime named, without more specific allegations, would be insufficient. But after the time has been stated with certainty, it may be referred to, in respect to other facts alleged, by the terms *then* and *there,* without being repeated. 2 Hale, P. C. 178; Hawk. b. 2, c. 25, § 78, and c. 23, § 88; 1 East, P. C. 346; 1 Chitty, C. L. 181–2.

In this case, the fact of committing the crime of adultery, at a certain time and place, with Emeline Whitehouse, is first alleged against the accused; but to the fact that she was a married woman, and the wife of another, no time is averred, nor is there a reference, to the certain time before stated, by the words *then* and *there,* or any equivalent terms. Although we can readily suppose what was intended by the averments, yet, in criminal pleading, nothing can be taken by intendment. The allegation, "*being* a married woman, and the lawful wife of Solomon H. Whitehouse," has reference to the time of finding the indictment, and not to the time of the offence, in strictness of criminal law. *Bridge's case,* Cro. James, 639; 2 L'd Raym. 1467; 2 Chitty, C. L. 181. The indictment is, therefore, insufficient.

SHEPLEY, C. J., and TENNEY, WELLS and APPLETON, J. J., concurred.

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.

MORRELL *versus* COOK.

Constables have authority to serve writs in personal actions, wherein the damages demanded do not exceed one hundred dollars.

In the service of such writs, constables may make valid attachments of real estate.

The service of such a writ by a constable, though it be not directed to him, is valid and effectual, unless objected to pending the suit.

Upon an execution, issued on the judgment in such suit, a constable may lawfully levy and set off real estate.

In construing a deed conveying a "farm," parole evidence is admissible to show whether it included a fenced lot, belonging to the grantor, upon which he had erected a tenement to let.

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

TRESPASS on land in Parsonsfield.

On May 24, 1816, one Whitten purchased of Joseph Blazo a lot of land, situated on the *north* side of the north road, and containing an acre and a half. Whitten's house, store and stable were placed upon that lot. His barn and shed were on the *south* side of the road, upon land which he purchased of John Drown.

In 1826, Whitten purchased another piece, also on the *north* side of the road, containing a quarter of an acre, adjoining the one and half acre lot; and built upon it an office, which he rented to an attorney at law. This quarter acre was called the office lot, and is the *locus in quo*. A witness testified that it had "always been enclosed in a fence by itself." Other witnesses testified that, after the attorney left the office, it continued to be rented by Whitten, for a dwellinghouse, to successive occupants, until the lot was attached, in 1845, by the plaintiff, on a writ against Whitten. In that suit, the plaintiff recovered judgment, and caused the lot to be seasonably levied and set off to him upon the execution.

For some acts done by the defendant upon the lot, this action of trespass *quare clausum* was brought. The defendant makes title in himself by a deed from Whitten to him made, in 1849, subsequent to the plaintiff's attachment. He also makes title in himself under a conveyance from Simeon Pease. It appeared that Pease claimed the land as follows: —

1. As assignee of a mortgage made, in 1831, by Whitten to McIntire and Tibbets, conveying, *the farm, which said Whitten then occupied and lived upon, situated upon the north road.*

2. As assignee of a mortgage, made by Whitten, in 1829, to Dalton, of a lot described in said mortgage as a lot of land where my house, store and stable stand, on the north side of the north road, containing one acre and a half, and is the same I purchased of Joseph Blazo, reference being had to his deed dated May 24, 1816.

3. As the immediate grantee of Whitten, under a deed made, in 1843, of land described as "a certain piece of land in Parsonsfield, being the farm on which said Whitten now

lives, occupies and improves, and being the same lot of land I purchased of John Drown, March 18, 1816." A reference to Drown's deed shows that the land which it conveyed was a large lot constituting the principal part of Whitten's farm and lying upon the *south* side of the road.

4. As the immediate grantee of Whitten by a deed made in 1847, conveying "the office lot," *the locus in quo.* This deed was given subsequent to the attachment made by the plaintiff, *but prior to the levy.* The defendant thus making title directly under Whitten, and also through Pease, objected to the validity of the attachment and levy, under which the plaintiff claims. The objection is, that though the writ was directed only to the sheriff or either of his deputies, it was in fact served and returned by a *constable,* who made the attachment, upon which the plaintiff relies. In that action Whitten appeared by attorney and answered to the suit, taking no exception to the service of the writ.

The *levy* of the land upon the execution recovered in that suit was also made by a *constable.*

The case was submitted to the Court for a legal decision, with jury powers in settling the facts.

N. D. Appleton, for the plaintiff.

McIntire, for the defendant.

Whatever title Pease had, became vested in the defendant.

Pease had perfect title as follows; —

1. Under the mortgage given in 1831, by Whitten to McIntire and Tibbetts. That mortgage conveyed the *farm* which Whitten then occupied and lived upon, situated upon the north road. That description was amply comprehensive enough to embrace, and did clearly embrace the office lot. That lot adjoined the other lands of Whitten; was connected with them; and equally with the rest constituted a part of the farm, and therefore passed by said mortgage.

2. Under the mortgage given in 1829, by Whitten to Dalton.

This mortgage also embraced the *locus in quo,* as is clearly established in *Drinkwater* v. *Sawyer,* 7 Maine, 366.

3. By the grant to Pease from Whitten, made in October, 1843. That was a grant of the farm on which Whitten lived, and plainly embraced the *locus in quo.* This grant, being expressly of the *farm*, could not be limited or restricted, by any reference in the deed to the sources from which Whitten had derived his title. *Vose* v. *Handy*, 2 Maine, 322; *Willard* v. *Moulton*, 4 Maine, 14; *Drinkwater* v. *Sawyer*, 7 Maine, 366; *Wing* v. *Burgis*, 13 Maine, 111; *Herrick* v. *Hopkins*, 23 Maine, 217; *Treat* v. *Strickland*, 23 Maine, 234; *Crosby* v. *Bradbury*, 20 Maine, 61; *Jameson* v. *Palmer*, 20 Maine, 425; *Field* v. *Huston*, 21 Maine, 69; *Marr* v. *Hobson*, 22 Maine, 321; *Moore* v. *Griffin*, 22 Maine, 350.

Whitten's deed to Pease, of 1847, was merely cumulative, being intended to settle all doubts. This expressly conveyed the *locus in quo*, and confirmed in Pease whatsoever title had ever belonged to Whitten. This conveyance was prior to the plaintiff's levy. By that levy the plaintiff therefore took nothing, unless by force of the pretended attachment on the writ. But no legal attachment was made on the writ. It was directed to the sheriff or his deputy, but was not served by either. It purports to be served, and an attachment to have been made by a constable, who was not required or authorized to serve it. The law on this subject was settled in case of *Adams* v. *Jewett*, 10 Maine, 426, which is relied on as decisive of this point.

It may be remarked also that the levy itself does not indicate any reference to any previous attachment. It relates solely to Whitten's interest at the time of the levy. *Hearsey* v. *Bradbury*, 9 Mass. 95; *Wood* v. *Ross*, 11 Mass. 271–276.

Wells, J.—This case, which has once been presented for consideration, and which is reported, 31 Maine, 120, appears to involve other questions not then raised. It is there stated, that the plaintiff's writ against Simon J. Whitten, was directed to a constable. But the case now shows, that it was directed to the sheriff or his deputies only, and not to a constable. The writ was duly served by the constable and

the attachment properly made, but it was not directed to any constable. The defendant claims title to the *locus in quo* under Whitten, through Simeon Pease, and contends, that the attachment of the land was unauthorized and invalid.

In the case of *Hearsey* v. *Bradbury*, 9 Mass. 95, where a motion was made to abate the writ, because it was served by a constable, although not directed to him, such omission was held to be a matter of form and amendable.

It is not denied, that Whitten appeared by counsel and answered to the action, and that the judgment may be good, but it is insisted, that the attachment is void. The attachment was made according to the commands in the body of the precept, and it appears to have been acquiesced in by the parties to the suit.

By the statute, c. 104, § 34, the constable was fully authorized to make the service. No objection is perceived to the service of a writ by a constable duly empowered, though it is not directed to him. He might not be obliged to make it, unless the precept was directed to him, but he may do the act without such direction, which being a mere matter of form cannot be necessary to give it validity. And by considering him as having power to obey the commands in the writ, though not directed to him, he made a legal attachment of the land. The lien created by it was preserved, by a levy duly made within thirty days from the rendition of judgment.

In the case of *Adams* v. *Jewett*, 1 Fairf. 426, the plaintiff did not request the officer to serve the writ as constable, but the direction to the constable had been erased, and it was directed to the sheriff or his deputy when delivered to the officer, who was both a deputy and constable.

The only question reserved for the opinion of the Court was, whether the entry of the action and taking judgment should be regarded as an acceptance of the service as constable. The officer was not authorized by the plaintiff to serve the writ as constable; if he had been, then he would not have been in any fault, and the plaintiff would not have had any

cause of complaint against him. The question raised in the present case is not embraced in that decision, for in this case the plaintiff procured the constable to serve the writ, and the debtor did not object to the service.

The attachment of the land was made as the property of Whitten, February 18, 1845. The defendant contends, that Pease, under whom he claims, had acquired previously a title to it. Whitten was the owner of three parcels of land. Two of them lay on the north side of "north road;" one contained a quarter of an acre, the other an acre and a half. Both of them were conveyed to him by Joseph Blazo, the latter in 1816, the former in 1826, which is the *locus in quo.* Whitten's house, stable and store were on the lot containing the acre and a half. The third parcel, owned by Whitten, was on the south side of the "north road," was purchased by him of John Drown, and constituted the principal part of his farm; he had a barn and shed on it.

Whitten conveyed to Pease, in October, 1843, "a certain piece of land in Parsonsfield, being the farm on which said Whitten now lives, occupies and improves, and being the same lot of land I purchased of John Drown," &c. By reference to the deed of John Drown, it would appear, that this parcel laid on the south of "north road, and therefore the *locus in quo* was not a part of it. But the defendant contends, that the *locus in quo* was a part of the farm, and that it is embraced in the description of the premises in this deed. The first inquiry which arises, is whether the evidence introduced shows it to have been a part of the farm. Robert T. Blazo testifies, that he is acquainted with the lot of land described in the writ, purchased by Whitten of Joseph Blazo in 1826, that Whitten afterwards built an office upon it for Noah Tibbets, which he subsequently occupied as an office, that it has been usually called the office lot, "and has always been enclosed by a fence by itself," and that the office was occupied after Tibbetts left it, by different tenants as a dwellinghouse, down to the time when Pease took his deed. He does not state at what period of time the office

was built, but his language would imply that the lot had been enclosed by itself at least ever since Whitten owned it. The inference to be drawn from the testimony is, that this lot was not occupied and improved as a part of the farm, nor did Whitten live on it. The burden of proof is on the defendant to establish the fact which he asserts, and it does not appear that he has done so.

The mortgage deed from Whitten to Dalton very clearly describes the lot conveyed by Blazo in 1816, and it appears by the evidence before mentioned, to have been entirely distinct and separate in its use from the *locus in quo.*

The mortgage deed from Whitten to McIntire and Tibbetts, in 1831, among other lands, also conveys "the farm, the said Whitten now occupies and lives on, situate on the north road in said Parsonsfield," &c. When this deed was made, and before and since, according to the testimony which has been referred to, the *locus in quo* did not constitute a part of the farm, and consequently it could not be embraced within the description of the premises, which the deed purports to convey.

The defendant does not appear to have had any title to the premises in controversy, of an earlier date than the plaintiff's attachment. *Defendant defaulted.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1853.

COUNTY OF KENNEBEC.

LITHGOW *versus* MOODY.

A tenancy of land under a written lease is terminated by the expiration of the lease.

To terminate a tenancy of land, held under a written lease for a specified time, it is not requisite that any notice be given or that any act be done by the lessor.

From the mere continuance of occupation by the lessee, after the expiration of such a lease, there arises no legal presumption of a tenancy at will.

From a proviso in such a lease, that the crops raised on the land shall be considered and remain the property of the lessor, till the rents should be paid, there arises no presumption that the rents were in fact paid by the crops.

In a process of forcible entry and detainer, it is not necessary to state *in the warrant*, that the complaint was made on oath.

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

COMPLAINT. FORCIBLE ENTRY, &c.

In October, 1843, the complainant, by a written contract, let a farm for five years to the respondent, whose residence was in Pittston, upon condition that the lessee should, by a

specified day, pay to the lessor a previously existing debt, and should also pay, annually, a stipulated rent, and the public taxes.

The contract stipulated that all the produce of the farm should remain and be considered the property of the lessor, till the agreed payments should be made; also that, if the lessee should delay any of the stipulated payments, for the space of three months, the lessor should have a "right to enter without notice and take possession of the premises, and that the lease therein should terminate."

This complaint on oath was made in October, 1850, before the municipal judge of Augusta, who thereupon issued his warrant, directed to the sheriff or his deputy, or to *the constable of Augusta*, and it was served by a deputy sheriff.

At the trial, the complainant, after proving his title to the farm, introduced the lease, and proved that, more than thirty days before commencing the process, he notified the respondent in writing to quit the farm and surrender possession to the complainant.

Upon these proofs, the case was submitted for a legal decision.

Bradbury & Mulliken, for the complainant.

Clay, for the respondent.

The complaint cannot be sustained.

1. It does not appear from the warrant that the complaint was made on oath.

2. The warrant was directed to the constable of Augusta. This was unauthorized, for the residence of the respondent was not in that town but in Pittston.

3. Because a notice to quit, as required by R. S. c. 128, § 5, was not given.

The first rent became payable in October, 1844, and if the respondent neglected to pay it by January, 1845, the tenancy under the lease was ended, and the complainant had a right to reënter. This complaint was not instituted until October, 1850, nearly six years after that right of reëntry accrued. By permitting the respondent to continue the occupation so

long, the complainant must be considered as having, by some new contract, made the respondent his *tenant at will.* The Act of 1850, c. 160, is a legislative construction to this effect. *Bennock* v. *Whipple,* 12 Maine, 346; *Wheeler* v. *Cowan,* 25 Maine, 283; *Kendall et al.* v. *Moore et al.* 30 Maine, 327; *Moshier* v. *Reding et al.* 12 Maine, 478 – 483.

4. If Moody had *paid* all the rents and taxes agreeably to the terms of his lease, he would be entitled to three months notice before this process would lie. R. S. c. 95, § 19; *Smith* v. *Rowe,* 31 Maine, 212.

5. A tenant at will has an estate in the premises which must first be *terminated,* before the process of forcible entry and detainer will lie, or before his right to possession will cease. R. S. c. 128, § 5; *Wheeler* v. *Wood,* 25 Maine, 287.

6. The notice given by the complainant was merely to terminate the tenancy of Moody. This is evident from all the facts in the case. Lithgow made no attempt to take possession, as he might and would have done, had Moody been a tenant at *sufferance.*

7. A tenant at sufferance has no estate in the premises to be terminated, and the landlord can enter without notice.

8. The complaint alleges, that Moody *unlawfully* refused to quit the premises. Moody then was not a tenant at sufferance, for *such* a tenant cannot *unlawfully* refuse to quit, till the landlord has attempted to enter and been resisted. *Wheeler* v. *Wood,* 25 Maine, 287.

9. If the complainant claims, that Moody neglected to pay the rents and taxes, so as thereby to terminate the tenancy, the *onus* is on him to prove it. *Gage* v. *Smith,* 14 Maine, 466. And there is strong presumptive evidence that the payments due from Moody, were all made, for the complainant retained the ownership of all the produce till the payments should be made. The tenancy of Moody was not terminated till thirty days after the notice. And he was entitled to a further notice to quit. *Clapp* v. *Paine,* 18 Maine, 264; *Smith* v. *Rowe,* 31 Maine, 212. In *Preble* v. *Hay,* 32

Maine, 456, two notices were given. And from the Act of 1853, c. 39, a resistless implication has arisen, that prior to its passage, such was the requirement of law.

WELLS, J. — The complaint appears to have been made under oath, and the warrant to be duly served by a deputy sheriff. The law does not require it to be stated in the warrant, that the complaint was made under oath.

The respondent held over after the termination of the written contract between the parties. His estate in the premises was determined by the terms of the agreement. The case comes within the fifth section of chapter one hundred and twenty eight of the R. S.; "whenever a tenant, whose estate in the premises is determined, shall unlawfully refuse to quit the same, after thirty days notice in writing, given by the lessor for that purpose, he shall be liable to the provisions of this Act," &c. The proviso to this section was repealed by the Act of June 21, 1847.

In the case of *Wheeler* v. *Cowan*, 25 Maine, 283, the occupant held over after the termination of a written lease, and he was considered liable to this process upon notice given in pursuance of the fifth section of the statute before mentioned.

It does not appear, that any verbal contract was made after the termination of the written one, creating a new tenancy by parol, which would have required a distinct notice to terminate it, as was the case in *Smith* v. *Rowe*, 31 Maine, 212.

Where one enters under a written lease, which has expired, no notice is necessary to terminate the tenancy. The notice under the fifth section of the statute is sufficient to authorize the institution of this process. *Preble* v. *Hay*, 32 Maine, 456.

According to the agreement of the parties a default must be entered.

SHEPLEY, C. J., and HOWARD, RICE and HATHAWAY, J. J., concurred.

NORTON *versus* WEBB.

A mortgagee of land, even before a breach of the condition, has the right of possession.

Of this right, however, he may divest himself by contract.

Such a contract, inasmuch as it operates upon an interest in real estate, must be evidenced by writing.

It need not be stated in any prescribed form of words.

It may be deduced from language used in the condition of the mortgage; as, for instance, that the mortgager should maintain the mortgagee at a house upon the land.

If, by such condition, the mortgagee have the right of electing to be maintained on the land, *parol* evidence is receiveable from the mortgager, to show that such an election has been made.

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

ENTRY.

The demandant conveyed a farm, lot No. 45, to the tenant, who at the same time re-conveyed it in mortgage. The condition of the mortgage was, "that if the said Webb, his heirs, executors or administrators, shall support me and Betsey Norton, my wife, in our house on said farm, if we choose, by furnishing us with food and clothing, medicine and medical aid, in sufficient quantity and quality, according to our circumstances, and as our necessities may require, and that, during our natural life, both in sickness and health, as we may need for our comfort, also provide and constantly keep for our use and benefit a good and gentle horse and convenient carriage, or otherwise provide them whenever we, or either of us, as the case may be, shall wish to ride, either in visiting or for recreation, then this deed shall be void."

At the trial, the tenant, under appropriate pleadings, offered to prove that, when the deeds were executed, he was in possession of the demanded premises, and had remained in possession of the same to the present time, and that the demandant was living with him in the house, upon the premises, with his wife, and so continued to live for two years thereafter, and there received their support, and that, while so living with the tenant, the demandant often stated that it was the intention of the parties that the tenant was to have possession of

the premises, and that the demandant was to live with him there. The tenant also offered to prove *that the demandant chose to receive his support upon the premises and to live in said house.* The tenant also offered to prove that he had not broken, but had kept and performed the conditions of the mortgage. The evidence, thus offered, was excluded by the Judge.

It was then agreed that, if the excluded evidence was admissible, a new trial is to be granted.

Vose, for the demandant.

The legal title and seizin of mortgaged land are in the mortgagee, together with the right of possession. 2 Comyn's Dig. 78, tit. mortgage; R. S. c. 125, § 2; R. S. c. 136, § 1, 4 & 5.

Of the right of possession, the mortgagee may divest himself by contract. But such contract can be evidenced only in writing, because it affects the interest in real estate. *Blaney* v. *Bearce*, 9 Greenl. 137, and cases there cited; *Colman* v. *Packard*, 16 Mass. 39. In this case, no contract of that kind is proved, nor can it be deduced from the language used in the condition of the mortgage. The tenant establishes no right to the possession by any contract, and the right is therefore with the mortgagee.

Morrell, for the tenant.

The mortgage relied upon by the demandant, contains stipulations tantamount to an agreement for possession by mortgager before breach of conditions.

It is not necessary there should be in the mortgage an express stipulation for possession by mortgager, it is sufficient if it appears from the terms of the mortgage *by implication*, that such must have been the understanding of the parties. *Flagg* v. *Flagg*, 11 Pick. 477; *Hartshorn* v. *Hubbard*, 2 N. H. 453; *Hobart* v. *Sanborn*, 13 N. H. 226; *Lamb* v. *Foss*, 8 Shepl. 240; *Dearborn* v. *Dearborn*, 9 N. H. 117 and 201; 5 Greenl. 89; 10 N. H. 83; 2 Greenl. Cruise, 102 and note.

From the terms of the condition, by necessary implication, the mortgager was to have possession.

The condition provides for the *maintenance* of the demandant's wife, in the largest sense; as their "necessities require."

The "support" was to be rendered, on the premises, in "our house."

To render "support," in this manner, necessarily entitles the mortgager to the possession. The condition could not otherwise be performed. How could the mortgager render the support, at that house, unless he had the possession?

By the condition, a *personal* trust is confided to, and a *personal* obligation is imposed upon, the mortgager, which he cannot delegate. 9 N. H. 201. This necessarily implies possession by him.

The tenant is to be regarded as mortgager in possession, *having performed his conditions* and cannot be entered upon or dispossessed.

The two deeds are in law one instrument, and amount to a conveyance upon conditions subsequent.

SHEPLEY, C. J. — By the provisions of statute c. 125, § 2, a mortgagee may recover possession, before any breach of the condition, "when there is no agreement to the contrary." Such an agreement, affecting the title to real estate, must be made in writing. It may be so made without the use of any particular form of words; and it may be inferred from the language used in a written contract between the parties, which cannot be executed, according to its terms, without a construction permitting the mortgager to remain in possession.

By the condition of the mortgage, the mortgager was to support the mortgagee and his wife "in our house on said lot No. 45, if we choose." By this he would not be authorized to retain possession without proof of such a choice.

If they had elected to have their support furnished in the house on that lot, the mortgager could not perform without being entitled to possession of it; and the intention of the parties and their agreement, contained in the condition of the mortgage, would in such case, authorize the mortgager to retain possession, until a breach had been committed.

There is no provision, that such election should be made known in writing. If clearly established by parol proof, that would be sufficient until revoked.

The report states that, among other matters, the tenant offered to prove, "that the demandant chose to receive his support on said premises and to live in said house. But the presiding Judge rejected the evidence." If this testimony had been received, it might have proved such an election as would have required the tenant to retain possession to be enabled to perform the condition. So much of the testimony offered and excluded should therefore have been received; not to vary the terms of the written contract, but to prove, that one party to it had, according to its terms, made an election respecting the manner of its performance. *New trial granted.*

WELLS, HOWARD and HATHAWAY, J. J., concurred.

MARSHALL *versus* MITCHELL.

The payee of a note, after having indorsed and negotiated it, waives demand and notice, by agreeing with the maker to pay it and take it back into his own hands.

Such an agreement, though made with the maker of the note, enures to the benefit of the indorsee, in an action against the indorser.

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

ASSUMPSIT against the indorser of a promissory note, payable in two years from its date. See 34 Maine, 227, where the same case was under consideration.

Mitchell, the defendant, on April 3, 1848, sold to one Merrow a shop, being personal property, for $350, taking $50 in cash and Merrow's two notes of that date for $150, each. Both of these notes he negotiated, by indorsing thereon his name in blank. It is upon one of those indorsements that this suit is brought.

When Merrow gave the notes, he also, to secure the payment of them, mortgaged the shop to Mitchell.

The plaintiff introduced Merrow as a witness, who testified

that, in Sept. 1849, the sale of the shop was rescinded; Merrow agreeing to give up all claims to it, and Mitchell agreeing to take it back, and to pay and cancel the two notes of $150 each, which he had sold.

The plaintiff thereupon contended that Mitchell, by that agreement, had waived the necessity of demand on the maker of the note, and of notice to himself of its non-payment.

In defence, testimony was offered, tending to prove that, in February or March, 1850, Mitchell, with the consent of Merrow, agreed to sell the shop to one Lawton, for the sum of two hundred and fifty dollars; and that Mitchell, by the consent and agreement of Merrow, was to take up the note in suit, with the proceeds of said sale, if Lawton should pay for the shop, the other note having been already taken up by Mitchell.

Lawton, however, did not take the shop or pay for the same, and it was destroyed by fire on April 6, 1850, Merrow having continued in possession of it until that time.

The Judge instructed the jury that, "if the defendant, in Sept. 1849, agreed with Merrow to take back the shop, and to take back the notes, he had thereby waived demand and notice, and the plaintiff would be entitled to a verdict."

The jury returned a verdict for the plaintiff, and the defendant excepted to the instructions.

Evans, for the defendant.

The *agreement* to rescind, testified by Merrow, was never executed. It was an agreement not binding on him — no transfer was made.

He retained the shop until it was destroyed.

An *unexecuted agreement* is not to have the effect of an *executed* one.

Mitchell's agreement to pay the note was only binding in the event he received back the shop.

If Merrow refused to surrender it, Mitchell was under no obligation to pay the note. The consideration of the promise failed. Merrow never did surrender, but retained the property till the last.

The jury should not have been told that the *agreement* merely was a waiver, but the *fulfilment of the agreement.*

The agreement, whatever it was, was modified by that of March, 1850; or rather that of March was substituted for it, by which Mitchel was to pay the note, out of the proceeds of the sale to Lawton.

The sale was never perfected.

The plaintiff was no party nor privy to these contemplated arrangements, and can claim no benefit from the agreement of the defendant.

Herein the case differs from *Mead* v. *Small,* 2 Greenl. 207.

H. W. Paine, for the plaintiff.

WELLS, J. — The object and purpose of notice to an indorser is, that he may take measures to indemnify himself, when a fruitless demand has been made upon the maker. If the indorser has security in his own hands fully equal to his liability, he can suffer no loss by the want of demand and notice, and therefore he has been held liable in such case, without proof of those facts. *Mead* v. *Small,* 2 Greenl. 207; *Corney* v. *Mendez Da Costa,* 1 Esp. 301; 3 Kent's Com. 113. And if the security is taken before the maturity of the note, it cannot be material whether it was before or after its negotiation. In either case it furnishes an indemnity.

No instruction to the jury was requested upon the effect to be given to the loss of the security. Nor does it become necessary to decide upon the duty of the defendant in relation to it, for the case is not submitted for decision upon the facts, but upon the legal questions raised.

It is contended, that the agreement on the part of the defendant with Merrow, the maker of the notes, to take back the shop, which was the consideration for them, and take up the notes, could have no effect unless it was executed. But that part of the agreement, which relates to taking up the notes, would induce Merrow to refrain from making any pre-

paration to pay them, and he would not expect a demand of payment to be made on him. It was equivalent to saying to him, that he need not pay the notes, but they should be paid by the defendant. And in case they were to be paid by the defendant, there could be no necessity for the plaintiff to call on the maker, or to give notice to the defendant.

A promise at the time a note is negotiated to take it up, if not paid by another party, has been held a waiver of notice. *Boyd* v. *Cleveland*, 4 Pick. 525.

The promise of the defendant several months before the note was due, made to the maker, that he would take it up, was a fact of which the plaintiff had a right to avail himself. He could safely repose upon such promise, although not made to himself, with the expectation it would be performed, and forbear to do those acts, which, if the defendant's promise were fulfilled, would be rendered entirely unnecessary. It is not for the defendant to say, after he has made the promise, that the plaintiff should not have relied upon it. Any holder of the note might justly infer from such promise a waiver of demand and notice. When the indorser says to the maker, he will pay the note, it is a declaration that the other parties need not give themselves any trouble in relation to it. This language would justify their inaction. It excuses a call upon the maker to do what the indorser himself has agreed to perform, and as he has taken upon himself to act for the maker, he would know whether the action had been completed.

It is not necessary to determine whether the agreement to take back the shop would be valid if unexecuted, as that to take up the notes is sufficient to authorize a jury in finding a waiver of demand and notice. *Andrews* v. *Boyd*, 4 Metc. 434. *Exceptions overruled.*

Shepley, C. J., and Howard and Hathaway J. J., concurred.

STATE *versus* MAHER.

Upon a town or city officer, powers additional to those given by the law under which he was appointed, may be conferred by the Legislature.

A magistrate, who has certified his record in an incomplete form, is bound, under leave of the Court, to complete the record, and to amend the certificate accordingly.

A conviction, upon an indictment, of being a common seller of spirituous liquors, cannot be pleaded or proved in defence of a complaint for a single act of sale, though such act be within the time embraced in the indictment.

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

[Memo. — The Act of 1851, c. 211, entitled an "Act for the suppression of drinking houses and tippling shops," § 4, provides that, on a second conviction for selling any spirituous or intoxicating liquor, the offender shall forfeit twenty dollars with costs of prosecution, & § 5, provides that such forfeiture may be recovered before a justice of the peace or Judge of a Municipal or Police Court.

The statute of 1849, c. 281, § 11, provides that "a Police Court shall be established in and for the city of Gardiner" with jurisdiction in matters civil and criminal "under twenty dollars."]

COMPLAINT for unlawfully selling spirituous liquor on February 5, 1853. The defendant was convicted before the Police Court of Gardiner, and fined *twenty dollars* with costs. From that judgment he appealed.

At the opening of the case for trial, in the S. J. Court, at its March term, 1853, the defendant moved to dismiss the appeal, because: —

1. The Judge of the Police Court of Gardiner had no jurisdiction of the case, inasmuch as his jurisdiction, by the city charter, extends only to cases in which penalties *less than twenty* dollars are allowed.

2. The record does not show that the defendant gave a bond of $200, required in order to authorize an appeal.

3. The defendant did not give such bond.

The first and third of these objections were overruled.

On motion of the County Attorney, the Judge of said Police

Court was then permitted to amend his record, by inserting the following words, the defendant objecting to the amendment: — "He also gave a bond, with two other good and sufficient sureties, running to the city of Gardiner, in the sum of $200, that he will not during the pendency of such appeal, violate any of the provisions of the Act entitled 'an Act for the suppression of drinking houses and tippling shops.'"

The case being then submitted to a jury, the government introduced evidence tending to prove an act of sale made some time in said month of February.

The defendant then proved that at the same March term of the Court, he had been indicted as a common seller, the indictment covering the time from 10th Dec. 1852, to 5th March, 1853; and that the jury had returned a verdict against him for that offence. The defendant therefore contended that the offence set forth in the complaint, was merged in that set forth in the indictment, and that he could not be tried again for this, and requested the Court so to rule; but the Judge declined so to rule, and instructed the jury that, if they found the sale proved, as charged in the complaint, they must find a verdict against the defendant, which they did.

To the foregoing rulings and instructions the defendant excepted.

Lancaster & Baker, for the defendant.

The Judge ought to have dismissed the appeal.

1. The Police Judge exceeded his jurisdiction in the assessment of the $20 fine. His authority to inflict penalties was confined to sums less than $20. Special Act of 1849, to incorporate the city of Gardiner, c. 281, § 11.

2. The amendment of the record by the Police Judge was wrongfully permitted. But, with its amendment, the record is insufficient, inasmuch as it does not show that the bond was conditioned "not to violate any statute of 1851," but only not to violate some Act bearing a specified title, without showing when such Act was passed, or what were its provisions.

The exception that the offence complained of was merged

in the indictment against the defendant for being a common seller, is not insisted upon.

Vose, County Attorney, for the State.

WELLS, J. — The Judge of the Police Court of Gardiner had authority to impose the fine of twenty dollars, by virtue of the "Act for the suppression of drinking houses and tipling shops," approved June 2, 1851, c. 211, § 5. It is therefore unnecessary to determine whether the Act incorporating the city of Gardiner conferred the same power.

It was the duty of the Judge of the Police Court to amend his record, and the act appears to have been sufficiently described by its title.

The indictment and conviction of the defendant as a common seller, embracing the time in which this offence is charged, are no objection to this prosecution, for they are different offences. The violation of the law in a single case is an offence; where there is evidence of several violations, they show another and more aggravated one of being a common seller, which implies a general and continued breach of the law. *State* v. *Coombs*, 32 Maine, 529.

Exceptions overruled.

BUTMAN *versus* HOBBS *and his trustees*, THE MONMOUTH MUTUAL FIRE INSURANCE COMPANY.

In a trustee process, an issue of fact for the jury may, under some circumstances, be formed between the plaintiff and the trustee.

In the pleadings, forming such an issue, the granting of amendments is at the judicial discretion of the Court.

In certain cases, a trustee may be discharged, if his disclosure show his liability to be doubtful. In cases of *prima facie* liability, dependent upon the facts put in issue, the burden of *full* proof is upon the trustee.

If an insurer should, after a loss of the property by fire, be summoned as trustee of the insured, and should plead that the property was burnt by the insured by design, or by his gross carelessness, the evidence to establish the burning by *design*, must satisfy the jury *beyond a reasonable doubt;* and to establish the burning by gross negligence, there would be stronger reason, requiring *full proof*.

Such a plea, in such a process, was filed by the trustee. His counsel, admitting that the burden of proof upon him was the same as in criminal cases, called for no different rulings as to the strength of evidence, necessary to establish the *gross carelessness* from that, necessary to establish the alleged *design;* nor did it appear from the case, that the evidence was such as to require any difference in the ruling. *Held,* to be no ground for exception, that the instruction to the jury required the *matter relied on in defence* to be proved *beyond any reasonable doubt.*

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

Assumpsit.

The questions arose upon the chargeableness of the trustees.

They disclosed that they had insured a house for the principal defendant, and had been notified that it was burnt during the life time of the policy, and that they had declined to pay the loss, on the ground that it was occasioned by design or gross negligence, on the part of the insured. An issue was then presented in the following form: —

"And now the Monmouth Mutual Fire Ins. Co. come and defend when, &c., where, &c., and say that they are ready to prove, when and where the Court shall direct, and now offer to prove, that the dwellinghouse, mentioned in their foregoing disclosure, and in the policy of insurance referred to therein, was burned, either through the gross negligence of said Hobbs, or fraudulently and by design, on his part, wherefore they pray judgment, that they may be discharged and for their costs. "By Seth May, their Att'y."

"And now the plaintiff, in view of the disclosure and allegations of the trustees aforesaid, says, as matter of fact, that the dwellinghouse insured by the policy referred to, did not burn either through the gross negligence of said Hobbs, or fraudulently and by design on his part; and of this he puts himself on the country.

"By J. H. Williams, his Att'y."

"And the Mon. Mut. Fire Ins. Co. likewise.

"By S. May, their Att'y."

The supposed trustees then desired leave to amend their allegation, by inserting the following additional averment, to wit: —

"And the said supposed trustees further say, and offer to

prove, that the dwellinghouse insured by the policy aforesaid, was not, at the time of said insurance nor afterward, of the value mentioned in said policy and application therefor, but was of much less value."

The Judge declined granting leave to amend, except upon terms. These terms the trustees refused to yield, claiming the amendment as a right.

Thereupon the parties to the issue thus raised, proceeded, under direction of the Court, to a trial by the jury, upon the evidence adduced by them respectively; the supposed trustees having the opening and close.

The plaintiff contended in argument, that it was incumbent on the trustees to satisfy the jury, beyond a reasonable doubt, of the truth of the averments in their plea. It was admitted by the counsel for the trustees that the burden of proof was upon them, and that it was the same burden as in criminal cases; but it was contended that the rule of law as to the amount of proof was now the same in both civil and criminal cases, whatever it may formerly have been, and that nothing more is now required, in either class of cases, than reasonable satisfaction.

The Judge instructed the jury, that the burden of proof was upon the trustees, and that it was incumbent on them to satisfy the jury *beyond a reasonable doubt* of the truth of their allegations in the pleadings. He at the same time defined the term "reasonable doubt" to be such a doubt as, if felt by an intelligent, conscientious, and reasonable man, would occasion mental distress, if disregarded by him; or, in other words, such a substantial doubt as would hold in suspense the judgment of an intelligent, reasonable, conscientious man.

The jury retired, and after some time returned into Court, saying there was doubt in the minds of some of the jurors, whether this was to be treated by them as a civil or criminal matter.

Thereupon the Judge instructed them that it was a civil suit, but was of a class of cases distinguished from ordinary civil proceedings, in this; that generally, in civil cases, juries

are authorized to decide upon a preponderance of evidence, whereas in this case, as in criminal proceedings, they must be satisfied, *beyond any reasonable doubt*, as had been explained to them before they first retired.

The jury, after further retirement, rendered a verdict, "that the dwellinghouse, mentioned in the disclosure of the trustees, and in the policy of insurance, was not burned through the gross negligence of said Hobbs, or fraudulently and by design, on his part, in manner and form as the said trustees have alleged."

To the instructions of the Judge, and to his ruling on the motion to amend, the trustees excepted.

May, for the trustees.

The admission by counsel, that the burden of evidence upon the trustees was the same as in criminal cases, was based upon a legal notion which may perhaps not be tenable in its extremest extent.

The counsel *then* considered that evidence, which should produce *reasonable satisfaction*, could be no other than that which should *exclude reasonable doubts*; — that no mind could have *reasonable satisfaction* of the existence of a fact, while it had a *reasonable doubt* of it. A reasonable doubt was defined by the Judge to be one, which, if felt by an intelligent, conscientious and reasonable man, would, if not yielded to, create mental distress; or would hold his judgment in suspense.

It seemed to the counsel difficult to perceive how a mind, *reasonably held in suspense*, could be *reasonably satisfied*; or how reasonable suspense and reasonable satisfaction could coëxist; or how a mind could have *reasonable satisfaction* of a fact, or what is the same thing a *reasonable conviction* of it, while it maintained a doubt which, if overruled, would create mental distress. But there are decisions, which claim a wide distinction, and assert that, for the dislodgment of reasonable doubt, a higher degree of evidence is requisite, than is necessary for imparting reasonable satisfaction.

Against those decisions we do not now contend. It is not

necessary for us to controvert them. But it will, however, be observed that, in the admission of the counsel, it was expressly stated to be no more than that the evidence must be such as to produce reasonable satisfaction.

What we now insist upon is, that the instruction to the jury was erroneous, in requiring of us any thing more than *preponderating evidence.*

The instruction was that, generally, civil cases might be decided upon a *preponderance of evidence*, but that, in this case, it was necessary to satisfy the jury *beyond a reasonable doubt.* The authorities show, that the necessary strength of proof varies according to the nature of the case; in some classes of cases preponderating evidence being sufficient, and others full proof being required. *Thayer* v. *Boyle*, 30 Maine, 475; 1 Stark. Ev. 450.

The trustees had alleged two facts, viz, the burning of the house by *design* and the burning of it through *gross carelessness.* The establishment of *either* of these facts would be a discharge of the trustees. For it will not be denied that they could not be held liable, if the house was burnt by the insured through design. And it is equally certain that they could not be held liable, if the burning was through his carelessness. *Chandler* v. *Worcester M. F. Ins. Co.* 3 Cush. 328.

If, in relation to *either* of the charges, preponderating evidence was sufficient, the exceptions will be sustained. The one allegation imported an aggravated crime, a felony; the other imported no crime. In attempting to establish the former, there was a legal presumption of innocence to be encountered and overcome; and therefore full proof might well be required. In relation to the other allegation, no such presumption was to be met, and therefore preponderating evidence was sufficient. The issue was merely one of *negligence*, and that is but an "ordinary civil proceeding," requiring but the strength of evidence belonging to such cases. Yet the instruction to the jury was, that *this case*, in regard to the requisite strength of testimony, was distinguished from

such cases, and required the same strength of evidence as in a trial for crime; thus requiring a charge of mere negligence to be supported by evidence equally strong with that needed to convict of the highest crime. This we hold to have been erroneous.

In a suit between the parties to the insurance policy, involving simply an issue of negligence, such full measure of proof would not have been required.

But it is respectfully submitted, that in order to discharge the trustees, the law does not require such full strength of evidence, as might be necessary in a suit upon the policy against the insurers. *United States* v. *Langdon*, 5 Mason, 280.

Trustees are often discharged upon a mere statement of their belief. *Cleveland* v. *Clap*, 5 Mass. 202; *Crossman* v. *Crossman*, 21 Pick. 21; *Chase* v. *Bradbury*, 17 Maine, 89.

J. H. Williams, for the plaintiff.

Shepley, C. J. — The proceedings in forming an issue were authorized by the provisions of the statute, c. 119, § 33 and 34. After it had been formed, any amendment of it was a matter to be submitted to the judicial discretion of the Court.

A trustee may, in certain cases, be discharged, when from a disclosure of the facts it appears to be doubtful, whether he is indebted to the principal. Such a rule is not applicable to a case like the present, in which the trustee appears to be chargeable, unless this result can be avoided by proof of facts put in issue by him. When, by the provisions of the statute, the jury are in such cases to decide upon the truth of the allegations made, to procure a discharge those facts must be fully proved by the trustee. He is in a condition similar to that of a debtor, who must offer full proof of payment.

To establish the alleged fact, that the building was burnt fraudulently or by design on the part of the principal, the proof should be such as to satisfy the jury beyond a reason-

able doubt. *Thurtell* v. *Beaument*, 1 Bing. 339; *Thayer* v. *Boyle*, 30 Maine, 475.

With respect to the allegation of gross negligence it may be observed, that the burden was upon the company to relieve itself from payment of a sum apparently due. When it proposed to do this by proof of gross negligence on the part of the person, to whom the money was payable, there is stronger reason for requiring full proof.

In the case of *Aeby* v. *Rapelye*, 1 Hill, 9, the defendant proposed to prove usury; and instructions were requested, that they would not be entitled to a verdict, unless they had established the usury beyond a reasonable doubt. This was refused; and the jury were instructed that it was enough if they were satisfied of the fact of usury. The Court held, that proof of usury to satisfy a jury beyond a reasonable doubt and proof to satisfy them of the fact was substantially the same.

In this case no distinction was made at the trial between the proof required to establish the different allegations put in issue. In the admission of counsel respecting the burden of proof, no such distinction was made. The reason why the counsel and the Court made no such distinction, if any should have been made, may have been, that the testimony introduced did not require it. Under such circumstances there can be no just cause of complaint, that no such distinction was made in the instructions to the jury.

Exceptions overruled.

WELLS, HOWARD and HATHAWAY, J. J., concurred.

SHELDON, *Adm'r*, *versus* WHITE *& al.*

The allegations of a plaintiff in his writ, though he may have prosecuted it to final judgment in his favor, cannot operate as an estoppel against him, when the judgment is no muniment of title, and when the party insisting upon the estoppel was not a party to the judgment.

ON REPORT from *Nisi Prius.*

Sheldon *v.* White.

REPLEVIN for a quantity of pine boards, sawed from logs cut on a tract of land in Canada, and hauled into Round pond, on the north branch of Dead river in this State.

One Larry obtained from the owners of the tract a permit to cut and haul the logs. One Atkinson testified that he saw Larry at the pond, where the logs were lying, and that Larry claimed them, and offered to sell them. Another witness testified, that in the spring of 1850, Larry employed and paid him for transporting to a house near the pond certain provisions, driving tools and log driving supplies, and also six men hired by Larry to drive the logs, and that Larry then said, that the supplies and men were for the purpose of driving the logs which were cut in Canada.

The logs were cut and hauled by Heald, Brown and Eldridge, and they claimed to own them. Larry, during the preceding season, had become accountable to one Mace for supplies then furnished to Heald and Eldridge. For those supplies, he subsequently paid Mace by property, sold to him by Heald and Eldridge, according to their bill of sale.

On Feb'y 16, 1850, Heald and Eldridge had received from these defendants some supplies for their logging operations, and were expecting to receive still more. To secure the defendants for what supplies had been and what should be furnished, they on that day mortgaged to them what logs they had then cut, and what they should subsequently cut that season.

This mortgage commenced with the words, — "Whereas White and Norris have furnished, the present winter, certain logging supplies to Abel W. Heald and William Brown and to said Heald and Jotham Eldridge, (said Eldridge being successor to said Brown,) &c. and was signed,

"Abel W. Heald for Heald and Brown,
for Heald and Eldridge."

The boards replevied were sawed from the logs embraced in that mortgage. From a disclosure, made by one of the defendants, it appeared, that in March, 1850, prior to the 30th day of that month, Larry took from Heald and Eldridge a

bill of sale of the logs and of other articles of property. The defendants introduced the copy of a writ dated March 30, 1850, in their favor against Larry, charging him with having taken said bill of sale, on the 17th of that month, with a design to aid Heald and Eldridge to defraud their creditors, and alleging that Heald and Eldridge were the owners and in possession of, and had a valuable interest in, certain property, embracing the logs in controversy, and on that day transferred them to Larry.

To secure to these defendants the amount which they might recover in that suit, Larry made to them, April 6, 1850, a mortgage bill of sale of the logs.

The defendants put in a copy of the judgment in that action, showing that they recovered judgment therein, at Oct. term, 1850, for $1900,86, and costs. The plaintiffs however objected to that copy, and suggested and introduced evidence tending to show a diminution of the record.

On October 10, 1850, Larry made a bill of sale to Parker Sheldon of two marks of pine board logs, [2368 pieces] cut in the Province of Canada the then past winter and landed in the North branch of Dead river.

The boards replevied were sawed from the logs described in that bill of sale. Parker Sheldon afterwards conveyed the logs to Parker C. Sheldon, who died intestate, and this suit is brought by his administrator.

The cause was submitted to the Court, with authority to draw inferences as a jury might, and to enter judgment on nonsuit or default as the law may require.

Evans and *Webster*, for the plaintiff.

Both parties claim the property in question under Larry. The defendants are estopped to set up a title under Heald and Eldridge, by the allegations in their writ against Larry. They there set forth that on the 17th of March, 1850, Heald and Eldridge, "were the owners" in possession of, and had a valuable interest in, certain property, embracing the logs in controversy; and that, on that day, they transferred them to Larry. By those allegations the defendants are bound, and

cannot be permitted to set up any anterior title in themselves. Comyn's Dig. Estoppel, A. 1 and A. 2; Co. Lit. 352, a. and b.; 16 Mass. 65; 6 Pick. 341; 1 Metc. 180.

If the defendants recovered a judgment against Larry, as they assert, what does it prove, except that the logs were *really* and *absolutely* the property of Heald and Eldridge, and that they, being such owners, sold the same to Larry. How can they now deny these facts?

There can be no doubt that Larry, and those privy with him in estate, as were the defendants, would by his mortgage to them be estopped to deny his title to the logs. Estoppels must be mutual and bind both parties. Com. Dig. Estoppel, B.; Co. Lit. 352, a.

The defendants are therefore estopped, by taking that bill of sale, to deny the title of Larry to the logs at that time. *Haines* v. *Gardner*, 10 Maine, 383; *Kimball* v. *Kimball*, 2 Maine, 226; *Nason* v. *Allen*, 6 Maine, 243; *Hamlin* v. *Bank of Cumberland*, 19 Maine, 66.

The defendants being estopped by their writ; and the defendants and Larry being estopped by Larry's bill of sale, to deny Larry's title on the 30th day of March, 1850, privies of either party are estopped by, and may take advantage of, the same. Com. Dig. Estoppel, B. and D.; *Adams* v. *Barnes*, 17 Mass. 365.

The plaintiff, having purchased the property of Larry after the making of that bill of sale and date of defendant's writ, is bound by, and *entitled to the benefit of both* estoppels.

Is it answered that the writ, defendants v. Larry, alleges that Heald and Eldridge had a valuable interest in the property which may be consistent with the rights of defendants as mortgagees, it is replied that this allegation is but cumulative or additional to the positive allegation of their ownership and cannot diminish or take from that positive allegation. And further, nothing but that positive allegation of ownership, laid in the writ and proved, would entitle defendants to their verdict, and they are bound by those allega-

tions, which were necessary to be proved to entitle them to a verdict under R. S. c. 148, § 49.

Again, if defendants had a good and valid mortgage of the logs from Heald and Eldridge, who sold them afterwards to Larry, they have elected to sue Larry for the alleged fraudulent purchase, and have obtained a verdict against him. And having chosen to resort to the penalty and attempted to recover of Larry double their just dues, it is not in their power to turn round and attempt to follow the property itself into the hands of an innocent purchaser, who bought the property without knowing of their claim.

The logs were cut under a permit which belonged to Larry. The presumption of law is, that the logs were cut and hauled, without the violation of any person's rights. As there is no evidence that Larry ever transferred his permit, it results that in getting the logs, Heald and Eldridge were at work for him. This presumption is fortified by much of the evidence in the case, such as that he claimed them and offered to sell them on the bank in the spring; carried up supplies and men to drive them; and became accountable to Mace for further supplies.

The pretended mortgage, signed by Heald, was invalid, because: —

1. It undertook to convey property, to which neither he nor those for whom he assumed to act, had any title.

2. The logging operations were not closed until March 16th, 1850. So says the defendants' writ against Larry. Yet the mortgage, though made as early as February 16, conveyed not only the logs then cut, but what might afterwards be cut. *Winslow* v. *Merchants' Ins. Co.* 4 Metc. 306.

3. The property mortgaged was incapable of delivery. It had no existence as personal property, being then annexed to the freehold of another. *Butterfield* v. *Baker*, 5 Pick. 522; *Bailey* v. *Fillebrown*, 9 Maine, 21; *Sherburn* v. *Jones*, 20 Maine, 10.

4. The co-partnership was not a general one, but was for the sole business of getting lumber. Yet *one* of the partners,

by the mortgage, conveyed the whole property to secure a *single* creditor. This was beyond his authority. 5 Paige, 30; 1 Hoffm. 511; 5 B. & A.; 1 Car. & Marsh. 93.

5. The dissolution of the firm of Heald and Brown revoked all authority in either partner to dispose of the partnership property independent of the other, or even of one half, except for the purpose of winding up the partnership concerns, as each partner has a lien upon the whole until the partnership debts are paid, and then has a right to his share of the balance in severalty.

6. It was a mortgage of property, part of one firm and part of another, to secure debts for which each was separately liable, without distinguishing what amount of debt belonged to each, or what amount of property to each.

7. It is void as being a mortgage of the present and *future* assets of the partnership to secure the present and *future* liabilities. This cannot be within the scope of the partnership. One partner could not do this, even if he have authority to mortgage the whole existing assets to secure an existing liability of the firm.

8. The mortgage was of property, not within the jurisdiction or limits of this State, and cannot operate unless the steps required by the laws of Canada be pursued, and if the mortgage, as to that part of the property in this State, would be good, the mingling it afterwards with that not in the State, by consent of both parties, avoids the mortgage.

9. The mortgage from Larry to White and Norris was not given to secure any debt from him to them, as no debt was due them from Larry. They had brought an action founded in an alleged tort, under statute, c. 148, § 49, against Larry, and in that no debt existed until judgment rendered. *Meserve* v. *Dyer*, 4 Greenl. 52.

This conveyance, although a mortgage, being without consideration, may be avoided by subsequent purchasers. Roberts on Fraud. Con. 12, 19, 459; *Gorham* v. *Herrick*, 2 Greenl. 87; *Howe* v. *Ward*, 4 Greenl. 195; *Frost* v. *Goddard*, 25 Maine, 414.

If it is said that the mortgage is not void but voidable, and must be rescinded before it can be avoided, we say it has been rescinded by Larry in every way he could adopt for that purpose. Sheldon purchased of Larry Oct. 10, 1850, and the pretended judgment, *White and Norris* v. *Larry*, was not recovered till the Oct. term, 1851, more than a year after the purchase of plaintiff; he took it therefore free from incumbrance.

J. S. Abbott, for the defendants.

SHEPLEY, C. J. — To maintain this action there must be proof, that the intestate had acquired a general or special property in the goods replevied. The boards appear to have been sawed from logs cut on a tract of land in Canada by the written permission of Andrew T. Galt to J. W. Larry.

The intestate claimed to be the owner of those logs by a sale of them made by Larry to Parker Sheldon on October 10, 1850, and by Parker Sheldon to himself on June 6, 1851.

The defendants claim them by a mortgage bill of sale made in February, 1850, and recorded in the records of the town of Bingham, where the mortgagers resided, on Feb. 16, 1850. And also by another mortgage bill of sale of them made by Larry to them on April 6, 1850.

The fact, that the logs were cut under a permit granted to Larry, is not sufficient to prove that they were owned by him. It might, in the absence of other proof, raise a presumption, that they were cut by or for him and that he was therefore the owner. It appears, that they were cut and hauled by Abel W. Heald, William Brown and Jotham Eldridge. It does not appear what arrangement, if any, was made for the purpose between them and Larry. Nor does it appear, that they were cut and hauled by them for Larry, or that Larry ever became responsible to pay them any thing for their labor.

It does appear, that those, who cut and hauled them, claimed to be the owners of them, and that as such they assumed

to convey them to the defendants. It further appears from a disclosure made by one of the defendants, introduced as evidence by the plaintiff, that Larry took a bill of sale of them from Heald and Eldridge in the month of March, 1850. That after this, on March 30, a suit was commenced by the defendants against Larry, charging him with having taken, on March 17, a bill of sale of these logs, with other property, from Heald and Eldridge with a design to aid them to defraud their creditors. To secure the payment of the amount of the judgment, that might be rendered in that suit, Larry made the bill of sale of the logs to them of the sixth of April, 1850.

Larry during the preceding winter had agreed to be accountable to Benjamin B. Mace for supplies then furnished to Heald and Eldridge. These supplies appear to have been paid for by Larry by property purchased by him of them by their bill of sale to him before named.

Larry also appears by the testimony of Atkinson to have claimed to be the owner of the logs in March or April, 1850, and to have offered to sell them. It does not appear, that this was before he had taken a bill of sale of them from Heald and Eldridge. It appears, that Larry, in the spring of 1850, procured men and supplies to float the logs from the ponds, in which they had been before found, but this appears also to have been after he took that bill of sale.

The result of this testimony is, that those who cut and hauled the logs claimed to be the owners of them and as such undertook to sell them; that Larry took a bill of sale of them from them, thereby admitting their title; that his subsequent claims and acts of ownership were not inconsistent with his admission of their prior title; that there is no satisfactory proof, that he owned the logs, unless he acquired a title to them from Heald and Eldridge. That title he could not obtain, if their prior conveyance to the defendants was effectual.

To this objection is made, that it was not properly executed by Heald for himself and partners; that the firm of

Heald and Brown had been dissolved; and that Heald could not therefore convey their property. Brown does not appear to have claimed any interest in the logs after he retired, and was succeeded by Eldridge. The bill of sale states, that Eldridge was the successor to Brown. An inference may therefore be justly drawn, that he succeeded to all his partnership rights. If he did, Heald and Eldridge might lawfully convey the whole. If he did not, Brown would retain his interest, which would not be conveyed to Larry any more than to defendants, by a bill of sale made by Heald and Eldridge. Heald and Eldridge appear to have been partners in that business, and a conveyance by one of them would convey their partnership property.

Another objection to it is, that they undertook to convey logs to be subsequently cut and hauled. It does not appear, that all the logs subsequently cut were conveyed to Larry. His bill of sale was taken about one month only later, and it does not appear, that the boards replevied were sawed from logs cut after the mortgage was made to the defendants.

Other objections were made, which are not regarded as valid.

It is insisted, that the defendants are estopped by the allegations, made in their writ against Larry, that Heald and Eldridge were the owners of the logs when they made a conveyance of them to Larry. An allegation in a writ cannot operate as an estoppel, when the judgment recovered is no muniment of title, and the party insisting is no party to the judgment. *Parsons* v. *Copeland*, 33 Maine, 370.

No such proof of title in the intestate is presented as would authorize a judgment for the plaintiff.

Plaintiff nonsuit and
judgment for a return.

HOWARD, WELLS, RICE and HATHAWAY, J. J., concurred.

STATE *versus* BEEMAN.

An indictment for obstructing a "*public street,*" is sustainable upon proof of obstruction to a *town way.*

In a warrant calling a meeting of the town to act upon the acceptance of a town way, a general description of the way is sufficient.

That a land owner had due notice of the selectmen's meeting to locate a town way, may be inferred from a notification seasonably inserted in a newspaper, published in his neighborhood.

Where it was required by a town, that notice of its meetings should be posted at the town house on a specified street, posting at "the town house" was held sufficient, it not being shown that more than one town house existed.

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

INDICTMENT for maintaining a part of a building upon "*a common highway and public street*" in Hallowell, alleged to have been laid out in the year 1836.

It appeared, that in 1828, the following vote was passed by the town: —

"Voted by the town, that town meetings, (except meetings for the selection and appointment of jurors,) be summoned and notified, in future, by notifications of the time, place of assembling, and purposes of the meeting, being posted up seven days at least before the time of said meeting, by any constable of the town, or by such other person as shall be appointed for that purpose, by warrant from the selectmen, or a major part of them, at the *town house on second street*, and at such other place in the town, as the selectmen, for the time being, or a major part of them, may, by their warrant for each and every meeting direct, it being left by the town, to the discretion of the said selectmen, or the major part of them, to direct or not direct as aforesaid, at their pleasure, that such notification be posted at any place other than the said town house."

To prove the location, in 1836, of the road described in the indictment, the county attorney relied upon the following records: —

The record of the selectmen was as follows: —

"The undersigned, selectmen of the town of Hallowell,

after having given notice to all persons interested, by publishing a notice in the American Advocate, three weeks successively, prior to the twentieth day of August, proceeded on the said twentieth day of August to lay out a town road, in said town, agreeably to said notice, as follows, to wit: Beginning, &c. Given in our hands, the twentieth day of August, A. D. 1836.

"James Atkins,
"S. K. Gilman,
"Samuel Locke."

On the first of October, 1836, the selectmen issued their warrant, directed to the constable, requiring him "to notify and summon the male inhabitants of said town, to assemble at the town house in said town, on the 8th of said October, to act, among other things, upon the following article, to wit: —

"To see if the town will accept a road laid out by the selectmen, leading from Front to Second street, through lands of Wm. Clark and the heirs of the late John Beeman."

At the bottom of the warrant is the following direction: "The mode of your notification to be, by posting up a notice of the within warrant, at the town house in said town, seven days before the within named time."

The officer's return of the warrant, is as follows: — Hallowell, ss. Oct. 1, 1836. I have notified and summoned the within named inhabitants, as within directed.

"Stevens Smith, *Constable.*"

At a meeting of the town held on said 8th of October, it was "Voted to accept the road as laid out by the selectmen."

The evidence for the State tended to show, that the defendant's building stands where it was erected long prior to the said location, and that nine and a half feet of it are upon the town way, so located and accepted, and that the defendant had been paid for the damage done to him by the location.

The defendant offered testimony, tending to show that, at the time of making said location, it was stipulated and agreed by the selectmen, or one of them, that said defendant might

maintain the building in its present position. But the Court rejected the testimony.

The defendant presented the following views, viz, *that* the indictment, being for the obstruction of a "*common highway and public street*," is not maintained by proof of the obstruction of a "*town way*;" *that* there is a material variance between the proof and the allegations of the indictment, in describing the way; *that* there is no sufficient proof that due notice was given by the selectmen to all persons interested, previous to making the location; *that* there is no proof that the location was filed with the clerk of the town seven days before the meeting for acceptance of the way; *that* the article, relating to the acceptance of the way, in the warrant calling the town meeting, does not sufficiently describe the way, and *that* there was no effectual acceptance of it, as the selectmen's warrant and the constable's return of it were illegal.

The defendant requested instruction to the jury conformably to these views. But the Judge refused the request, and instructed the jury that, if the building complained of was situated, in part, upon the street, as located by the selectmen in 1836, their verdict should be for the State. The verdict was against the defendant, and to the rulings and refusal to instruct, he excepted.

Morrell and *Stinchfield*, for the defendant.

1. Possibly, in common parlance, the words "common" and "public," as applied to ways, may be the same. But in legal contemplation they are of different import.

"Common highway" means no more than "highway." Does the one description, "public street," used in the indictment, change the import of the other description, "common highway?" The term "highway," does not modify the term "street;" and therefore a public street has not the import of a common highway; it is rather set in contra-distinction from it. Highways are established by county officers; streets, by another authority. Street means a city or village way. Public street has no technical import. It is the same as common highway, or is mere surplusage. The indictment, therefore,

can be considered as charging only the obstruction of a common highway, a county way, extending perhaps into a city or village. The proof in the case is only of an obstruction to a town way. The prosecution therefore fails. *Cleaves* v. *Jordan*, 34 Maine, 9; *State* v. *Bigelow*, 34 Maine, 243; R. S. c. 1, § 3, rule 6.

2. The pretended location of the way was ineffectual.

1st. The notice was defective. It did not sufficiently describe the road proposed to be accepted. A newspaper publication was insufficient. It should have been posted in two public places. R. S. c. 25, § 28.

2d. The location was not filed with the town clerk seven days before the acceptance. R. S. c. 35, § 29; 3 Greenl. 439.

3d. The selectmen's order for posting the notice by the constable, was not in conformity to the vote of the town. It merely required it to be at the town house; instead of the town house on Second street.

Vose, County Attorney, for the State.

WELLS, J. — The indictment against the defendant is founded upon the statute, c. 164, § 1, which provides, that "the obstructing or incumbering by fences, buildings or otherwise, the public highways, private ways, streets, alleys, &c. shall be deemed nuisances," &c. The way is described in the indictment to be a "common highway and public street." The word highway has been defined to mean county way, and as not embracing a town way, unless the sense of the statute where the word is used would require such meaning. Its import, when not controlled by other language connected with it, has been limited by statute to a county way. Chap. 1, § 3, rule 6; *Cleaves* v. *Jordan*, 34 Maine, 9. It is unnecessary to say what construction should be put upon it, as used in the chapter upon which the indictment is founded. For the word street means any public way, and embraces a town way, which is the one alleged to be incumbered by the defendant. The indictment was therefore maintained by proof of the obstruction of a town way. The indictment was good although the charge may be broader than the offence proved, for the ac-

cused may be acquitted of a part and found guilty of the residue, which alleges substantially an offence. R. S. c. 166, § 7.

The law of 1821, under which the town road in question was laid out in 1836, did not point out any mode by which notice should be given to the owner of the land. But it has been decided, that he was entitled to notice. *Harlow* v. *Pike*, 3 Greenl. 439. It appears, that notice was published in a newspaper, printed in the neighborhood of the defendant, of the intended location, three weeks before it was made; and that his damages were paid to him. This testimony was sufficient to authorize the jury in finding notice. It does not appear, that any objection was then made by the defendant, that it was not received in due season.

The article relating to the acceptance of the way in the warrant of the selectmen calling the meeting of the town, gives a general description of the way, which they had laid out, and was sufficiently clear and explicit to call to it the attention of the inhabitants of the town. Any one desirous of more particular information in relation to the courses and terminations of the road, could examine the return of the location made by the selectmen.

There does not appear to have been but one town house, and the notification for the meeting to be held at the town house, must have been understood at the town house on Second street.

When the road was laid out, the law did not require, as it now does, that the location of the selectmen should be filed with the town clerk seven days at least before the meeting of the town.

The acquiescence on the part of the town in the incumbrance upon the road for so many years, would indicate a consent, that the defendant's building should remain upon it. But that would not furnish a legal excuse. It is the record which shows the existence and boundaries of the road, and the selectmen had no lawful authority to allow the building to remain upon it. *Exceptions overruled.*

Shepley, C. J., and Howard and Hathaway, J. J., concurred.

INHABITANTS OF MONMOUTH *versus* ROBERT H. GARDINER.

A grant by a proprietor, to overflow his lands by a dam, cannot justify the overflowing of a public highway, existing upon the land at the time of the grant.

A remedy by action lies in favor of a town for damage sustained by throwing back the water upon the banks of its public highway by means of a dam, though the dam was erected for mill purposes only.

Such remedy for the town subsists unimpaired, though the owner of the dam may have obtained the permission of the proprietor to flow the land; — and though the town, at a reasonable expense, might have prevented the damage; —

and though other causes jointly with the dam contributed to occasion the damage; —

and though the dam was not the principal cause of the damage.

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

CASE for overflowing a public road, which the plaintiffs were bound to keep in repair. The declaration charged that the injury was occasioned by a dam which the defendant had erected at the foot of the pond, upon the margin of which the road lay.

The *ad damnum* was alleged at $500. The suit was commenced in the late District Court, from which it was brought to this Court on demurrer, plea good, with leave to waive the demurrer and plead anew.

Upon the trial, on issue to the jury, it appeared that in 1812, the road began to be traveled, and has ever since been used as a road, and kept in repair by the plaintiffs. It lay 60 or 70 rods across a low and wet piece of land, "a swamp or bog," between the foot of Pease's hill and the Bunyaw stream. The stream run to the pond, and over it there was a bridge. The road was constructed by placing logs on the surface of the swamp, where necessary, and covering them with bushes, upon which earth was laid.

It also appeared that the defendant's dam was erected in 1845 or 1847, and that an earlier dam at the same place was built in 1834. The plaintiffs' evidence tended to show that the overflow and consequent injury to their road was caused by the defendant's dam.

The defendant's evidence tended to prove that, long before the erection of any dam, the road was frequently overflowed by the spring freshets, and rendered impassable and sometimes dangerous; — that it cost no more to keep the road in repair since the erection of the dam than before; — that the Bunyaw stream is raised suddenly by heavy rains; — that formerly one Hall had a dam and mills on the stream, two miles above the road in question, which flowed several hundred acres of low ground, and kept back the water, but that, about ten years ago, Hall's dam was wholly taken away, and there has since been nothing to keep back the water; — also to prove that the water-course at the bridge over Bunyaw stream was not sufficient to discharge the water passing down the stream; that about seven or eight years ago it was reduced in its width and capacity to discharge water; that its water-course and culverts were much choked up and obstructed by logs and drift stuff, and that, in consequence, the water accumulated in the stream above the road and overflowed the road; also to prove that the dam of 1834 would raise the water of the pond as high as the present dam would; that at the time of the erection of the dam, and previously, he had deepened the channel of the stream at the outlet, and that the waste-ways of the dam where the gates were placed were two feet or more below the natural bed of the stream, whereby he was enabled to draw off the water of the pond more rapidly and to a lower stage than formerly could be done. He also introduced evidence tending to prove that there is a bridge across the outlet stream, 40 rods above the dam complained of; that the water-courses between the abutments of said bridge are too narrow to discharge the water freely; that the gates and waste-ways of the dam are sufficient to discharge all the water which can pass through said water-courses in times of freshets; that the water above the bridge is ordinarily higher than at the dam; that the object and purpose of the dam is not to raise or retard the water in the times of high water or freshets, but that, on the contrary, the gates are invariably kept open, and all the water of the pond is

discharged which the bridge above it allows to pass; that not until the water falls to ordinary high water mark are the gates closed — the object being to retain a supply of water for the drought of the season; and that this stage of water does not flow over the road in question; — also to prove that there is a bridge at Hall's mill-dam, the water-way of which, between the abutments, is 24 feet wide, and that this bridge had been overflowed, and that more water passes the Bunyaw Bridge than Hall's. In 1843, the owner of the land granted to the defendant the right to flow it.

The defendant contended that he was not liable for any injury which had been occasioned to the road in question, and requested the Judge to instruct the jury as follows, viz: —

1. That the defendant had a legal right to erect and maintain the dam and to flow the land on each side of the road, and that if, by means of such flowing, the road did absorb the water thus raised on the sides of the road and thereby become soft and more liable to be cut up and furrowed by traveling thereon, that would not be an injury for which the plaintiffs can maintain this action.

2. That, if the road could have been so constructed, at a reasonable expense, as to be free from any injury by means of flowing the adjoining lands, it was the duty of the town so to construct it; and if they have neglected so to do, they can maintain no action for any injury to it, which might have been thus avoided.

3. That the right of the defendant to erect and maintain the dam is as perfect as the right of the public to the easement in the road, and that each is bound to use his right in a reasonable and proper manner, and so as to impair as little as possible the right of the other; and that if, by the exercise of the defendant's right, some injury to the road is inevitable, which can be avoided by the plaintiffs at a reasonable expense, it is their duty so to avoid it.

4. That if the injury, which the road sustained, is attributable in any degree to other causes than the erection of the dam, this action cannot be maintained.

5. That, if several causes contributed to produce the injury, one of them being the dam, the action is not maintainable.

6. That, if the dam was not the principal cause of the injury complained of, the defendant is not liable in this action.

The first of the foregoing requested instructions was given, with this addition: "but if the road was actually damaged, by the flowing of the defendant, he would be liable for the damage thus occasioned." The others were refused.

The Judge instructed the jury that if they were satisfied that the road in question, without being flowed or damaged by defendant's dam, had been made and kept in repair by the plaintiffs for a period of more than twenty years, and had been used and traveled for that length of time as a public highway, the plaintiffs were bound to maintain it, and to make it safe and convenient for travelers, and could maintain an action for any injury which should, (after that period of time,) be done to it, and that, if the defendant by his dam did cause the water to flow back upon the road and do damage, for the damage thus occasioned, he would be liable, even though other causes independent of the defendant's dam might also occasion damage to the road.

The verdict was for the plaintiffs, damage being assessed at one dollar.

To the foregoing instructions and rulings, and refusals to rule, the defendant excepted.

The verdict being for less than twenty dollars, the defendant moved for costs, since the appeal taken by the plaintiffs from the judgment in the District Court, which motion the Judge refused to allow. To that refusal the defendant excepted.

The plaintiffs moved that they should be allowed full costs. The Judge denied the motion and ordered that quarter costs only should be taxed. To that order the plaintiffs excepted.

Evans, for defendant.

Admitting that the road has been injured by the absorption of water from the adjacent lands flowed by the dam, we contend that no action can be sustained therefor.

The defendant has done no more than he had a legal right to do. He has flowed his own lands and no more, and no negligence can be imputed to him. He has exercised his rights in a proper and reasonable manner, and if any injury has been sustained thereby, it is "*damnum absque injuria.*"

This falls within the principle of many adjudged cases. *Callender* v. *Marsh*, 1 Pick. 418; *Radcliff's Ex'rs* v. *Brooklyn*, 4 Comstock, 200; *Gerrish* v. *Union Wharf*, 26 Maine, 392.

The damages *alleged* are remote and consequential; the damages *found* are merely *theoretical;* for neither can an action be sustained. *Thompson* v. *Crocker & al.* 9 Pick. 59.

The public have an easement only in the *land taken* for a highway. The owner of the adjoining land may occupy and use it as he has been accustomed to do, or as it is capable of being used; consequently he may flow it.

Upon the laying out of a highway, no damage would be allowed upon the assumption that the owner of the adjacent land would be debarred from flowing it, or otherwise using it at his pleasure.

It is the duty of the public or the town so to construct their road as to leave the owner the fullest enjoyment of his legal rights.

The jury must have found that other causes than the dam occasioned almost the whole amount of damage sustained, and in such case they should have been instructed, that no cause of action existed.

The neglect of the plaintiffs themselves may have *contributed* to the injury received, and instead of being received in mitigation of damages, it goes to the whole action.

But the instructions permitted the jury to find for the defendant only in the event that the *whole* damage was attributable to the imperfect construction of the road.

There was proof tending to show other causes for the damages sustained, such as the removal of Hall's dam, so that the instruction on that point was properly requested and was applicable. *China* v. *Southwick*, 12 Maine, 238.

The principle contended for is of daily application in suits against towns for injuries received on defective highways.

Where other causes than the neglect of the town *contributes* to the injury, the town is not held responsible. Why should not the same rule apply here? 5 Denio, 255; *Clark* v. *Syracuse and Utica R. Road*, 11 Barb. S. C. R. 112.

The plaintiffs were bound to construct their road so as to be free from the injury, if it could be done at reasonable expense. Every party is bound to the use of ordinary care, and it was a want of ordinary care not to construct it so.

If some trivial injury to the road does arise from the defendant's dam, it is inevitable on the part of the defendant, and if the plaintiffs can avoid it at a reasonable expense they are bound to do so, rather than deprive the defendant of the enjoyment of his own property.

The instructions were erroneous in allowing the jury to hold the defendant responsible for any injury done to the road. If the town had not repaired the injury, they could not recover. The directions should have been that, if the town had been put to expense in consequence of the injury occasioned by the dam, they might recover for such expenses, but not for any unrepaired injury.

F. Allen, on the same side.

The action is of novel impression. There has been no action in the State, for such damage, except that of *China* v. *Southwick*, 12 Maine, 238, and that one failed.

The plaintiffs were not bound to repair the road. They did it voluntarily. It was never legally established. They used it in subserviency to our right of flowing the pond. A road by user is not entitled to be *guarded* or *regarded*, as one located by authority.

The reported evidence shows that many causes, other than the dam, might have occasioned the injury; at least that they might have concurred with the dam in doing it, such as the want of open water-courses, the removal of Hall's dam and the bridge at the foot of the pond. It was for the plaintiffs to show that such other causes did not do the damage or con-

tribute to it. Hence the fourth and fifth requested instructions should have been given. So also should the sixth. For if the dam was not the principal cause of the injury, something else was. One cause was enough. It is unphilosophical to seek more. Whatever that principal cause was, we are not accountable for it. The amount of the verdict shows that no *actual* damage was done by the dam to the plaintiffs. It will be time enough for them to sue, when they have done their own duty, and suffered from us, without contributing themselves to the injury.

Emmons and *May*, for the plaintiffs.

HATHAWAY, J. — In cases for flowing lands by mill owners, the remedy for the proprietor of the land is provided by the statute, and an action at common law cannot be maintained. Statute c. 126, § 28. *Stowell* v. *Flagg*, 11 Mass. 314. The defendant had the right to flow the land of the proprietors as provided by law, and in 1843, he acquired the unconditional right to flow it, so far as they were concerned. But that did not authorize him to obstruct or injure the *public highway*, which the plaintiffs were legally bound to keep in a condition safe and convenient for travelers.

The public have but an easement in the land upon which the road is made. The town is obliged by law to keep the road in repair, and cannot have the benefit of the statute remedy for flowing. *Calais* v. *Dyer*, 7 Greenl. 155.

In the case last cited, MELLEN, C. J. intimated, that an action on the case would be an appropriate mode of redress for the town.

The easement in the land, over which the road was made, must have been either paid for or given to the public at the time; or the road could not have been legally established. Although the title in the soil remained in him from whom the use was taken, yet the public acquired the right to pass over the surface, in the state in which it was, when first made a public road. *Callender* v. *Marsh*, 1 Pick. 430. The statute does not justify or excuse the erection of a dam in such

manner as to overflow a public highway already appropriated and in actual use. *Commonwealth* v. *Stevens*, 10 Pick. 247.

It would present a remarkable conflict of legislation, for one statute to authorize an indictment against a town for a *defective* highway, while another statute authorized an individual to render it defective.

If additional rights of flowing lands, in such cases, are deemed necessary, it is for the Legislature, not for the Court, to grant them.

The Court does not perceive any error in the instructions given by the Judge who presided at the trial, or in his refusal to instruct as requested.

This action was brought up, on the plaintiffs' appeal from a judgment, in the late District Court, on demurrer filed, by consent of parties, with an agreement to waive the same, and the defendant claims costs after the appeal, under the statute, c. 97, § 15, because the plaintiff did not recover more than two hundred dollars. By recurring to the statute it will be perceived that *such an appeal* is embraced in the exceptions, in that section of the Act, and not in the enacting clause. He is not therefore entitled to costs.

According to the decisions of the Court in *Sutherland* v. *Jackson*, 32 Maine, 80, and *Morrison* v. *Kittredge*, 32 Maine, 100, the plaintiffs are entitled to recover full costs.

The plaintiffs' exceptions are sustained.

The defendant's exceptions are overruled.

Judgment for the plaintiffs, on the verdict, with full costs.

WELLS and HOWARD, J. J., concurred. SHEPLEY, C. J., concurred in the result.

KIMBALL *versus* KENNEBEC AND PORTLAND RAIL ROAD CO.

County Commissioners' appraisement of the damage done to an individual by the location of a rail road across his land, may be revised by a jury, as well upon the application of the Rail Road Corporation as upon that of the land owner.

ON FACTS AGREED.

DEBT on a judgment, alleged to have been rendered by the Court of County Commissioners for $2500.

The defendants located their rail road across the land of the plaintiff, who applied to the County Commissioners for an appraisement of his damages. The Commissioners awarded therefor the sum of $2500, to be paid by the defendants, and the award was accepted and recorded.

Afterwards, at the proper term of the County Commissioners' Court, the defendants applied for the empannelment of a jury to revise said appraisement, and to reässess the plaintiff's damages. A jury was accordingly empannelled, before whom the plaintiff appeared and filed an objection to the proceedings on the ground, "that the amount of damages was not a question, open to the defendants, and that the jury had no jurisdiction to revise the amount, inasmuch as the defendants were concluded by the Commissioners' award."

The jury, however, proceeded and rendered a verdict of $1500 for the plaintiff, which verdict was returned to the Court, and, though objected to, was accepted and recorded, and the amount thereof was ordered by the Commissioners to be paid by the defendants to the plaintiff. Afterwards the plaintiff demanded the $2500, which had been awarded by the Commissioners, and brought this suit to recover the same.

If this Court shall be of opinion, that the assessment by the Commissioners and their acceptance of the same, are conclusive upon the defendants, and that the action of the jury was unauthorized, judgment on default is to be entered for the $2500 with interest; but if the Court shall consider that the defendants had the right to a revision of the damages by the jury, a nonsuit is to be entered.

Allen and *Paine*, for the plaintiff.

The damages having been "ascertained and determined" by the County Commissioners, the defendants could have no right to appeal or to demand a jury.

By R. S. c. 81, § 3, the damages are to be *ascertained* and *determined* by the County Commissioners. That section provides that, (when the parties cannot agree,) "the damages shall be *ascertained* and *determined* by the County Commissioners, under the *same conditions* and *limitations* as are by law provided in case of damages by laying out *highways*."

To "ascertain and determine," is to settle definitively. Webster's Dictionary.

What then are the conditions and limitations under which the Commissioners are to settle definitively the damages by laying out highways? R. S. c. 25, § 5, 6, 7, 8.

The only condition or limitation is, that the land owner has a right to call a jury.

The term highway is defined in R. S. c. 1, § 3, as equivalent to "county road" or "county way."

A county road or county way is one laid out by the County Commissioners, the county being liable for damages. *Goodwin* v. *Hallowell*, 12 Maine, 271.

If the county cannot have a jury in case of highways, so neither can a rail road company. But a county cannot have a jury, —

1. Because the county itself, by its own agents, locates the road and estimates the damage. The county is therefore estopped; it cannot be aggrieved by its own doings, the doings of its agent.

2. A county was not designed to be included in R. S. c. 25, § 5.

3. Jurors would all be interested in favor of the county.

4. A county has a more efficient remedy, by a discontinuance of the road.

There has been no such practice as a county calling for a jury.

A rail road company, as the party to pay the damages, re-

sembles a county, and can, by the statute, have no greater rights. In no case, can a jury be called, except to give an *increase* of damages. The defendants' application was for a *decrease.*

A rail road company, like a county, may change its locations, to avoid the payment of excessive damages. R. S. of Massachusetts, c. 39, § 55, 56, 57.

The statute authorizes a jury only upon the call of some party "aggrieved." This obviously extends only to owners of lands taken. True, it speaks of "any town or other corporation" aggrieved. Whatever right is here given to the town, is where the road is laid over land belonging to the town. No corporation, except a county, can be aggrieved by a high assessment of damages. The taking of the plaintiff's land was at the option of the defendants. If too costly, they needed not to take it, or they may alter their location. The plaintiff has no such option. He is not consulted. He must lose the land at all events.

As the right to demand a jury is not given by statute, so it does not arise by any implication of law. A jury thus called is wholly unlike the jury of a common law court to ascertain facts. It has no facts to pass upon. To understand the language in question, some aid may be had by referring to statute of 1832, c. 564, § 1; statute of 1831, c. 500, § 5. In cases of turnpikes, the right to a jury is given to "either party." R. S. c. 80, § 5. The omission to express the right in cases of rail roads, furnishes an implication, that it was not designed to be given.

The defendants had no lands over which a road was to be laid. It was therefore unnecessary to provide a remedy for them. Without determining what might be the extreme rights of land owners, it is sufficient for us, in this suit, to show that the right to a jury does not belong to a rail road company. And such a company cannot complain, for they proceed by their choice, upon such powers only as the Legislature has consented to give them.

Evans and *J. H. Williams*, for the defendants.

SHEPLEY, C. J. — The question presented is, whether a rail road corporation has a right, by way of petition and appeal from a decision of County Commissioners, to have a jury determine the amount of damages to be paid for lands taken for the road.

By the provisions of the statute, c. 81, § 3, the damages are to be determined by the County Commissioners "under the same conditions and limitations as are by law provided in case of damages by laying out highways." The damages occasioned by laying out highways are to be determined by County Commissioners, and all persons aggrieved by their decision may present a petition and have a jury estimate them. And "any town or other corporation aggrieved by the estimate of the Commissioners shall be entitled to a similar remedy by a jury." Ch. 25, § 3, 5, 8.

It is insisted, that no town or other corporation can be aggrieved by the assessment of damages for lands taken by laying out highways, unless it owned the lands, for no corporation but a county is liable to pay them, and a county cannot be aggrieved by a decision of its own agents, more especially as those agents, after a jury has decided upon the amount of damages to be paid, may prevent any liability for payment by determining, that the highway shall not be laid out.

Admitting the full force of this argument it will not prove, that a town or other corporation than a county would not be aggrieved, and therefore be entitled to a jury, if it were liable to pay damages for land taken for a highway. If the law requiring counties to pay the damages were repealed and towns, as formerly, were required to pay the damages for lands taken within them, they might be aggrieved by an over estimate of damages and have the right to a jury to determine, whether that estimate should not be diminished. The fact, that no application has or can be sustained under the provisions of the statute, c. 25, for a diminution of damages by laying out highways, because no such corporation by the existing laws can be aggrieved by an over estimate, is not conclusive against the right of a corporation to do it, made

liable by c. 81 to pay the damages occasioned by taking land for a rail road, and therefore liable to be aggrieved by an over estimate of damages.

A reference appears to have been made by the provision in statute c. 81, to that in c. 25, to determine under what circumstances and by what course of proceeding a jury might be had, rather than to determine, who might be considered to be aggrieved.

The *constitution* having provided, that in all controversies concerning property the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practised, it cannot be supposed, that the Legislature intended by that reference to prevent a rail road, that might be aggrieved, from having an estimate made by a jury, because a corporation, whose land was not taken for a highway and whose property was not liable to be taken for payment of damages and which could not therefore be aggrieved, was not entitled to have such an estimate made.

It was not the purpose of the sixth section of c. 25, to determine, that no petition for a diminution of damages should be sustained, but to prescribe the course to be pursued by the Commissioners, when a petition for an increase of damages was presented. That section might remain unaffected, if towns instead of counties were made liable to pay the damages and might therefore be aggrieved and entitled to maintain a petition and have a jury determine, whether the amount assessed by the County Commissioners should not be diminished.

One of the conditions and limitations referred to being, that any party, town or other corporation aggrieved by the estimate of damages made by the Commissioners may by petition be entitled to a jury, it only remains to show, that a rail road corporation has been thus aggrieved to bring it within the provision.

The failure of the argument against it is found in its inability to show, that a rail road corporation must be in the same position and have the same rights as a county or other

corporation, which cannot be aggrieved, when the railroad corporation may be aggrieved. *Plaintiff nonsuit.*

WELLS, HOWARD, RICE and HATHAWAY, J. J., concurred.

WING *versus* CHASE *& al.*

The affixing of a seal, though it be not mentioned in the instrument, constitutes a deed.

In an action of *covenant broken*, an omission to allege in the declaration, that the instrument declared upon was under seal, is amendable.

It is a principle of law that the sealing of a contract furnishes of itself sufficient evidence of a consideration, although no legal consideration is stated or recognized in the contract itself.

A seal has the effect to overcome and control statements, expressly made in the contract itself, that there was no legal consideration.

A *joint* covenant by two or more persons, that they will not do a specified act, which it was lawful for either of them to do alone, is broken whenever the act is done by either of them.

One, holding a guaranty against the arrest of his person, can, after being arrested, recover upon the guaranty none of the costs or expenses, arising subsequently to the arrest. HOWARD, J. dissenting.

Such an one, after having given the poor debtor's relief bond to procure his release from such an arrest, does not act prematurely in commencing an immediate suit upon the guaranty.

ON FACTS AGREED.

COVENANT.

This plaintiff and one Emerson hired $400, at the bank, upon a note signed by themselves as principals, and by the defendants, Chase and Percival, as sureties. Judgment and execution were recovered by the bank against them all. The sureties paid the execution in unequal sums, Chase paying $232,28, and Percival the residue.

Afterwards Wing, this plaintiff, in 1842, paid to the sureties ten per cent. of what they had paid, and received an instrument, executed by them, of the following description, being the one upon which this action is brought. —

"Whereas, the President, Directors and Company of the

Ticonic Bank, at a Court holden at, on, &c., recovered judgment against Charles Emerson, David Wing, Joseph Percival and Hall Chase, on which said Percival and Chase were sureties, and whereas said Chase and Percival have paid the whole amount of said execution: — now in consideration of ten per cent. of said execution paid to us by said Wing, we hereby covenant and agree with said Wing that we will not levy said execution, nor any execution growing out of said claim, on the property or body of said Wing.

" Hall Chase, [L. s.]

"Attest, I. Redington," " Joseph Percival, [L. s.] "

Afterwards, in 1846, Chase, one of the sureties, brought an action against Wing to recover for the money he had been so compelled to pay, and took judgment and execution for $166, damage, and $26,20, cost. Upon that execution, Wing was arrested, and gave an execution debtor's relief bond. This suit was then brought by Wing. Having failed to fulfill the conditions of that bond, an action was brought upon it, which is now pending.

The cause was submitted to the Court, with power to draw inferences as a jury might, under a stipulation that a nonsuit or default should be entered, as the principles of law may require.

Bradbury and *Morrell*, for the plaintiff.

Stackpole, for the defendants.

1. Actions of covenant broken can be maintained only upon instruments under seal. The paper offered in evidence in this case is not to be considered a sealed instrument. In its language, it does not purport to be sealed, or that it was recognized or intended to be. The fact that some small slips of blank paper are *now* found to be wafered to the instrument, can have no effect. *When*, by *whom*, and *for what purpose*, this wafering was done, is wholly unknown. As, in the instrument itself, the signers make no recognition of any sealing, so neither does the subscribing witness. The *Court*, as a *matter of law*, cannot decide, neither is there any thing in the case from which a *jury* could *find*, that the instrument was a seal-

ed one. *Warren* v. *Lynch*, 5 Johns. 239; *Perrin* v. *Cheeseman*, 6 Halst. 174; *Andrews* v. *Herriot*, 4 Cow. 508; *Lee* v. *Adkins*, Miner, 187; *Boynton* v. *Reynolds*, 3 Mis. 79; *Jenkins* v. *Hunt*, 2 Rand. 446; *Duning* v. *Bullitt*, 1 Blackf. 241.

2. There was, in point of fact, no consideration for the promise declared upon. A balance of nine tenths of the debt, due from Wing to these defendants, remained unpaid. The agreement signed by them, as Wing now contends, was a promise not to enforce execution for that balance; that is, in effect, to give the portion of that balance to the debtors. Upon such a promise, a mere *nude fact*, no action is maintainable. *Bailey* v. *Day*, 26 Maine, 88.

As there was no consideration *in fact*, so there was no *proof* of any. The duty of proof is upon the plaintiff. The paper itself furnishes nothing from which even to infer a consideration. On the other hand, it expressly shows that the contract was founded upon no legal consideration.

True, there is a dogma that a seal is evidence of a consideration. We have, however, shown that the paper, relied on by the plaintiff, had no seal. But suppose it was in due form and under seal, would that alter any liabilities? A debt due is one thing, the evidence of it is another. The obligations resting upon the debtor are the same, to discharge to the full extent by payment, the sums he may owe, whether the proofs of his indebtedness are by parol or by specialty. Any other conclusion would be giving to mere form the superiority over substance. By following the principle out fully, all inconsistency may be avoided and all real injustice. It is difficult to perceive how the *force of the language* in a contract can be enlarged or restrained by the form, or any other peculiarity of the instrument, by which the proof of it is perpetuated or preserved. Intrinsically there is no difference between a simple promise to pay what is justly due, and a covenant or bond under seal, or a judgment of a competent court for the same. They are all but different modes of proof of the same fact. And it is yet to be ascertained whether courts of law have made any such arbitrary distinctions. They have determined

what shall be the *inferences* from the *facts*, stated in instruments in writing, judgments, &c.; and in so doing they have declared that a promise to do a thing, though made in writing, is void, unless a consideration be expressed in the writing or can be proved *aliunde;* — while, if the evidence of the same promise is put in the form of a bond under seal, a consideration for it shall be conclusively *presumed* from the mere form of its authentication, whenever its language is such as neither to deny or admit that a consideration existed. This, however, does not place the contract by a specialty on a different footing, as to the *necessity* of a consideration to support it, from the simple contract. So that, a writing under seal, stating distinctly and clearly that it was made without any consideration, cannot by any implication or presumption, which would not do violence to reason and common sense, be construed to contain evidence thereof. The language of the instrument would be an express and direct contradiction of the fact to be *presumed.* The statement of a good consideration for a deed, (unless it be a gift, or release executed,) of land or other thing, is essential to its validity. The rules of law as to the admission and effect of evidence, estop the party from denying the consideration stated in his deed. But the instrument in this case, expressly shows that it was not founded upon any consideration, either of disadvantage to the party who received it, or of advantage to the party who gave it. It is, therefore, respectfully submitted whether the rights pertaining to a simple contract, can be changed by the mere affixing of a seal, (a most unmeaning and useless form,) at a period like this, when almost any man can authenticate his obligations by his own proper signature?

3. The instrument relied upon is one, made by the defendants jointly, and stipulates only against their joint acts. They did not constitute themselves sureties for each other. But the act complained of was done by Chase alone. Against such an act Percival made no contract. He had no agency in it or control over it. No recovery then can be had against him. And if so, this action, being against him as well as against Chase, must wholly fail.

4. The stipulation of the defendants was, that they would not levy "*said execution*," nor any execution growing out of "*said claim.*" What execution is meant? Was it the one which the bank had recovered and which had been satisfied? What "*claim*" is meant? Does it mean that satisfied execution, or rather does it not mean the ten per cent.? If the latter, there was an adequate consideration, and the paper was in effect but a receipt for that part, with a promise, unnecessary and therefore mere surplusage, not to collect that part a second time. Such a construction would be the grammatical one, and it would exactly conform to the justice of the case.

Again, if the paper, relied on by the plaintiff, could support an action like this, it might have been successfully used in defence of the action *Chase* v. *Wing*. The presumption is that it was attempted to be so used. But the case shows that Chase, in that suit, recovered a much smaller sum than he was entitled to. Why that reduction? It was so made, as a jury might very properly infer, upon a compromise of the parties, and such a compromise annulled the paper now in suit, at least as to Chase. Such a compromise the parties had a right to make, and it was favorable to this plaintiff, both in view of the sum he owed, and by reason of the uncertainties as to the import of the instrument now under consideration.

5. The writing declared upon is not a discharge of the defendants' claim. Notwithstanding that writing the judgment in favor of Chase is valid against the property of Wing. As, for instance, in case of his death, his representatives would have to pay it. It may be satisfied of his property in any way not involving the levy of an execution. With that exception, every legal and moral obligation rests on Wing, as if no such writing had been given. He is, therefore, not injured by the levy of the execution, and is not entitled to damages.

6. The case finds that this suit was commenced before the plaintiff had performed any condition of his bond, given on his arrest, and before any forfeiture of the bond had accrued, and before any thing had been paid by him, and long before Chase brought his action on the bond. The action was pre-

maturely brought, and the plaintiff can in no event recover damages, unless nominal, in this suit.

7. The forfeiture of the bond, being voluntary on the part of plaintiff, and he having allowed and compelled Chase to resort to his suit on the bond, after its forfeiture and after the commencement of his action against Chase, whatever the result to which the Court may come as to other questions and matters in controversy, the plaintiff is not and cannot, under the terms of the agreement, be entitled to any damages on account of the costs and special damages accruing against him in the action upon the bond.

WELLS, J. — The instrument upon which the action is founded is under seal, and although it is not so stated in it, yet the existence of the fact is sufficient to make it the deed of the defendants. 1 Dyer, 19, a.

The declaration should show in an action of covenant that the contract was under seal. 1 Chitty on Plead. 114. But if there is an omission of such allegation in the plaintiff's declaration, as is suggested, though it is not exhibited, the error would be amendable.

The sealing of the instrument implies and carries with it internal evidence of a consideration. 2 Black. Com. 446. It is not any objection to a bond, if there is no consideration to it. *Fallowes* v. *Taylor*, 7 T. R. 280; *Bunn* v. *Grey*, 4 East, 200. The recital of a consideration of ten per cent. paid to the defendants cannot affect the obligation, for it would have been valid as their deed if nothing had been paid. *Lee* v. *Oppenheimer*, 32 Maine, 254.

The covenant, "that we will not levy said execution nor any execution growing out of said claim on the property or body of said Wing," was broken by the arrest of Wing on Chase's execution, for that execution manifestly grew out of the claim of the bank. It is true they agree not to do what each one might do separately by commencing a suit for what he had paid. If it clearly appeared, that the acts to be done, were several, and the defendants were not to be holden for

each other, one would not be liable for what the other did. But the covenant is in form joint, and there is nothing to indicate that they did not intend to be holden jointly. The levying the execution, which the bank recovered against them, upon the body or property of Wing, would not necessarily be a separate act. In reference to the part of the covenant not to levy that execution, they must have intended to be holden jointly. And it is not probable they contemplated a joint obligation as to one part of the covenant, and merely a several one as to another part of it.

It appears, that Chase caused Wing to be arrested on the execution, which issued on his judgment; that Wing was discharged by giving a poor debtor's bond; that a suit was subsequently commenced against him for a breach of its conditions, and that the damages and costs were paid by him. Wing might have paid Chase's execution when he was arrested, and prevented the expenses, which accrued by his own act after his arrest. He cannot justly claim as damages a greater sum than he was then required to pay. That sum will be the amount of Chase's execution, and the officer's fees for making the arrest, to which should be added interest on the same to the time of rendering judgment in this action.

Defendants defaulted.

SHEPLEY, C. J., and HATHAWAY, J., concurred.

HOWARD, J., considered that the costs and expenses subsequent, as well as those previous, to the arrest should be included in the damage, assessed for the plaintiff.

Farnsworth *versus* Richardson.

The writ *de homine replegiando* lies only for the benefit of a person, unlawfully restrained of liberty.

It cannot be used for the benefit of another person, although such other person may have, by contract, a lawful claim to his services or society.

If a father, after making an assignment of the services or society of his minor child, have retaken the child into his own keeping, the remedy of the assignee, (if any he have,) is not by replevin, but by action on the contract.

Whether such an assignment can be valid; *quære.*

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

Replevin of a person.

The writ required the officer to replevy "Harriet M. Richardson, who sues this action in the name of Nancy Farnsworth."

Harriet M. Richardson is a child, under the age of four years, and is the daughter of the defendant and grand daughter of Mrs. Farnsworth, in whose name this suit is brought. By virtue of the writ the child was taken from its father and delivered to its grandmother.

Mrs. Farnsworth, to show her right to this action, offered to prove that the child, upon the death of its mother, and when it was but a few days old, was given and delivered to her by the father, and that, after residing with her for a season, was taken and kept by the father, who claimed to control it as his own, and refused to let it reside with Mrs. Farnsworth. This evidence being objected to, was excluded by the Judge, and a nonsuit was ordered; to which ruling the plaintiff excepted.

Evans, for the plaintiff.

The question is upon the rejection of the evidence offered. The decision of the Judge does not indicate the ground of the rejection, whether because of any error in the form of the action, or whether the contract, offered to be proved, was not of a character to give to the plaintiff a right to the custody of the child.

I. The plea is *non cepit* with a brief statement, putting an issue *of fact* to the jury.

Therefore the question whether this form of action will or will not lie, *in the name of the plaintiff*, does not arise. If this form of action is not maintainable, there should have been a demurrer or a plea in abatement.

If the plaintiff cannot sue, it should be shown in abatement. Not being so pleaded, it is waived. Eastman's Dig. Abatement, 3 b., § 4, 6, 7; *Savage Man. Co.* v. *Armstrong*, 17 Maine, 34; *Trustees of Dutton* v. *Kendrick*, 12 Maine, 381; *Soc'y for Gospel* v. *Pawlet*, 4 Pet. 480. Such was the form of action in *Wright* v. *Wright*, 2 Mass. 109.

II. The object of the evidence offered was to show a contract fairly and deliberately made between the parties, upon good consideration, whereby the defendant waived and surrendered his parental rights to the plaintiff.

1. The rejection of the evidence raises the question whether such a contract is binding upon the defendant, and whether, by virtue of it, the plaintiff is entitled to the custody of the child.

By the evidence rejected, the plaintiff offered to prove all the elements of a valid contract; one fairly and deliberately made; by parties competent to contract; upon good consideration; upon a subject neither illegal nor immoral; having a fit and meritorious object, the accomplishment of a great good; the permanent benefit of the child.

It must be assumed that the plaintiff is willing and suitable in every respect, to support and educate the child, and that she has violated none of the agreements on her part.

The objection to it is, that the law will not allow a father thus to dispose of his minor children, and the reason offered is, that he is under obligations, of which he cannot divest himself, for their support and education. Parental rights, it is said, result from parental duties.

But may not one waive or release *rights* without thereby freeing himself from obligations?

Repeated decisions have settled that parents may emancipate minor children, so as to lose all right to their earnings, and judicial tribunals are allowed to infer such emancipation, often from slight circumstances.

But it has never been held that, in such cases, the father is released from his obligations to support the child, whenever support is needed.

Fathers are allowed to give, or sell, to children under age, their time till majority, and the courts have sustained it. *Withington* v. *Nightingale*, 15 Mass. 275; *Whiting* v. *Earle*, 3 Pick. 201.

It is not supposed, however, that the father is thereby free from the duty imposed by law on parents, should the child require its performance.

As between the father and the person who agrees to receive and support the child, the father would be free.

In the present case, can the plaintiff maintain an action against the father for the maintenance of the child? Would it not be a perfect defence, that by the agreement, she was bound to support and educate it at her own expense?

2. The contract is not within the statute of frauds: — 1st. Because this is not an action brought upon the contract. — 2d. Because there has been performance on behalf of the plaintiff.

3. Nor is it void by reason of being against public policy. On the other hand, public policy requires such contracts to be upheld. It affords opportunity to provide for the support and education of those, who might otherwise grow up in poverty and ignorance.

Nor is there any danger that the power of thus disposing of children will be abused.

Generally, natural affection will restrain a father from parting with his child, unless it be for the good of the child. If his expectations are disappointed and the *quasi* parent fail to perform his duties, the Court have ample power to remove the child from his custody and restore him to the father or other friends. The remedy for the correction of any abuses in such cases, is prompt and decisive.

It may be urged that the duties which are incumbent on a father towards his children are *personal* and not assignable.

But may not a parent contract for the education and sup-

port of a child, and is it not often done? Are not children often sent from home for long periods, for purposes of education, health or improvement in worldly prospects? Are they not under the entire discipline and control of guardians and teachers? And if this may be done for *years*, why not during minority?

Could he refuse to pay for the nurture and instruction of his children, on the ground that a contract to that end, was void, being on a matter not allowable?

If not, then it is lawful for a father to provide for the support, education, control and discipline of a child by others; and this is done in a vast number of cases.

The education and bringing up of a child is not therefore a *personal* trust.

4. It is not denied that, by law, *generally*, the father is entitled to the custody of the children; but it is denied that it is *universally* so. There are many exceptions, as where the father is an unsuitable person, from his character, or habits, or inability; or where the age or health, or other circumstances of the child, render it unfit.

The law was formerly more stringent than it is now, and more so in England even now than here.

The child now is regarded not merely as the child of the father, but also as the child of the State. Society has found out that it has a deep interest in its welfare and in many instances withdraws it from the father's control.

The well-being of the child is now the leading consideration in determining with whom, among conflicting claimants, it shall remain.

How can this be so, if the right of the father is of the stern, unyielding, inalienable character, contended for?

The parental right may be forfeited by misconduct, or by poverty. Why may it not be waived or surrendered?

The common law rule of the absolute control of the father, has been much modified and shaken by American decisions, and even in England has been the subject of legislative inquiry. Kent's Com. 194, (195,) note c.

The principles we contend for are recognized and established by many cases. *State* v. *Smith*, 6 Greenl. 464 and 466; *In re M. E. Waldron*, 13 Johns. 418; *Commonwealth* v. *Addicks*, 5 Binney, 520; *U. S.* v. *Greene*, 3 Mason, 482; *Morse* v. *Welton*, 6 Con. 550; 6 Barbour, 368; *Pool* v. *Gott*, Law Reporter, Sept. 1851, p. 269.

The statute respecting apprentices does not take away the common law right of the father, to dispose of his children. *Day* v. *Everett*, 7 Mass. 145.

Emmons and *Paine*, for the defendant.

HATHAWAY, J. — The question presented by the exceptions was decided by the Court in the case *Richardson* v. *Richardson*, 32 Maine, 560.

If the defendant made a contract with the plaintiff, by which he transferred to her the care and control of his child, an action on the contract would be the proper remedy for any injury to her, caused by a breach of it, on his part. *Bridges* v. *Bridges*, 13 Maine, 408.

Exceptions overruled, and nonsuit confirmed.

SHEPLEY, C. J., and WELLS, HOWARD and APPLETON, J. J., concurred.

WOODWARD *versus* ABORN.

An action of *the case*, charging that the defendant's act was done *maliciously*, may be maintained by proof that it was done *negligently*. Malice, though alleged, need not be proved.

For keeping a deleterious article so negligently as thereby to occasion damage to another, an action is maintainable, although from such keeping no damage would have accrued, except for the extraordinary, but not *very* uncommon, action of the elements.

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

CASE, charging that the defendant *maliciously* placed, and for one week kept a pile of animal manure so near to the plaintiff's well as to render the water unfit for use.

From the evidence, it appeared, that the parties were own-

ers of adjoining lands; that the divisional line was very near to the plaintiff's well; that the defendant's servant attempted to draw a load of manure to the back part of the plaintiff's garden, but being unable to draw it so far, lodged it very near the well; where it remained about a week. The next day after it was placed there, the defendant was notified that it was injuring the water in the well. For two days, the weather being dry, the manure might have been removed by some ten minutes labor. Then came a rain of extraordinary power, which, as the plaintiff contended, after soaking the manure, came into the well, and vitiated its water. There was evidence tending to show that previously the water was impure and worthless.

The defendant requested instruction to the jury, *that*, as the plaintiff had alleged the defendant's doings to have been malicious, the proof must show malice; and that, if the plaintiff's well would not have received any injury from the manure lying there, except for the extraordinary rain, his action could not be maintained.

The Court instructed the jury that, if the defendant deposited or retained the manure in a particular situation, with the *malicious intent* to injure and corrupt the water in plaintiff's well, and the water was thereby corrupted and injured, to the damage of the plaintiff, the defendant would be liable; or, if the defendant *negligently* suffered the manure to remain in such a situation as that the water in the plaintiff's well would be thereby injured and corrupted, he, defendant, knowing the fact, and in consequence of such negligence, the water was corrupted and injured, to the damage of the plaintiff, the defendant would be liable.

In answer to an inquiry from the jury, what they should do if satisfied that the water was injured before the manure was placed there, and was also affected by the manure, the Judge instructed them that, if the water was so injured and corrupted by other causes as to be wholly unfit for use and worthless, they would find for the defendant, but if the water was injured by other causes, but not thereby rendered *wholly worthless* and

unfit for use, and received additional appreciable, substantial injury from the manure, for such additional injury, occasioned by the malice or negligence of the defendant, he would be liable.

The verdict was for the plaintiff, and the defendant excepted to the instructions and to the omission to instruct as requested.

Lancaster & Baker, for the defendant.

The plaintiff's declaration charges that the acts which he complains of were done "*maliciously.*" His proofs must conform to his allegations. He must prove the malice. Yet the instruction to the jury expressly allowed the plaintiff to recover though it should appear that the acts were merely done negligently. That instruction we hold to be erroneous.

The injury to the well, if any, was a consequence of the extraordinary rain. The request, therefore, for instruction to the jury, that if the plaintiff's well would not have received any injury from the manure lying there, except for the extraordinary rain that fell, the action could not be maintained, was very pertinent and very proper, and should have been given. *China* v. *Southwick*, 12 Maine, 238.

The instruction which the Court did give was not at all applicable to this point, for the defendant could not know or anticipate that an extraordinary rain would come.

Again, the instruction given in answer to an inquiry from the jury, did not meet the case as presented by the evidence. Instead of telling them, that, if the water was injured by other causes before the manure was placed there, but not rendered wholly worthless, and then received substantial additional injury from the manure, they might find for this injury, the court should have instructed them that if the water would have been rendered wholly worthless by the excessive rain, if the manure had not been there, then the action could not be maintained.

The instruction given applied to the water *as it was* before the manure was hauled there; the one contended for, to the condition of the water after the great rain.

Vose, for the plaintiff.

SHEPLEY, C. J. — The principal cause of complaint insisted upon is, the refusal to instruct the jury, "that if the plaintiff's well would not have received any injury from the manure lying there, but for the extraordinary rain that fell, the plaintiff's action could not be maintained."

This request assumes, that if the waters of the well would not have been injured without such a rain, and that they were injured by such a rain, by reason of the negligence of the defendant there could be no legal cause of action.

A person should not place or negligently allow a deleterious substance to remain, where the useful waters of another may be corrupted either by the ordinary or extraordinary, and yet not very uncommon, action of the elements.

Exceptions overruled.

WELLS, HOWARD and HATHAWAY, J. J., concurred.

BATES, *Administrator, versus* TALLMAN.

A relief bond, given by an arrested execution debtor, does not operate to discharge the judgment.

Such a bond is merely a collateral security.

The discharge of such a bond, upon the payment of a part of the execution, there being no stipulation that such payment of a part should be accepted as a release from the whole, will not bar a suit upon the judgment to recover the balance.

Hence the discharging, (under such circumstances,) of *such* a bond, given by the *maker* of a note, will not defeat a suit against the *indorser* to recover the unpaid part of the judgment.

ASSUMPSIT, against the indorser of a promissory note.

The defence rested upon the following statement of facts.

The plaintiff's intestate recovered judgment against the makers for $711,00. They were arrested on the execution, and each gave a poor debtor's six months' relief bond. One of them, at the time of making their disclosures, being the owner of a mill, mortgaged it to secure the debt; whereupon the creditor canceled and gave up both the relief bonds. The mill was sold, by consent of the parties in interest, at $400,

which sum the creditor received and indorsed upon the execution. This suit, against the *indorser* of the note, is brought to recover the unpaid part of the note.

The cause was submitted for nonsuit or default, according to the opinion of the Court upon the law.

Whitmore, for the plaintiff.

Tallman, for the defendant.

At the common law, the voluntary discharge of an arrested debtor is a satisfaction of the judgment. "The execution is considered, as to him, a satisfaction of the judgment." 3 Bouvier's Inst. 570; *Ramson* v. *Keyes*, 9 Cowen, 128; *Yates* v. *Van Rennsselaer*, 5 Johns. 364; 25 Maine, 110.

True, there are cases in which a debtor may be released from arrest, while at the same time, the judgment remains in force. But this is a statute regulation, and requires preliminaries which were not taken in this case. R. S. c. 148, § 59. This enactment implies that, *unless* those preliminaries be adopted, the discharge from arrest is a bar to any further suit for the same cause of action. 25 Maine, 110.

The creditor in this case, having so materially changed the original contract, cannot now resort to the indorser of the note, for that change would preclude the indorser from any suit against the makers.

SHEPLEY, C. J. — The only defence insisted upon in the argument was, that the principal debtors have been arrested on execution and voluntarily discharged by the creditor; and that this amounts to a satisfaction of his debt.

It is agreed, that they were arrested, "and liberated from said arrest by giving the poor debtors' bond."

This release is one to which the debtors were entitled by the provisions of the statute, c. 148, § 20. It was not a voluntary one by the creditor, but an involuntary one made by the officer in obedience to law. By the provisions of the forty-second section no such release can impair the right of the creditor to his debt or demand; and by this release the debt was not discharged.

This however is not the release, upon which the defendant relies as having such an effect. He contends, that the creditor by taking a mortgage of property from one of the principal debtors at the time, when they made their disclosures, and by surrendering their bonds given to procure their release from arrest, voluntarily discharged them from arrest; and that such discharge, not having been made in conformity to the provisions of the fifty-ninth section, the creditor is not protected from the effect of it at common law.

This argument fails, because it has no foundation, upon which it can rest.

The debtors having been before released from their arrest by giving bonds, were no longer under arrest. There was no existing arrest, from which the proceedings referred to could operate as a release. Those proceedings could only operate to discharge the bonds given to procure their release. Such bonds are only collateral security for the debt; and the creditor may refuse to prosecute them or may discharge them without relinquishing his debt.

The release provided for by the fifty-ninth section, is not one which takes place after the debtor has been by law released upon giving bond. It is one made to release him from arrest or imprisonment, before he has otherwise obtained it. Those provisions are not applicable to a case like the present.

Defendant defaulted.

HOWARD, RICE and HATHAWAY, J. J., concurred.

MOOERS, *Adm'r, versus* ALLEN.

An action pending in Court is discontinued by a common law submission of it to arbitrators.

A plaintiff died after having entered into such a submission, and after having assigned her interest in the claim. The arbitrators, afterwards, at the suggestion of the assignee, heard the cause and awarded in favor of the deceased, the administrator taking no part at the hearing. — *Held*, that an action brought upon the award, in the name of the administrator, is unsustainable.

On Facts agreed.

Debt upon an award.

The defendant's intestate, Polly Allen, was plaintiff in a suit pending in the District Court against this defendant. The parties referred the claim made in that suit, together with all other demands, by a written common law submission, to the determination of arbitrators.

The arbitrators met the parties and, for their own convenience, adjourned the hearing to a subsequent day. Polly Allen then transferred all her right and interest in the demand to one Ira Thing. Afterwards, before the arrival of the day to which the hearing was adjourned, she died.

The plaintiff was appointed administrator on July 8. After that appointment, the arbitrators issued new notices directed to Polly Allen and to the defendant, for a hearing on the 3d of August, on which day the defendant and also this plaintiff attended. The defendant filed a plea, protesting that the death of Polly Allen had annulled the jurisdiction of the arbitrators. They however proceeded to hear the cause, and made an award in favor of Polly Allen, being the award upon which this action is brought, for the benefit of Ira Thing.

It does not appear, that, upon that hearing, this plaintiff took any part, nor was his name used by the arbitrators in any part of their proceedings.

Upon these facts the cause was submitted to the Court for adjudication.

Bean, for the plaintiff.

The submission was at common law; no bonds were given between the parties, and the only remedy is by action on the award. *Tyler* v. *Dyer*, 13 Maine, 41; *North Yarmouth* v. *Cumberland*, 6 Maine, 21.

The award will be sustained, unless there was gross partiality, corruption or evident excess of power on the part of the arbitrators, of which no pretence is even suggested. *Morgan* v. *Mather*, 2 Ves. 15; *Barlow* v. *Todd*, 3 Johns. 363; *Yarmouth* v. *Cumberland*, 6 Maine, 21; *Tyler* v. *Dyer*, 13 Maine, 41; *Dean* v. *Coffin*, 17 Maine, 52.

The case distinctly finds all the facts necessary to the maintenance of an action upon the award.

Kempton, for the defendant.

As the submission contained no stipulation that it should survive, it was revoked or annulled by the death of Polly Allen. Kinne's Law Compendium, Jan. No. 1845, p. 11; *Bailey* v. *Stewart*, 3 Watts & Serg. 460; Story's Pl. Tit. Pleas in bar, 167; 2 Barnwell & Creswell, 345.

RICE, J. — Prior to April 5th, 1850, Polly Allen, the plaintiff's intestate, had commenced an action at law against the defendant. On that day the parties, in writing, agreed to refer that suit with the costs in the same, and all demands between the parties, to arbitrators, the report of whom, or a major part of whom, made as soon as may be convenient, to be final.

This being a submission, not under the statute nor under a rule of court, but at common law, was a discontinuance of the action then pending. *West* v. *Stanly*, 1 Hill, 69; *Towns* v. *Wilcox*, 12 Wen. 503; *Ex Parte Wright*, 6 Cow. 399.

During the life of Polly Allen, the arbitrators, upon due notice, met the parties in interest, and after a hearing, for their own convenience and satisfaction, continued said hearing until some time in May, 1850. Before the day of adjournment arrived, Polly Allen deceased. After her decease, but prior to the third day of August, 1850, the arbitrators issued a new notice to the parties, in the name of Polly Allen, for a further hearing, on said third day of August, and they appeared upon said notice, whereupon the defendant filed a plea in bar or abatement, to the jurisdiction of the arbitrators, based upon the fact of the death of said Polly Allen, which plea was overruled by the arbitrators, who proceeded with the hearing, and on the sixth day of the same August made an award in favor of Polly Allen, and in her name.

The plaintiff was appointed administrator of the estate of Polly Allen, July 8, 1850, but does not appear to have taken

any part in the hearing before the arbitrators, nor was his name used by them, in any of their proceedings.

The case further finds that after the agreement to refer was entered into and before the first hearing, the plaintiff's intestate assigned all her right, title and interest in the claim, action and demand referred, to Ira Thing, who was sole owner of the same at the time of the several hearings before the arbitrators, and at the time of making and publishing their award, and that the claim was prosecuted for his sole benefit and interest.

The agreement to submit is a naked personal contract between the plaintiff's intestate and the defendant. It contains no provisions or stipulations authorizing her assignee or other representative to act in her behalf or in her name in the prosecution of this claim before the arbitrators. Her administrator did not assume to act in the premises, nor was his name used in the proceedings. Under such circumstances the arbitrators have no authority to proceed against the protestations of the defendant. *Blundell* v. *Bretargh*, 17 Ves. 231; 2 B. & C. 345; Story's Pl. 167. This award therefore cannot constitute a foundation on which this action can be maintained. A nonsuit must therefore be entered.

Shepley, C. J., and Wells, Howard and Hathaway, J. J., concurred.

Shaw *versus* Berry *& al. Adm'rs.*

Joint executors or administrators, representing the testator or the intestate, are, in law esteemed to be one person.

An act by one of them, relating to the goods of the estate, is deemed to be the act of all.

Thus, a witness' liability to the estate may be released by one alone of several joint administrators.

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

The suit was originally against Jacob M. Berry. After his decease, the defendants, being cited in as his administra-

tors, appeared and took upon themselves the defence of the suit.

At the trial, they offered the testimony of one Sands, who, being objected to for interest, was excluded. He thereupon produced a release, executed by James Berry, one of the administrators. His competency, however, was still objected to by the plaintiff, but he was admitted and testified. The verdict was for the defendants.

To the admission of the witness, the plaintiff excepted.

Evans, for the plaintiff.

H. W. Paine, for the defendants.

RICE, J. — The only question reserved for the consideration of the Court is whether James Berry, one of the administrators on the estate of Jacob M. Berry, had, by virtue of his office, authority to release any interest which the witness Sands had in the result of the suit.

It appears to be well settled, that if a man appoint several executors they are esteemed in law but one person, representing the testator, and the acts done by any one of them which relate to the delivery, gift, sale or release of the testator's goods are deemed the act of all. If one releases a debt it is good and binds all the rest. *Wheeler & al. Ex'rs* v. *Wheeler*, 9 Cowan, 34.

In case of joint executors or administrators, the authority of each is entire, and competent to the discharge of debts due the estate. 1 Atk. 28.

After administration is granted, the power of an administrator is equal to, and with the power of an executor. Williams on Executors, 609; Toller on Executors, 243; *Jacomb* v. *Harwood*, 2 Ves. Sen. 265.

Power to release an absolute debt would necessarily include authority to release a contingent liability.

Exceptions overruled.

SHEPLEY, C. J., and WELLS, HOWARD and HATHAWAY, J. J., concurred.

THOMPSON *versus* MITCHELL.

To the validity of an award, founded upon a common law submission to three persons, upon a stipulation to abide the determination of any two of them, it is essential that all three be present at the hearing of the parties.

That all were thus present, is sufficiently evidenced by a statement of that fact contained in the award, although it be signed by two only.

A provision, in a submission, that the award should be "made and published in writing," does not require a written notice to the parties, that such an award, subject to their examination, has been made.

Such a provision only requires that the referees make an award in writing, and give to the parties an opportunity to examine it.

An award, when duly made and signed, and its contents made known to the parties, fixes their rights; and cannot rightfully be altered, recalled or withheld by the referees.

In deciding whether, in an award, the requirements upon the respective parties were designed to be dependent upon each other, the Court will take into account what would most contribute to the safety of each party.

When, in an award, one of the parties is required to pay money unconditionally, he is, upon publication of the award, liable to pay without any demand.

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

DEBT.

The case shows that the plaintiff purchased from the defendant a part of a patent right of a certain machine, and gave therefor one note of $100, and two of $200 each, all of which the defendant sold in the market. A controversy afterwards arising between the parties, they submitted the whole matter to the determination of three referees, and gave mutual bonds, stipulating to abide the award, which the referees or any two of them should make and publish in writing under their hands at any time within sixty days after hearing the parties.

This suit is brought upon the bond thus given to the plaintiff.

The hearing was had by the referees, and their duties were concluded about the 21st of January, 1850, at which time a report was signed by all of them, stating that they were all present at the hearing, and awarding that the plaintiff should pay the defendant $75, and that the defendant should take up and cancel the said notes, amounting to $500, which

he had sold, against the plaintiff. The next morning after the award was made, one of the referees informed the defendant the contents of the award, as nearly as he could recollect the same, but "presumes he did not recollect all the contents."

The chairman retained the award and drew a duplicate of it, which, with the original award, he transmitted by mail to the two associate referees, one of whom signed the duplicate more than a month after the hearing.

Neither of the awards was delivered, but the plaintiff obtained possession of the duplicate, thus signed by two of the referees, by representing to one of them that he wanted it for the chairman, and that the chairman had sent for it. This duplicate the plaintiff produced and read, in evidence, though objected to by the defendant.

When the duplicate, with the original award, was received from the chairman by the associate referees, the defendant was present with them, and paid the fees of the referees, and asked for a copy of the award, which, however, was not furnished to him. One of the referees seasonably notified the plaintiff, of the contents of the award, who replied that he should pay the $75, and would pursue the defendant so long as he had a dollar. The plaintiff however told another of the referees, that he would not pay the $75.

A witness testified that on April 9, 1850, the plaintiff tendered a re-conveyance of the patent right, and notified the defendant that he had lodged $75, for him with Mr. Plummer, which the defendant could have on repaying to the holders the notes, amounting to $500, against the plaintiff. Mr. Plummer testified that one of the $200 notes was in his hands; that the plaintiff wished him to pay the defendant $75, or to allow $75, on that note; that he assented to do so, when the plaintiff would give him security for that amount, which the plaintiff never did. One of the $200 notes was paid by the plaintiff, by giving a new note therefor; the other was sued and was paid by a levy and sale of a right which the plaintiff had to redeem certain real estate.

Mr. Plummer also testified that, prior to the submission, he, as attorney to the plaintiff, had commenced a suit against the defendant for the same subject matter, and that, several weeks after the making of the award, the plaintiff procured personal service of that suit to be made upon the defendant.

Some suggestions, made among the referees, relating to an alteration of the award, and concerning a delivery of it to the parties, are stated in the opinion of the Court.

The case was submitted to the Court for adjudication, with power to draw inferences of fact, as a jury might do.

Paine, for the plaintiff.

Danforth and *Woods*, for the defendant.

The award was invalid.

1. It was signed by only two of the referees, and it does not appear *of record* that all three of them were present at the hearing.

2. It was never delivered.

3. It was never published "in writing," nor does it appear that the defendant ever had an opportunity to read it. *Knowlton* v. *Homer*, 30 Maine, 552, and cases cited on 556; Caldwell on Arb. 156, 157; *Kingsley* v. *Bill*, 9 Mass. 198; *Sellick* v. *Adams*, 15 Johns. 197; 1 Saund. 327 a, note 3.

4. The two associate referees declare the award was not delivered, because they thought it ought to be altered, and the chairman also proposed an alteration. Thus not one of the three were willing to deliver or publish it. *Eveleth* v. *Chase*, 17 Mass. 458.

5. The award was not binding upon the defendant, because the plaintiff himself refused to abide by it. This appears by his own declaration, and also by his omission to provide the means of performing on his part; and also by pursuing, long after the award, the suit which he had previously instituted against the defendant.

6. No demand was ever made upon the defendant to perform. Such a demand is an essential prerequisite. Cald. on Arb. 156, 157; *Knowlton* v. *Homer*, 30 Maine, 557.

7. A tender by the plaintiff of a performance on his part

was essential. The sum awarded to the defendant, ($75,00,) was never paid or tendered. *Shearer* v. *Handy*, 22 Pick. 417; 1 Saund. 320, note 4, rule 4.

Shepley, C. J. — The suit is upon an arbitration bond. The plaintiff must prove, that an award in writing was made and published in conformity to the requirements of the condition of the bond. One was introduced signed by two of the arbitrators, and objection is made, that it does not appear of record that all three of the referees were present at the hearing. It is stated in the award, that all of them met and heard the parties; and that is sufficient.

Another objection is, that it was not delivered or published in writing. The condition of the bond in this case did not require, that the award should be delivered to the parties. In the cases cited in a note to 1 Saund. 327 a, the conditions did require, that it should be ready to be delivered to the parties before a certain day.

The condition of this bond required, that it should be made and published in writing within sixty days after the hearing of the parties. The meaning is, that the award should not only be made in writing, but the parties should be enabled to obtain a knowledge of it in writing. Not that they should in writing be informed, that an award had been made and that it was subject to their examination.

The three referees were examined as witnesses. The fair conclusion from their testimony is, that at the conclusion of their duties, on or about Jan'y 21, 1850, an award was drawn, which was signed by all of them, that their chairman retained it, and subsequently drew a duplicate of it, and signed it, and transmitted by mail with the other to the other referees. That one of the others only signed that duplicate, which was produced at the trial.

The referee, who last signed the duplicate, more than a month after the hearing, states, that the defendant was present and paid the fees of the referees; and that he had before, on the morning after the award was made, informed him of its

contents, as nearly as he could recollect them. He presumes that he did not recollect all the contents. This is but an opinion formed at the time of the trial and long after the transaction. It is not very probable, that on the morning after their report was made, he would from want of recollection omit to inform him of all the material parts of the award. He also states, that he told them to the plaintiff. When the duplicate was signed, the defendant "asked for our copy of it, which was not given to him," says one of the referees. It does not appear, that he might not then have read it, had he desired to do so.

It appears to have been withheld, because two of the referees desired to have some alterations made in the award; and because the plaintiff, when its contents were made known to him, declared that he would not pay the seventy-five dollars awarded against him, and threatened, that he would follow the defendant as long as he had a dollar.

It was stated in the case of *Knowlton* v. *Homer*, 30 Maine, 552, that an award would be considered as published when the parties were informed, that it was within their reach on payment of the charges. This must be understood, when the condition of the bond is like the present, to mean when they are legally entitled to it, or to examine and read it. If it should be wrongfully withholden from them, after the referees had fully performed their duties, had made up and signed their award and communicated it to them, its validity would not be thereby impaired.

In this case it is evident, that the chairman intended that the award should be binding. He states, that a proposition was made to alter it, and that he proposed an alteration with respect to cost, which was never decided upon, and that he came to the conclusion, that it would not be safe to alter it. The duplicate appears to have been transmitted to the other referees for signature and delivery with the award first signed. Another referee states, that he informed the third, that he had better deliver the awards to the parties. Subsequently he authorized that one to do as he pleased about delivering them.

When referees have fully heard the parties; have made up and signed their award; and have communicated its contents to the parties, their duties are closed, and they have no power to alter it or to destroy its effect by a refusal to deliver it or by an attempt to recall it. *Brown* v. *Vawser*, 4 East, 584; *Henfree* v. *Bromley*, 6 East, 309; *Irvine* v. *Elnon*, 8 East, 54; *Oliver* v. *Collings*, 11 East, 367; *Woodbury* v. *Northy*, 3 Greenl. 85; *Aldrich* v. *Jessiman*, 8 N. H. 516.

They have nothing to do with its execution or performance, and any attempt to vary it, because one of the parties improperly refuses to perform and threatens the other, is unauthorized and vain.

The plaintiff appears to have obtained the award from one of the referees, very improperly, by a misrepresentation, but that cannot, if he be otherwise entitled, destroy his right to maintain the action. He might have left it in possession of the referee and have summoned him to produce it on trial.

It is insisted, that the defendant is not bound by the award, because the plaintiff has refused and neglected to perform his part of it. So far as performance by one party is made by the award to depend upon performance by the other, the objection would be good. It could not have been the intention to require the defendant to repay the consideration received for a conveyance of one fourth of the patent right, without obtaining a reconveyance of it; or to make the plaintiff pay to the defendant seventy-five dollars more without being relieved from the payment of any part of that consideration. Nor will a fair construction of the award require any such result. The re-conveyance has been tendered, and the defendant, if required to pay to the plaintiff the amount of the consideration received, can, in a hearing in equity, have the seventy-five dollars deducted from the amount, for which execution should issue.

It is insisted, that a demand should have been made before the commencement of the suit. When an award is made for the payment of money unconditionally, the party becomes

liable to pay upon publication of the award according to its terms, without any demand. *Parsons* v. *Aldrich*, 6 N. H. 264; *Nichols* v. *Renssellaer In. Co.* 22 Wend. 125. The amount for which execution should issue, will be determined on a hearing in equity. *Defendant defaulted.*

WELLS, HOWARD, RICE and HATHAWAY, J. J., concurred.

SMITH *versus* PORTER, *Ex'r.*

The assignee of a debt and of the mortgage of personal property by which the debt was secured, though the assignment was by *delivery* only, has the same right to *possession* of the property as the mortgagee would have had.

The taking of property into possession, under a just claim of right, will not charge upon a person any liability as executor *de son tort.*

A purchase from an executor *de son tort*, will not charge the purchaser as an executor *de son tort.*

ON FACTS AGREED.

DEBT on a recognizance for debt for $13,39, signed and sealed by James Kimball, and brought against this defendant as his executor.

Plea, that this defendant was never executor.

In 1849, Kimball, (whose death occurred in 1852,) owned a yoke of oxen, and mortgaged them to secure to one Tilton a note of $15,00.

By the terms of the mortgage, Kimball was under no obligation to pay till after a demand.

Tilton took possession of the oxen and permitted them to remain in the hands of Kimball, until his, Kimball's, death.

After the death of Kimball, Tilton transferred the note and mortgage by delivery to this defendant, who took the oxen into his possession and sold them, having first purchased of Kimball's widow, for $60,00, the legal and "equitable interest" which the estate had in the oxen.

At the time of the sale by her, the oxen were in the possession of one Eaton, whom she had hired to keep them for two or three weeks.

When these sales were made there had been no administration on Kimball's estate. But afterwards letters were granted to his widow.

The plaintiff claims to recover against the defendant as executor in his own wrong.

The cause was submitted to the Court for a legal adjudication.

Kempton, for the plaintiff.

The defendant was executor *de son tort*. R. S. c. 107, § 18; Toller on Ex'rs, 38, 39, 366, 367, 368; Starkie on Ev. part 4, p. 553, 554, 555; 2 Greenl. Ev. 274, 275, 276; *Edwards* v. *Hasben*, 2 Tenn. 587; *Mitchell* v. *Lunt*, 4 Mass. 654; *Allen* v. *Kimball*, 15 Maine, 116; *White* v. *Mann*, 26 Maine, 361.

As no demand for the payment of the $15 note had been made upon Kimball, or upon any one representing him, there was no delinquency of payment. But until a delinquency, neither the mortgagee nor his assignee had any right to take possession of the oxen.

But if such right could exist, it could be transferred by the mortgagee only by a *written assignment*.

Kimball's widow had no authority to take the oxen or to sell the right of redeeming them. The defendant could take, by a purchase from her, no greater rights than she herself had. Toller on Ex'rs, before cited. In taking and selling the oxen, the defendant interfered with the estate of Kimball, and became executor *de son tort*. The appointment of the widow, after the sale, to be executrix, cannot purge the previous wrong.

Fuller & Edwards, for the defendant.

To make one executor *de son tort*, he must do some act, indicating "that he has assumed the office" of executor and is acting as such. Toller on Ex. 37. Williams on Ex. 210.

There must be some *indicia* by which it may be presumed "that he has a will of deceased, not yet proved, wherein he is made executor." 2 El. Com. 507; 4 McCord, 286.

The facts found in the case are: —

The defendant held a mortgage of the oxen, (consequently a right to possession.)

The widow had exercised such acts as to hold *herself* out as executrix.

She had taken possession of the oxen.

Had procured their removal to some place to be kept.

Had hired them kept, and assumed the control, and

Had offered for sale, and *sold* any *legal* or *equitable* interest of deceased therein.

She, therefore, if any one, was the executrix *de son tort.*

The defendant may have well presumed her to have been the rightful executrix or administratrix, as she was first entitled to letters of administration.

His course of dealing shows in the absence of any thing to the contrary, that he did so suppose and so treated her.

The negotiation with, and payment to her by the defendant, clearly *negatives* all idea of his "assuming the office" of executor, and rebuts conclusively any presumption that he had a will of the deceased.

If the defendant is to be charged, it must be in consequence of his having taken *possession* of the oxen, for it does not appear that he had sold them before action brought, or administration granted.

1. The defendant was entitled to the possession by virtue of his mortgage.

He held by a conveyance from the deceased and no intermeddling with property so held can make one executor *de son tort* (even if the conveyance be fraudulent.) Toller, p. 41, note, and p. 103; 15 Maine, 116; 1 Dev. 25; 5 Ala. 41; 1 Root, 104.

His possession being lawful, and held as security, he might, however, lawfully *sell*, and though a surplus should remain, he could not be chargeable as executor *de son tort.* 2 Sm. & Marsh. 388; 4 Miss. 181; 4 Blackf. 21; 1 McCord, 107; 6 Blackf. 367; 2 McCord, 516.

2. The case finds that defendant purchased the *legal* and equit-

able "interest" of the intestate in the oxen. What more is needed to perfect his title, and how can he be said to be executor *de son tort* of *his own property*? But suppose the sale by the widow to have been invalid at the time, what follows? Simply this —

1. Having a valid conveyance from the deceased, the presumption of law would be, that he took possession under that, and there being no payment or tender of payment, no action could be maintained, and in 60 days his title would be absolute.

2. The grant of letters of administration to her would render such sale valid. Toller, p. 367; *Shillabar* v. *Wyman*, 15 Mass. 323; 2 Bac. Abr. 391; *Andrews* v. *Gallison*, 15 Mass. 325; 8 Johns. 126; 3 Term R. 590; Moore, 126.

It seems therefore —

Defendant had no legal right to possession.

He exercised no unlawful control.

He did not "*officiously* intermeddle."

He had no funds belonging to estate of the deceased.

He had purchased all right of intestate in the oxen.

The administratrix now holds the funds received, to be accounted for as part of the deceased's estate.

No "wrong" can therefore be charged upon the defendant.

Rice, J. — By purchasing the note of Betsey Tilton, with the mortgage of the oxen by which that note was secured, the defendant was subrogated to her rights as mortgagee. This gave him the right to have possession of the oxen, but not to sell them, before the mortgage had been legally foreclosed. Taking possession under his mortgage would not render him liable in this action, for one who takes possession under a fair claim of right is not chargeable as executor *de son tort*. *Femings* v. *Garratt* 1 Esp. 335.

Nor was the subsequent purchase of the legal and equitable interest that James Kimball's estate had in the oxen, of Betsey Kimball, the widow of said James, for an apparently full consideration, such an intermeddling with the estate of the deceased Kimball, as would render him liable. The widow, by the sale of the oxen to the defendant, may have rendered

herself chargeable, as executor in her own wrong, but the party, who, even knowingly, receives goods from an executor *de son tort* and deals with them as his own, does not himself thereby become an executor *de son tort.* 9 Ad. & El. 365. There is, however, nothing in this case, to show that the defendant knew that the party of whom he purchased acted without legal authority. *A nonsuit is to be entered.*

SHEPLEY, C. J., and WELLS, HOWARD and HATHAWAY, J. J., concurred.

JOHNSON *versus* PIKE.

By R. S. c. 125, § 37, liens for erecting or repairing buildings extended only to contracts made by the *owners* or *mortgagers* of land or by persons who had contracted with *them.*

An obligee in a bond for the conveyance of land cannot subject it to a lien for such a cause.

A lien right for such a cause is lost, unless the land be attached within ninety days from the pay-day.

It is also lost, if the creditor, in taking his judgment, include any non-lien claims.

The owner of land may expose it to a lien-claim in favor of a person, who may make erections thereon, pursuant to a sub-contract between himself and the principal contractor, whom the owner had employed to do the work.

In such a case, the sub-contractor may perfect his lien by levying the land under the judgment which he may have recovered against the principal contractor.

But in a subsequent suit, involving title to the land, such owner is not to be considered as a party or privy to that judgment, and is not estopped by it, or by any allegations in the writ upon which it was obtained, to show that no lien right had existed.

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

CASE against the sheriff, for the neglect of his deputy.

It appeared that E. D. Johnson and Samuel Soule were in the joint occupation of a grist-mill. The mill needed repairs, and Soule contracted with Johnson to procure and pay for them. The plaintiff furnished E. D. Johnson with mill rons for that purpose. On July 7, 1846, the plaintiff's ac-

count amounted to $56,75, for such articles furnished at different dates between October 18, 1845, and March 7, 1846. Upon July 7, 1846, he sent to the debtor a copy of the account, attached to a letter requesting an early payment.

[NOTE. — This letter was offered in evidence by the defendant, and was admitted, though against objection made by the plaintiff.] On July 23, 1846, the account was enlarged by a charge of $4, for an additional mill iron. The articles thus charged were all of them used by E. D. Johnson, in repairing the mill.

On *Aug.* 10, 1846, the plaintiff brought his action upon the account alleging, that he had furnished the irons upon a contract, made Oct. 1845, which was performed on his part and completed on *July* 23, 1846.

The writ was delivered on the same day to the defendant's deputy, with orders indorsed upon it to attach the real ——— of the defendant, especially his interest in a grist-mill operated by him.

The deputy returned such an attachment, and certified that he had made return thereof to the office of the *town clerk*. He in fact made no return of it to the the *register of deeds*.

In that suit, the plaintiff recovered judgment by default, and seasonably placed his execution in the hands of said deputy who returned the same unsatisfied. This action is brought against the sheriff for the neglect of the deputy to attach the mill upon the writ.

In relation to the title and rights in the mill and its lot, the proof was as follows: —

In 1845, Soule owned and still continues to own one half undivided, of the value of $1000.

In 1843, the other half was owned by E. D. Johnson. In Sept. 1844, he conveyed his half to one Russell, by warranty deed, recorded March, 1845.

On Nov. 2, 1844, Russell contracted in writing to re-convey upon payment of debts due from Johnson of $305,38. In Dec. 1845, Johnson quitclaimed all his interest in the property to Emerson, who in the margin of the deed certifies

that he took it for the benefit of Henry True. On March 24, 1846, Russell's contract was canceled, and he gave a new one, to convey to Johnson the same half of the property, on payment by Johnson, *within one year*, of $376,69, and interest. This contract was, on the 17th July, 1846, by a conveyance, not specifying any consideration for it, assigned by Johnson to True, and on the same day, Russell, by his deed purporting to be in consideration of $300, conveyed half the mill to True.

The case was submitted to the Court, upon certain stipulations, one of which was that, if the paper containing the above mentioned account of plaintiff against E. D. Johnson, with its accompanying letter, "should be held to be legally admissible and available and sufficient for defence, judgment should be rendered for the defendant."

J. H. Williams, for the plaintiff.

The question here presented is different from that in *Lambard* v. *Pike*, 33 Maine, 171.

The fault of the deputy does not arise from the *language* used in his return, but from his *doings*. His wrongful registration in the office of the town clerk, instead of the registry of deeds, made a nullity of all that he did, as an attachment of real estate. R. S. c. 114, § 32.

I. The furnishing of the mill irons for the repairs, gave a lien right upon the mill. To the perfection of such a right, an attachment must be made within ninety days from the pay-day. The copy of the judgment against Johnson shows that pay-day for the irons was not until July 23, 1846, less than ninety days before the deputy was ordered to make the attachment. Such an attachment then would have perfected the lien. By the neglect to make the attachment, the lien right was lost.

1. Soule owning half the mill employed Johnson to make the repairs.

In such a case, the statute expressly gives a right of lien. R. S. c. 125, § 37. This was lost by the failure of the deputy to make the attachment.

2. There was also a like right upon the other half. John-

son made the contract for the repairs on Oct. 18, 1845. At that time, Russell's first obligation for a conveyance was in force. That obligation gave to Johnson an equitable interest in half the mill. That interest was *attachable;* R. S. c. 114, § 73; *saleable* on execution, R. S. c. 94, § 50; and *enforceable* by bill in equity, R. S. c. 117, § 50. It is equally a subject of lien as an equity of redemption would have been. It was an alienable interest, such as could have been "secured," as the statute expresses it, "by attachment." The second obligation for a conveyance by Russell did not extinguish the former. It was a mere renewal or continuation of it, inserting a definite limit of time, in which its condition should be performed.

This lien-right having thus attached to Johnson's equitable interest, no subsequent conveyance by him could dislodge it. *Whitmore* v. *Woodward*, 28 Maine, 417.

Thus by the neglect of the deputy to make the required attachment, the plaintiff's remedy has been wholly lost: for 1st, as against Soule, there being no privity of contract, the remedy was wholly *in rem;* and that is now gone. 2d, as against Johnson, the lien having failed to be secured, his deed to Emerson is let into full effect, and Johnson, as appears by the officer's return, has nothing wherewith to pay the debt.

II. Irrespective of any lien claim, the plaintiff is entitled to recover. Johnson, the debtor, had, under Russell's second obligation, an attachable interest in the mill.

His assignment of that obligation to True was without consideration, and therefore inoperative. Shep. Touch. 222; 10 Johns. 515.

As against creditors, it was clearly void. 28 Maine, 417. It being a parol contract and not a specialty, the consideration must be proved. *Rann* v. *Hughes*, 7 T. R. 347.

That equitable interest then, if duly attached, would have secured the plaintiff's debt. Hence the defendant's liability in this suit.

J. S. Abbott, for the defendant, presented the following, among many other points, in defence. —

The plaintiff has presented no evidence that there was any agreed time of payment. Hence the payment for each item of the iron work was due, as soon as the same was delivered. The plaintiff's letter of July 7, shows, that all the items, (except one of $4,00,) had been furnished as early as March 7; so that the lien-right expired on the 6th of June, that being ninety days from the last pay-day, *Badger* v. *Titcomb*, 15 Pick. 415.

And as to the $4 item also, the lien was lost, inasmuch as it was included in the judgment with the non-lien items. *Bicknell* v. *Trickey*, 34 Maine, 273; *Lambard* v. *Pike*, 33 Maine, 142.

This view at once dislodges all the support to this action on the ground that any *lien-claim* was lost to the plaintiff by the officer's omission to make an attachment.

Except on that ground of lien, (and that ground I have just shown to be untenable,) the plaintiff cannot and does not complain that Soule's interest in the mill was not attached, that action having been brought against Johnson alone. He however complains that irrespective of the lien, the neglect to attach Johnson's interest in the mill was an injury. But it was no injury. For Johnson, never, after the date of the writ, Aug. 10, 1846, had any interest whatever in the property. His last remaining interest was in Russell's conditional obligation for a conveyance. But that interest he had conveyed to True, on July 17, 1846.

Williams, in reply. —

The gentleman has assumed, in his argument, that the plaintiff's letter of July 7, 1846, is available to him as evidence. But that letter was not admissible, and the objection to it was seasonably made at the trial. The objection is, that it might be supposed to contradict the record of the judgment against E. D. Johnson. That record alleges, that the contract for the irons was made by E. D. Johnson, Oct. 18, 1845, and that the agreed pay-day was July 23, 1846. The recitals of the judgment are conclusive. 26 Maine, 411. The defendant cannot impeach them collaterally, for he is not a

creditor of E. D. Johnson. 6 Greenl. 29. Except by that letter, the plaintiff does not attempt to impeach them. But that letter does not, *in fact*, contradict the record. It merely states an account as it then stood, and makes a call for money, (much wanted.) It does not speak of a job completed, nor even of a debt due. The plaintiff could not know whether the job was completed, for he did not know whether E. D. Johnson would or would not want more irons. And, in fact the job was not then completed, for Johnson subsequently called for and took another article of the iron work contracted for. The recitals of the judgment then are to be taken as true, and they establish that the contract for the irons was made Oct. 18, 1845, and completed on July 23, 1846, which became the pay-day for the whole amount. The lien-right of the plaintiff then was in full force when the writ was issued, and when the officer was directed to make the attachment. His right of lien then attached to whatever interest Johnson on *that day* had in the mill. But on that day Johnson held an interest by virtue of Russell's first obligation for a conveyance. To that interest the lien-right attached, and adhered, and it would have been perfected by the attachment which the plaintiff ordered. For, as already stated, Johnson's assignment of it was void for want of consideration. If it should be held, that Russell's first obligation was nullified by the arrangement of March 24, 1846, and that his second obligation of that date was a new and original contract, then we say, that as the pay-day for the irons was not until July 23, the lien attached to the interest under that new contract. Johnson's conveyance to Emerson was not made until Dec. 10, 1845, and therefore not until the lien contract, of Oct. 18, 1845, had attached to the estate conveyed.

Wells, J. — It is contended, that the plaintiff has sustained an injury, by the neglect of Seth Greenleaf, the defendant's deputy, to make an attachment of the real estate of Elijah D. Johnson on the tenth day of August, 1846. But

the real estate of the debtor, which the officer was directed to attach, had been conveyed by him to Leonard W. Russell, in September, 1844. Russell gave to Johnson a written agreement to convey the premises to him, dated Nov. 2, 1844. On the 24th of March, 1846, another contract was made, by which Russell agreed to convey the premises to Johnson, upon the payment of a sum of money, named in it, in one year. This contract was assigned, July 17, 1846, by Johnson to Henry True. It is said that the assignment was invalid because it was without consideration. None is mentioned in it. But on the same day when the assignment was made, Russell conveyed the premises to True, for a consideration recited in the deed of three hundred dollars. It also appears, that on the tenth of December, 1845, Johnson conveyed all his interest in the same land to I. P. Emerson, for an alleged consideration of five hundred dollars, and Emerson certifies in the margin of the deed, that he acted as the agent of True in taking it, and that it was executed to him for the benefit of True. The second contract from Russell might have been intended to be held by Johnson for the benefit of True, and the arrangement made in good faith to enable him to obtain a deed from Russell. An apparent consideration is disclosed, and there are no facts from which a fraudulent intent can be inferred. Johnson therefore at the time of the attachment had no interest in the land.

Nor can the claim by lien prevail. It is true, that the items of the account, excepting one, had accrued before the assignment. But no lien could arise under the statute, c. 125, § 37, except against the owner of the land, or a mortgager, upon some contract for labor or materials made with him. Russell was the owner, but he made no contract with any one for repairs, and his estate could not be charged with them against his consent. And Johnson had no power by virtue of the agreement with Russell for the purchase of the estate, to incumber it by a lien. Johnson's interest in the estate under the agreement, although attachable by his creditors, so long as he owned it, was not made subject by the statute to

any lien. One furnishing materials for repairs to the holder of such agreement has no priority over other creditors or purchasers.

But it is contended, that the plaintiff had a lien upon the half of the premises owned by Samuel Soule, and that it was lost by the want of a valid attachment. Soule made a contract with Johnson, the debtor, to repair his part of the mill. He being the owner might create a lien upon his own property by such contract, and under the statute, the plaintiff could claim the benefit of it, though the contract for the repairs was made by Soule with Johnson, the debtor.

But if a lien at any time existed against the property of Soule, it appears to have been lost by the course, which the plaintiff pursued. The letter of the plaintiff, dated July 7, 1846, shows very clearly, that the items of his account were then overdue. The date, of the last item mentioned in the letter, is March 2, 1846, and the inference to be drawn from its date is, that it was then due, and that the items prior in date were due at that time, if not before. The account then existing was due more than ninety days before the commencement of the action against Johnson. The preservation of the lien required, that the action should be commenced, and an attachment of the premises made, within ninety days from the time when payment becomes due. R. S. c. 125, § 37 and 38.

There is one item of the account against Johnson, which appears to have accrued on the twenty-third day of July, 1846, and the action was brought in season to preserve the lien on that charge. But it having been united with the other items, the lien for which was lost, and judgment having been taken for all of them, the lien to secure the payment for that item was also lost. *Lambard* v. *Pike*, 33 Maine, 141.

But it is contended, that the defendant is not at liberty to show, when the debt really became due, because it would contradict the time alleged in the writ against Johnson, and that the defendant is concluded by the judgment against

Johnson, from showing when the payment for the articles furnished actually became due. But the plaintiff claims a lien against Soule, and if none existed, or if it once existed, and was lost by his own conduct, then he has suffered no detriment by the alleged neglect of the defendant's deputy in making the attachment. If the requisitions of the statute had been followed, and the lien had been perfected, Soule's interest in the mill might have been held. But it would have been so held by force of the facts, by which the lien was established, in conformity with the statute, and not by any estoppel against Soule arising from the judgment against Johnson. For Soule is neither party, nor privy to that judgment, and it would be a gross act of injustice towards him, if he were not permitted in subsequent litigation to show, that there was in fact no lien existing upon his property, when the judgment was rendered. Soule, not being a party to the judgment, would have a right to controvert those facts, which, it is alleged, lay the foundation for the lien. By the evidence now exhibited, it is very manifest, that there was no lien upon Soule's part of the mill, when the judgment was rendered, and that this result was produced by the action of the plaintiff himself. If the officer had attached all, that the plaintiff says he ought to have done, it would have been of no service to him. A levy upon the interest of Soule in the mill, would have proved entirely ineffectual, because the plaintiff had failed of securing his supposed lien upon it. It is in vain for the plaintiff to complain of an omission of duty on the part of the officer, who made the attachment, when a full and complete performance of it, in its broadest extent, would have been of no service to him.

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

Shepley, C. J., and Howard, Rice and Hathaway, J. J., concurred.

GILES *versus* VIGOREUX.

The hirer of a vessel on shares, while using and controlling her under the contract, is to be considered the owner, acting for himself, in procuring seamen and supplies.

The enrollment or registry of a vessel is not conclusive evidence against the general owner in a suit against him for sailor's wages.

No promise, upon which a sailor can maintain suit for wages, is deducible from his right to collect them by process *in rem*.

Against the general owner of a vessel chartered upon shares, no action for wages can be maintained by a sailor, who was employed by the hirer, while using and controlling the vessel under the charter-party.

ON FACTS AGREED.

ASSUMPSIT, for the plaintiff's wages as a sailor on board the schooner Mary.

The defendant owned the schooner, and let her to one Partridge the master, upon a contract that Partridge was to have the use and control of her; to victual and man her at his own expense; to employ her as he should choose; and to pay the plaintiff one half her earnings, deducting half of port charges. Under that contract Partridge controlled the vessel, using her for coasting purposes, and hired the plaintiff as a sailor on a trip from Gardiner to Boston. The trip was made and freight was earned. It did not appear that the hiring of the plaintiff was known to the defendant. Upon these facts, the case was submitted to the Court for a legal decision.

Whitmore, for the plaintiff, cited *Scolfield* v. *Potter*, Davies' R. 392.

Danforth & Woods, for the defendant.

WELLS, J. — During the time the services were performed by the plaintiff, the schooner was let by the defendant to the master, Welcome Partridge, who was to victual and man her at his own expense, was to have and did have the use and control of her, to employ her as he should choose, and to pay the owner one half her earnings, deducting one half of the port charges. The plaintiff was employed by Partridge.

The law appears to be well settled by numerous decisions,

that the general owner of a vessel is not liable for shipments, or for supplies obtained by the master, who has the control of a vessel under a contract like that made in the present case. *Thompson* v. *Snow*, 4 Greenl. 264; *Emery* v. *Hersey*, Ib. 407; *Winsor* v. *Cutts*, 7 Greenl. 261; *Cutler* v. *Thurlo*, 20 Maine, 213; *Sproat* v. *Donnell*, 26 Maine, 185; *Thompson* v. *Hamilton*, 12 Pick. 425; *Webb* v. *Pierce*, 15 L. R. 9.

These cases were decided upon the ground, that the hirer is the owner of the vessel for the time in which he exercises control over her under the contract, and that he acts for himself in making contracts of shipment and for supplies, and not as agent of the general owners.

The same principle must apply to seamen's wages. They contract with the owner *pro hac vice*, while the general owner has made no contract with them. *Aspinwall, Adm'r* v. *Bartlett*, 8 Mass. 483; *Goodridge* v. *Lord*, 10 Mass. 483. The hirer in such case being regarded as the owner, and having the benefit of the services, no implied assumpsit can arise against the person, who has let to him the vessel. Where there are several owners of a vessel, they are tenants in common, and are generally to be regarded in the same manner as tenants in common of other chattels. And the enrollment or registry does not make the owner any more liable for seamen's wages when the vessel is let on shares, than the landlord of a house would be for the wages of the servants employed by the tenant. Notwithstanding the general owner has parted with the control of the vessel, the seamen would have a remedy against it by a process *in rem*, for they have in ordinary cases a threefold remedy, against the ship, the owners and the master. Abbott on Shipping, 475. By arresting the vessel, the general owners may be made indirectly liable for seamen's wages. But this claim upon the vessel arises from the nature of their employment, and is to be pursued in a court of admiralty. It is a proceeding authorized by the marine law, and also by the Act of Congress of 1790, c. 56, § 6. As the vessel has been brought safely into port by their exertions, it should be a security for their compensation. But the existence

of such claim lays no foundation for a right of action *ex contractu* against an owner, who has parted with the control of his vessel by letting it to another, as was done by the defendant.

In the case of *Scolfield* v. *Potter et al.* Davies' R. 392, there was a special promise made by the owners to the plaintiff to pay the order drawn on them in his favor by the master when it was presented, and the freight earned on the cargo brought home was collected by one of the owners, and retained in their hands. These facts might warrant the decision in favor of the plaintiff, although the vessel was let to the master on shares.

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

SHEPLEY, C. J., and HOWARD, RICE and HATHAWAY, J. J., concurred.

COX *versus* BODFISH.

Joint stock associations, though with a common object, and for the purpose of dealing exclusively in personal property, and with a community of profit and loss, are not necessarily co-partnerships.

In a suit brought against the depositary of such an association by one of its members to recover his aliquot part of the joint fund, it is no defence that available debts are yet due to the company.

Such an association was formed to operate by trade and labor in a distant State. Its constitution divided the stock into shares of $500, and provided that each member, by subscribing to render his personal labor should be entitled to another share, but that desertion from the service should forfeit all his interest in the association.

C. became a stockholder, but did not subscribe for personal services. He however authorized W., as his substitute, to labor and vote as representing his share abroad, and W. was permitted to act and vote accordingly, though he had never subscribed for stock. W. afterwards deserted the employment. *Held*, that the substitution conferred upon W. no share in the stock, and that C's interest in the association was not forfeited by the desertion, although such a forfeiture had been declared by the unanimous vote of the company.

ASSUMPSIT.

Certain persons, among whom was the plaintiff, stipulated

with each other under their hands and seals, Jan. 15, 1849, to form an association for trading and mining in California, called the Kennebec Mining and Trading Company. They adopted a constitution on Jan. 29, 1849. By it the capital stock was divided into eighty shares, each subscriber to have one share for every five hundred dollars by him subscribed.

Whoever of the share holders should subscribe to go to California, and there render his personal services for the benefit of the Company was to have therefor an additional share. The 14th article of the constitution prohibited any member to withdraw from the association, without the written permission of the majority, and provided that any member so withdrawing, should forfeit all his interest in the association. Certificates of stock were issued to the share holders, transferable by indorsement. The plaintiff was a subscriber for one share, and received a certificate of the same. The defendant was also a share holder. The management of the association was confided to three directors, of whom the president was to be one *ex officio*. The defendant subscribed to go to California, and he was chosen president.

The directors purchased a vessel, loaded her on company account and sent her to California, carrying the share holders who were to be there employed. The defendant went to California and acted as president and director, and afterwards returned to Maine in the early part of 1851.

The plaintiff introduced evidence tending to prove that the defendant, after so returning, paid to several of the members of the company $920 each, upon their respective shares. There was also evidence tending to prove that, long after the bringing of this suit, there were debts due to the company of at least $2,500. To the plaintiff's demand for his share of the money, the defendant replied, that the company had declared the plaintiff's share to be forfeited. The plaintiff, asserting that the company was dissolved in 1850, brings this suit to recover his proportion of the funds.

The defendant introduced evidence that the plaintiff admitted (after the sailing of the vessel,) that Frederick Wells who

was on board, represented his share ; — that he had consented that Wells might " go against his share ;" — also evidence that Wells, on the passage out, and on arriving at California, voted with the company, and that, about twenty days after the arrival, he deserted the ship, and did not afterwards rejoin the company. The defendant requested instruction to the jury : —

1. *That*, to enable the plaintiff to recover, they must be satisfied that the debts due to the company had been paid, or were worthless ; —

2. *That* if it was understood and agreed between the plaintiff and Wells and the company, that Wells should become the proprietor of Cox's share, and should become a member of the company, and if Wells, in pursuance of that agreement, did actually become a member of the company, and did subsequently withdraw, without their consent, the share purchased by the plaintiff would be forfeited, although he did not transfer his certificate by writing on the back, and although Wells did not sign the articles of agreement.

These requested instructions, the Judge refused to give, but told the jury that Wells could not become a member, so as to forfeit by desertion, without signing the articles of agreement, unless the provisions of the articles of agreement or constitution had been waived by every member of the company. The jury returned a verdict of 920 dollars for the plaintiff. To the aforesaid instructions of the Judge and refusals to instruct, the defendant excepted.

H. W. Paine, for the defendant.

The plaintiff and defendant were both members of a co-partnership, doing business under the name of the " Kennebec Trading and Mining Company." This action is brought to recover a portion of the common fund, and the plaintiff must show that the defendant has his money.

The plaintiff might claim upon either of two grounds ; — that the defendant had *his* dividend money set apart for *him*, or that, as a member of the company, the defendant had more than his share of the common fund. There was evidence

which, if believed by the jury, established the fact that debts to a large amount were due to the company when the action was brought.

The defendant requested instruction, that the suit could not be maintained, unless it were shown that the debts due to company had been paid or were worthless. It was error to refuse this request.

In England, assumpsit will not lie in favor of one partner against his co-partner, unless a final balance has been struck and an express promise to pay has been made. But it has been held in Massachusetts, that if a final balance has been ascertained, an action may be supported. It must, however, be a *final balance*, so that the judgment may put an end to all controversy. *Fanning* v. *Chadwick*, 3 Pick. 420; *Brinley* v. *Kupfer*, 6 Pick. 179; *Williams* v. *Henshaw*, 11 Pick. 79.

The 4th requeted instrusction ought to have been given.

The sixth article of the constitution gives the form of a certificate of stock, declaring that the same shall be transferable by indorsement. That sort of evidence of the transfer, the company may waive, though they would not be *obliged* to recognize, as a member of the company, a person who should claim to be the owner of a share, *not so transferred.*

Now the request presupposes, *that* the jury may find that Wells was the proprietor of the certificate issued to the plaintiff; — *that, with consent* of the company, he was a member; and *that* he withdrew *without consent*, in violation of the 14th article. Why then did he not forfeit all his interest? and being proprietor of the share, which was once Cox's property, why did he not forfeit that?

But Wells did not sign the articles. What of that? The original members did sign and seal, but is it therefore incompetent for them to take in additional partners, without requiring them to sign and seal?

Does it lie in the mouth of this plaintiff, who had placed his certificate in Wells' hands, to enable him to become a member, now to urge that he was permitted to go as a mem-

ber, and to act as a member, *but was not in fact a member?* and therefore incapable of forfeiting the share, without which he could not have gone.

The whole basis of the enterprize was, that no person could be a member without the investment of money. There must be something for each one to forfeit, in order that he might be kept true. The plaintiff had one share by virtue of his investment of $500. He would have had a right to another share, by subscribing to go upon the expedition. He wished to substitute Wells as the laborer in his room. The company consented, and Wells was substituted. If the plaintiff had gone, and then deserted, his interest would have been forfeited. And the same result must follow from the desertion of the man, whom at the plaintiff's request, the company received and treated as his substitute.

By such proceedings on the part of the plaintiff, he must be estopped. Otherwise they were a fraud on the company.

Should it be said that these parties were not co-partners, but mere tenants in common, no advantage could arise therefrom to the plaintiff. For one tenant in common can maintain no action against another for a part of the common property.

Allen and *Evans*, for the plaintiff.

Shepley, C. J. — The association of which the defendant was president, was formed by an instrument subscribed and sealed by the parties to it. Each person was to have one share for every $500 subscribed. The capital was to consist of eighty shares, transferable certificates of which were to be issued.

The constitution of the association provided for a choice of officers, and that the president and directors should "have the exclusive direction and arrangement of all the concerns of the company and treasury department." Thus constituted it became rather a joint stock company than a proper co-partnership. If they had been co-partners, each individual could have disposed of the whole property, incurred liabilities, and made purchases.

In this association no one, nor even all the members, not being directors, could have done this. And the law applicable to partnerships proper does not decide the rights of the members. *Livingston* v. *Lynch*, 4 Johns. Ch. 573; *Irvine* v. *Forbes*, 11 Barb. 588.

By the constitution of the company, no person could become a member of it without subscribing and sealing the indenture or obtaining a certificate of stock directly from its officers or by transfer. Two classes of stockholders were provided for, those who owned stock without engaging to render any personal service, and those who agreed to go to California and to devote their personal services exclusively for the benefit of the company, for which each was to have one additional share. There was no provision, that a person who was not an owner of stock should become so by rendering such personal service. The plaintiff does not appear to have become one of those members, who had agreed to render a personal service.

The testimony shows, that he consented that Frederick Wells should represent his share; and that he was permitted to perform service for a time, and to vote and act as a member of the company. Such permission and action could not constitute him a legal member, for those members who performed service had no power to introduce thus a new member. If they permitted him thus to act as a member, and to have the privileges of one, and to derive a benefit from them, it must be imputed to their own inconsideration or negligence. One who was not legally a member of the company, could not by a violation of its laws occasion the forfeiture of a share of one, who was a legal member.

The defendant does not appear to have been aggrieved by the instructions which were given, and those requested were properly refused. *Exceptions overruled.*

Howard, Wells and Hathaway, J. J., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1853.

COUNTY OF FRANKLIN.

GENNINGS *versus* NORTON.

Upon a bond conditioned to *pay* an outstanding mortgage upon land purchased by the obligee, the right of action accrues at the expiration of a reasonable time after the mortgagee would have been compellable to receive payment of the mortgage.

Upon a bond conditioned to *save harmless* from such a mortgage, no right of action accrues until the obligee has been subjected to some injury.

Upon such a bond, a liability to loss, if attended with inconvenience to the obligee, constitutes a breach, and gives an immediate right of action.

In a suit upon such a bond, commenced after a breach, the damage occurring during its pendency may be included in the judgment.

When, in such a case, the conditional judgment upon the mortgage has been recovered against one to whom the obligee had, without covenants of warranty, conveyed a part of the land, and the obligee has paid the amount of the judgment; *Held*, that, (as such payment lifted the mortgage from his own part of the land as well as from that of his grantee,) he may, in a suit upon the bond, recover for the amount due on the mortgage; but not for the cost in that judgment, the payment of the same having been voluntary.

For necessary services rendered and expenses paid in defending a suit, brought upon such mortgage against the obligee, he is entitled to recover compensation in his suit upon the bond.

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

Debt on Bond.

Prior to 1824, one Gower held an outstanding mortgage of a lot of land to secure a note payable on Sept. 15, 1828. This mortgage was afterwards assigned to Calvin S. Douty.

In 1824, one Pierce deeded the land with covenants of general warranty to the plaintiff, and gave him a bond, with sureties, conditioned to clear the property from the incumbrance of said mortgage and save him harmless from all damage, cost and injury on account thereof.

The plaintiff conveyed a part of the land by deed of warranty to B. & N. S. Allen. On January 28, 1851, Douty commenced two actions upon the mortgage, one against the Allens and the other against the plaintiff. The Allens gave to this plaintiff a release from his covenants of warranty to them, and used him as a witness in the suit against them.

On October 23, 1852, the conditional judgment for $188,43, was entered for Douty in each of the suits, and for costs in the suit against the Allens, amounting to $38,07.

Afterwards, on the same day, this plaintiff paid to Douty the whole amount so recovered, being $226,50, and took from him a quitclaim deed of the mortgaged land. The plaintiff also paid to counsel $12 for attending to *each of the actions* in Court. He also paid $10,40, for witnesses, and $2, for a deposition in the suit against himself. His personal services and expenses were estimated at $20.

This defendant was a surety in the bond of indemnity given by Pierce to the plaintiff. This suit is upon that bond. It was commenced on February 4, 1851, a few days subsequent to the commencement of Douty's actions, but prior to the recovery of his judgments.

The case was submitted to the Court, with jury powers as to inferences of fact.

H. & H. Belcher, for the plaintiff.

1. The defendant's obligation, under the bond, was to discharge the debt, due on the mortgage, at its pay-day, or in a

reasonable time afterwards. But he never paid it. Hence there was a breach of the bond.

There was also a further obligation under the bond. It was to save the plaintiff harmless from loss and injury by the mortgage. This obligation was not kept.

There must, therefore, be judgment for the penalty. In such cases, the damages are computed up to the rendition of the judgment. R. S. c. 115, § 78; Stat. of 1842, c. 31 § 9; *Waldo* v. *Forbes*, 1 Mass. 10; *Fish* v. *Dana*, 10 Mass. 46.

2. Though the condition of the bond was broken soon after its date, there was a continuing right of action, so long as the incumbrance of the mortgage remained. The statute of limitations, therefore, is not applicable.

3. The plaintiff is entitled to recover not only the amount of the conditional judgment, but also for having paid the bill of cost recovered by *Douty* v. *Allen*. True he had obtained a release from his covenants to them; but it is not to be presumed that he obtained it without having paid them the amount of their exposure under the mortgage.

It is plain that he is entitled to recover for his own services and expenses and for the $24, paid by him for counsel fees, and the $12,40, paid for the witnesses and for the deposition.

Cutler, for the defendant.

1. The bond contained virtually but a single covenant. The contract to save harmless was of the same import as that to clear the incumbrances.

The right of action accrued, therefore, as early at least as the note was dishonored, which was in Sep. 1828. The suit was not brought until 1851. It is therefore barred. Statute of Limitation, R. S. c. 146, § 11; *Clark* v. *Swift*, 3 Metc. 390; R. S. c. 115, § 78, compared with Statute of 1821, c. 50, § 3; Statute of 1842, c. 31, § 9.

2. But if the bond contained two covenants, and if the agreement to save harmless was a different one from that to clear the incumbrance, that agreement to save harmless was not broken when this suit was commenced. No "damage,

cost or injury" had then accrued to the plaintiff. *Gardner* v. *Niles*, 16 Maine, 279; *Boynton* v. *Dalrymple*, 16 Pick. 147.

3. Should there be occasion to examine the question of damages, there can be no recovery by the plaintiff for the amount of the cost in the suit against the Allens. For they had released him from his covenants. He had, therefore, no occasion to pay that cost. His act was merely voluntary.

4. For the other expenditures claimed by the plaintiff, his remedy, if any, must be by *scire facias* for further damage.

Shepley, C. J. — The plaintiff purchased a tract of land of Samuel Pierce on January 23, 1824, which was subject to a mortgage previously made to James Gower.

The bond upon which this suit has been commenced, was executed on the same day by Pierce and by the defendant, and another person, as his sureties, with a condition providing, that they "shall clear the property conveyed by said deed from the incumbrance of said mortgage, and save the said Gennings harmless from all damage, cost and injury on account of said mortgage."

It appears, that the mortgage had been executed on December 25, 1820, to secure the payment of certain notes, the last of which did not become payable before September 15, 1828. Two suits were commenced by Calvin S. Douty, an assignee of that mortgage, on January 28, 1851, to recover possession of the premises. One of these suits was against the plaintiff, and the other against Benjamin and Newman S. Allen, to whom a part of the premises had been conveyed by the plaintiff, by a deed containing covenants of warranty. This suit upon the bond was commenced on February 4, 1851, before the session of the court, to which those two suits were made returnable.

1. The counsel for the defendant insists, that the bond contains a single covenant only, and that a cause of action accrued thereon more than twenty years before the commencement of this suit, which is barred by the statute of limitations, c. 146, § 11, providing, that all personal actions shall be

brought within twenty years after the accruing of the cause of action.

If the bond could be regarded as containing only a single covenant or stipulation, this objection might be fatal. No time being named in the bond when the estate should be cleared from the incumbrance, the law would allow a reasonable time for it after the mortgagee would be obliged to receive payment.

When a reasonable time after Sept. 15, 1828 had elapsed, a right of action would accrue to the obligee; and more than twenty years had elapsed since that time before the commencement of this suit.

The bond cannot be regarded as containing but one stipulation. The obligors engage not only to clear the property from the incumbrance, but to save the obligee harmless from all damage, cost and injury, on account of it. The obligee might be subjected to cost and injury without having discharged the mortgage, and the obligors might then pay the debt, and extinguish the mortgage, and if the stipulations were regarded as single, the obligee would be without remedy to recover damages for the cost and injury, to which he had been previously subjected. This could not have been the intention of the parties. There are two distinct clauses, and the language used will not admit the construction insisted upon.

2. It is insisted, that there had been no breach of the covenant to save harmless, when this suit was commenced.

The plaintiff does not prove, that he had paid any thing before that time on account of damages or costs. The only injury, which he appears then to have suffered, arose out of the commencement of the suits to recover the estate from him and from his grantees. He was then liable to be seriously injured thereby, and it would be his duty as a prudent man to take measures immediately to ascertain, whether the incumbrance had been extinguished and to make all needful preparations to defend those suits unless satisfied upon investigation, that no defence could be legally made.

This duty he must be presumed to have performed. He

appears to have applied to counsel and to have concluded to have a suit commenced. A liability to injury attended with any inconvenience or damage to the obligee, on account of the neglect of the obligors, will constitute a breach of a bond to save harmless. *Lyman* v. *Lull*, 4 N. H. 497. The Court, being authorized by agreement of parties to draw such inferences as a jury might, must conclude that the plaintiff was subjected to loss of time, if not to expense, within a week after two suits had been commenced to take the estate from him and from his grantees after it had been for so long a time quietly enjoyed, and that he was not therefore saved harmless.

3. It is insisted that the plaintiff cannot be entitled to recover for damages, suffered after the commencement of the suit and before the close of the trial. It is admitted, that the decision was otherwise in the case of *Gardner* v. *Niles*, 16 Maine, 279; but it is said, that the reason for such a decision under the statute then in force, providing a remedy for the recovery of further damages for other breaches by writ of *sci. fa.*, does not exist under the present statute providing such a remedy by a new suit upon the bond.

Although the remedies are different under the different statutes for the recovery of further damages, for other breaches, there is no material difference in the mode provided for the assessment of damages in an action after proof of a breach of the bond. Under each statute, judgment is to be entered for the penal sum, and execution is to be issued for the amount of damages proved. The damages, for which execution is to be issued, may be composed in part of damages suffered at any time before the conclusion of the trial.

4. As the plaintiff received a release of the covenants, contained in his conveyance to the Allens, it is insisted, that he cannot recover for the amount paid to Douty to satisfy his judgment recovered against the Allens. The satisfaction of that judgment extinguished the mortgage, which included the estate of the plaintiff as well as the estate conveyed to the Allens. The estate of the plaintiff continued to be liable to be taken to pay the whole amount due upon the mortgage

after judgment had been recovered against the Allens. He might therefore relieve his estate from the incumbrance which it was the duty of the defendant to have extinguished; and he may recover for that amount in this action. But he cannot recover for the costs paid in the suit, Douty against the Allens. Nor for the counsel fees paid in that suit. He was under no obligation to make such payments after he had received a release of the covenants contained in his conveyance to the Allens. Having made voluntary payments to them or for them, they do not constitute a legal claim against the defendant.

He will be entitled to recover the amount paid to extinguish the mortgage; for the counsel fees in the action against himself; the amount paid to witnesses in same action; the amount paid for taking a deposition in same, and the agreed sum for his personal expenses and time.

Defendant defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1853.

COUNTY OF LINCOLN.

NEWBIT *versus* STATUCK.

In an indictment for perjury, the falsity of the testimony, given by the accused, cannot be proved, except by something more than the testimony of one witness; the oath of such witness being balanced by the oath of the accused on the former trial.

In a suit for words charging the crime of perjury, a justification by the defendant that the charge was true, can be established only by evidence as strong as would have been necessary to convict the plaintiff of the perjury upon an indictment.

In such a suit, therefore, the testimony which the plaintiff gave upon the previous trial, is to be considered as evidence, to be weighed by the jury in connection with the other evidence in the case.

In such a suit, an allegation of the defendant's plea, that the false testimony, given by the plaintiff was *corruptly* given, cannot be supported by evidence which leaves the jury in doubt and uncertainty as to the plaintiff's motive.

Among slanderous words, actionable in themselves, are those which impute the crime of perjury.

An action for such words may be maintained without proof of special damage; the amount recoverable being referred to the jury.

On Exceptions from *Nisi Prius*, Shepley, C. J., presiding.

Case, for slanderous words, charging the crime of perjury.

The defendant by brief statement, after averring that the plaintiff had been a witness for one Benj. Orchard upon the trial of an action against this defendant, proceeded to specify several propositions which this plaintiff had sworn to upon that trial, and then alleged that those propositions were untrue, and that, in relation to each one of them, the plaintiff knowingly "swore to an absolute lie, and so was guilty of perjury," and also pleaded that all the words which he spoke in relation to the plaintiff were without malice.

The defendant introduced evidence to show what testimony the plaintiff gave in the former suit, and evidence was introduced by both parties as to the defendant's having made the charge of perjury, and as to the truth or falsity of the testimony which the plaintiff had given in the former case.

Among other things the jury were instructed that, although the plaintiff could not testify in his own case, his testimony given in the former case having been introduced into this case by the defendant, they might, in coming to their conclusion respecting the truth or falsehood of that testimony, consider it as a part of the testimony in this case, in connection with the other testimony tending to prove its truth or falsity;

Also, "that the burden of proof was upon the defendant to satisfy them that the allegations made in his brief statement were true; that if they were not satisfied that those allegations were true or that any one of them was true, but were left in doubt and uncertainty, respecting them, the defence set up in the brief statement would fail."

A request was made by the defendant, that the jury might be instructed, that if they should find the defendant liable, the damages to be assessed should be but nominal, no damage having been proved. This requested instruction was not given.

The verdict was for the plaintiff, and the defendant excepted to the instruction given, and to the refusal to instruct.

Lowell, for the defendant.

1. The authorizing the jury to take, as evidence, the former testimony given by the plaintiff, was erroneous. The only cases in which such instructions could be proper, are those for malicious prosecution. 1 Greenl. Ev. p. 497 and notes; *Burlingame* v. *Burlingame*, 8 Cow. 141.

2. The instruction, that if the defendant's allegations in the brief statement were left, by the evidence, in doubt and uncertainty, the justification failed, was more stringent upon the defendant than the law required. This is a civil suit, and the parties were entitled to a verdict upon a *preponderance* of testimony. It was not necessary that all possible uncertainty or doubt should be removed. It was incumbent on the defendant to prove, 1st, what the testimony was, which the plaintiff had previously given; 2, that it was untrue; and 3d, that it was given corruptly. Whatever strength of testimony might be necessary for establishing the first and second of these requirements, the evidence to establish the corrupt motive, need not be such as to impel a conviction beyond all doubt. A preponderance is all that the nature of such an issue could demand.

3. We have proved what testimony the plaintiff had given, and that it was false. In such a stage of the case, the burden of proof should change, making it the plaintiff's duty to show that his testimony, though false, was given by mistake or without corrupt motive.

4. The requested instruction ought to have been given. *Whipple* v. *Cumberland Manf. Co.* 2 Story, 661; *Schoonover* v. *Rowe*, 7 Blackf. 202; 7 U. S. Dig. 8, 85, 346; *Allen* v. *Naley*, 5 Blackf. 200; *Beach* v. *Rouney*, 2 Hill, 309; *Shank* v. *Case*, 1 Smith, 87; *Landis* v. *Shanklin*, 1 Smith, 78; *Shortly* v. *Miller*, 1 Smith, 395.

Evans, for the plaintiff.

Rice, J. — This is an action on the case for slander. Defence, that the words spoken were true. Complaint is made that the Judge who presided at the trial, after instructing the jury that the burden of proof was upon the defendant to satisfy them that the allegations, in justification, contained in his

brief statement were true, also instructed them that, "if they were left in doubt and uncertainty respecting them, the defence contained in the brief statement would fail."

Without, at this time, going into the consideration of distinctions supposed to exist between the terms "preponderance of evidence," "satisfactory evidence," and that degree of evidence which shall exclude "all reasonable doubt," it is sufficient to say, that upon principle and authority, in actions of slander, wherein the allegation in the writ is, that the plaintiff has been charged with perjury, the defendant, to sustain a plea of justification, must give as conclusive proof as would be necessary to convict the plaintiff of perjury on an indictment. *Gants* v. *Vinard*, 1 Smith, 287; *Woodbeck* v. *Kellar*, 6 Cow. 118; *Lanter* v. *McEwen*, 8 Bl. 495; *Byrket* v. *Manahan*, 7 Bl. 83; 2 Yerg. 235. This instruction is not therefore open to objection.

Objection is also taken to the instruction that the testimony of the plaintiff on a former trial, which was introduced in this case by the defendant, might be considered by the jury as evidence in this case. Such a result legitimately and necessarily follows from the rule stated above. If the plaintiff were on trial for perjury, and one witness only were produced to swear that his testimony was false, a jury would not be authorized to convict without additional evidence, because the case would be in equilibrium, being oath against oath, and both given under circumstances where the obligation to speak the truth was alike binding. Such is the rule universally recognized in this class of prosecutions.

The requested instruction was properly withheld. When words are actionable in themselves, it is not necessary to alledge or prove special damage. In such cases, that some damage has been sustained, is an implication of law, and it is for the jury to determine the amount, having reference to the degree of malice exhibited by the defendant, and the injurious consequences necessarily resulting to the plaintiff.

Exceptions overruled.

WELLS, HOWARD and HATHAWAY, J. J., concurred.

ROGERS *versus* KENNEBEC & PORTLAND RAIL ROAD COMPANY.

The compensation, provided by statute for damages occasioned by the location and construction of rail roads, extends only to real estate or materials taken.

For damages, indirectly resulting from the lawful acts of a chartered corporation, the law affords no remedy.

It is competent for the Legislature to authorize permanent erections across tide waters or any navigable waters, although the navigation may thereby be impaired.

The charter of the Kennebec and Portland Rail Road Company, with its additional enactments, authorizes the erection of bridges and causeways across navigable water, but requires them not to be built in such manner as to prevent the navigation of such water or to occasion unreasonable detentions thereon.

For the damage occasioned by so erecting the structures as to prevent such navigation or occasion such detention, the remedy is not by application to the county commissioners, but by action at law.

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

CASE.

The route of the defendants' rail road crossed a small salt-water creek, in which the tide ebbed and flowed. Across the creek they placed an embankment of earth, having in it a culvert for the passage of water.

On the stream, three fourths of a mile below the embankment, were mills owned by the plaintiff, which had been driven for more than thirty years by the water of the stream, into which the creek emptied itself.

[Memo. — An Act passed in 1845, in addition to the Act incorporating the defendants, section 2, authorized the company to erect, for the sole and exclusive travel on their rail road, "a bridge or causeway," across any navigable rivers or streams or tide waters; *Provided* said bridge or causeway shall be so constructed as not to obstruct or impede the navigation of said waters.

An Act was passed in 1844, to incorporate the *Bath and Portland* Rail Road Company. Its fifteenth section authorized the erection of bridges across any tide waters, navigable rivers or streams, provided that the same should be "so constructed

as not to prevent the navigating said waters, and said corporators shall be liable for all damages, sustained by individuals in consequence of unreasonable detention.

An Act of 1846, additional to the Act incorporating the *defendants'* company, gave to them "the same power to construct bridges and causeways across tide waters," and "with the same conditions and restrictions, as are granted to the Bath and Portland Rail Road Company by the fifteenth section of the Act incorporating said company."]

The plaintiff introduced evidence, tending to show that the culvert was badly constructed, and that the floor of it was not laid sufficiently deep, for which reason the water was detained by the embankment from coming, as it had been used to do, into the plaintiff's mill-pond; and his logs were unreasonably detained in the creek above the embankment, by the difficulty of getting them through the culvert.

To recover for these injuries, this action is brought.

The Judge directed a nonsuit, to which the plaintiff excepted.

Gilbert, for the plaintiff.

That the plaintiff has sustained serious damages by the embankment, is not controverted. It is one for which he is entitled to compensation. The question then is as to the form of the process to obtain that compensation.

It is not obtainable by any proceeding in the county commissioners' court. The claims coming within their juridiction, are limited to the owners of land or of building materials, taken by the corporation. But we have no complaint to make for land or any other property taken by them. The remedy, then, must be by action at law, and we are therefore *recti in curia.*

And here, at the outset, we admit, that if the Legislature have, by constitutional authority, granted to the defendants the right to do the acts, by which we have been injured, and to do them in the mode they have pursued, we have no case. But we do not seek redress for acts so done. Our claim is for acts *unauthorized*, and therefore *unlawful.* We contend, that the obstruction of the tide waters, boatable and floatable, was

unlawful, and that for the losses which the plaintiff suffered by such obstruction, he is entitled to recover.

1. We claim for injury sustained from the impediments to getting our logs down the creek from the place where we had deposited them before the embankment was made. In that creek we had a right of passage for lumber. It was subject to servitude for the public use, for boating, rafting and floating. *Brown* v. *Chadbourne*, 31 Maine, 9.

But that right was incumbered by the defendants' embankment.

The Legislature did not authorize such an obstruction. They gave no permission to cross tide waters, except upon bridges. The defendants therefore transcended their authority in erecting the causeway, the embankment.

2. We claim for a diminution of our water power. The erection by the defendants kept back a part of the water from our pond, as the evidence fully proved. To the full flow of that water we had a right.

If the creek is not to be viewed as a navigable stream, we had the right to the water by R. S. c. 126, § 1, giving the right to flow for mill purposes.

If it be a navigable stream, our right to it was perfected by prescription. The fact that it is a navigable stream does not prevent the acquisition of a right by long user. Our occupation for more than twenty years has ripened into a right to the full use of the water, a right which cannot be divested, even by the Legislature, without compensation.

But it has been said, in defence, that our dam, being upon navigable tide water, is in violation of public right, and that therefore, as against a third party, *we* could acquire no right. But such is not the law. If the maintenance of the dam is wrongful, the sovereign power only has a right to complain, except in cases of injury sustained by individuals. *Low* v. *Knowlton*, 26 Maine, 128; *Gerrish* v. *Union Wharf*, 26 Maine, 384; *Borden* v. *Vincent*, 24 Pick. 301; *Simpson* v. *Seavy*, 8 Greenl. 138.

But further, the broad ground is taken, in defence, that the

erection of the causeway was authorized by the additional Act of 1846. By a fair construction, however, that Act authorizes no erection but bridges over tide waters. The defendants have, nevertheless, placed a permanent embankment across the stream. It was that unlawful structure which occasioned so much injury to the plaintiff; and for that injury he here seeks redress.

Evans, for the defendants, referred to the statute provisions of 1844 and 1845, above recited, to educe from them an authority to erect the embankment, and then proceeded; — "The plaintiff's mills and dam are upon a navigable stream of tide waters. Such a stream belongs to the public, and is subject to the control of the sovereign power. *Berry* v. *Carle*, 3 Greenl. 269; *Spring* v. *Russell & al.* 7 Greenl. on p. 290; *Cutler* v. *Mill Dam Co.* 20 Maine, 356; *Low* v. *Knowlton*, 26 Maine, 128; *Brown* v. *Chadbourne*, 31 Maine, 9, where the cases are collected. — Also *Davidson* v. *Boston & Maine R. R.* 3 Cush. 105, which is directly in point. See clause 4, opinion of the Court, *Munson* v. *Hungerford*, 6 Barbour's S. C. R. 268, 269, and cases cited. See remarks of TANEY, C. J. in *Pennsylvania* v. *Wheeling Bridge*, 13 How. 582, as to the rules relating to navigable waters; *Charlestown* v. *Co. Commissioners of Middlesex*, 3 Met. 202.

It is not admitted that, in navigable tide waters, a prescriptive right can be acquired. *Nullum tempus occurrit regi.*

The defendants, then, have done no more than they were authorized to do by their charter, and the additional enactments. For acts thus done by authority of law, no damages are recoverable. Damages so occasioned are *damnum absque injuria*. *Radcliff's Ex'rs* v. *The Mayor, &c. of Brooklyn*, 4 Comstock, 200; *Callender* v. *Marsh*, 1 Pick. 418.

If the plaintiff has sustained any damage, for which he is entitled to redress, he should have sought it by application to the County Commissioners, agreeably to the provisions of the statute. *Mason* v. *Ken. & P. R. R.* 31 Maine, 215; *Dodge* v. *Co. Commissioners of Essex*, 3 Met. 380.

SHEPLEY, C. J. — By their charter and by the general Act respecting rail roads, the defendants were authorized to take and hold land and other real estate and materials, that might be necessary for the construction and operation of their road, subject to certain restrictions; and they were required to pay for the same. No provision was made by statute for compensation for an injury occasioned by a construction of the road to any person, from whom no land, estate or materials were taken. In this respect the provisions of our statutes differ from those of Massachusetts, as explained in the case of *Dodge* v. *County Commissioners*, 3 Metc. 380. No land, estate or materials owned by the plaintiff was taken; and he cannot be entitled to the remedy provided by the statute in such cases.

For any lawful act done by the defendants, in the construction of their road, the plaintiff will not be entitled to recover damages, although he may have been indirectly injured. *Spring* v. *Russell*, 7 Greenl. 273; *Callender* v. *Marsh*, 1 Pick. 418; *Radcliff's Ex'rs* v. *the Mayor, &c. of Brooklyn*, 4 Comst. 200.

The Legislature might authorize the defendants to construct a causeway or bridge across navigable or tide waters, although the navigation might thereby be impaired or injured. *Parker* v. *The Cutler Mill-dam Co.* 20 Maine, 353; *Brown* v. *Chadbourne*, 31 Maine, 9.

The defendants will not, therefore, be liable for any damages suffered by the plaintiff, unless they have exceeded the authority conferred upon them and conducted unlawfully.

It is insisted, that across tide or navigable waters, they were authorized to erect bridges only, and not causeways.

The additional Act of July 16, 1846, provides, that the "company shall have the same power to construct bridges and causeways across tide waters," "and with the same conditions and restrictions as are granted" to the Bath and Portland R. R. Co. by the fifteenth section of the Act incorporating said company. The meaning of this must be, that the defendants should have the same power to construct bridges and causeways as said Bath and Portland R. R. Co, had by

their Act of incorporation to erect bridges. They might lawfully construct a causeway, and the bank raised for a passageway over the stream may, perhaps, be properly denominated a causeway.

By the provisions of the fifteenth section of their Act of incorporation, the Bath and Portland R. R. Co. were not authorized to construct bridges so as to prevent "the navigating said waters." If, therefore, the defendants have so constructed a causeway over a navigable stream as to do this, they may be liable for damages in an action on the case. They might also, according to the language used in the same section, be "liable for all damages sustained by individuals in consequence of unreasonable detention."

If they have not prevented the navigation of the stream, but have so constructed their causeway or embankment as to occasion unnecessary and unreasonable detention, they may be liable for the damages thereby occasioned.

There is testimony, from which a jury might perhaps find, that the navigation of the stream had been prevented; and that certain logs of the plaintiff had been unreasonably detained while floating down the stream.

Exceptions sustained; nonsuit taken off, and case to stand for trial.

WELLS, HOWARD, RICE and HATHAWAY, J. J. concurred.

ADAMS *& al. versus* SMITH.

An indorsement of a note to a bank, without specifying the particular bank, (there being a blank space in which to insert the name,) is but a blank indorsement, which any lawful holder of the note may so alter as to insert his own name.

By the holder's lodging such note at a bank for collection, such blank indorsement is not converted into an indorsement to the bank.

The indorsement of a note by the payee, "*on account of the payee,*" made to a bank, without specifying the name of the bank, is not a restrictive indorsement.

The authority of one who indorses a note as the secretary of a corporation need

not to be proved by any record or usage. It is sufficiently shown by uncontradicted testimony from a witness, that such person was the secretary and had the authority.

A note indorsed and transferred, before its pay-day, by the payee to his creditor, in discharge of a debt, is to be considered a note transferred in the ordinary course of business, and in a suit by the indorsee against the maker will be protected against any set-off claims or equitable defences, which might have prevailed in a suit by the payee against the maker.

The indorsee of a negotiable note purchasing it for value before its pay-day, may recover in an action against the maker, though, when taking the note, he knew that, between the maker and the payee, there was a written stipulation that, on a specified contingency, the note was not to be paid, and although before the pay-day, such contingency actually occurred.

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

Assumpsit by the indorsee against the maker of a promissory note of $72,25, payable in fourteen months to the Protection Insurance Company of New Jersey or order, at the Augusta Bank. Upon the face of the note were the words "No. Brig Cushnoc." The note was upon a printed form, and upon the back of it the following words had been printed, "Pay to the order of the Protection Insurance Company of New Jersey."

"Pay to the Bank on account of the Protection Ins. Company of New Jersey." Under this indorsement was the signature "W. Earl, a Sec'y."

Under this was another indorsement, "Pay to the order of Daniel Pike, cashier. S. P. Baker, Cashier."

The note was received by the plaintiffs in payment of a debt due to them from the Insurance Company.

After this suit was commenced, and before the trial, the plaintiffs' counsel had altered the indorsement, over the signature of Earl, so as to read — "Pay to the order of A. & W. Adams."

The signature of Earl was shown to be genuine. To show that Earl had authority to make the indorsement, the plaintiffs relied wholly upon the evidence given by one Edwards, whose testimony on that point was simply, that Earl had such authority.

The note had been lodged by the plaintiffs for collection at

the Mariner's Bank, of which Baker was the cashier. Baker, shortly before the pay-day, sent it for collection to the cashier at Augusta. It was there protested, and was returned to Baker, who thereupon obliterated the indorsement which had been made by him.

The defendant filed in set-off a claim against the Insurance Company for damage to brig Cushnoc by a disaster, which happened during the life-time of the policy, and prior to the pay-day of the note, $400, and offered to introduce the policy of insurance upon the brig Cushnoc by said Company, for which the note was given, which policy among other things contained a stipulation; viz. "In case of loss, such loss to be paid in thirty days after proof of the loss and of interest in the assured, the amount of the note given for the premium being first deducted." The note in suit is the one given for the premium. The defendant further offered to prove, *that* the brig was his property; *that* the note was given for insurance upon her; *that* she was lost within the life-time of the policy, and before the pay-day of the note; *that* the requisite steps for proving and perfecting his claim had been duly taken; *that* his claim under the policy exceeds the amount of the note; and *that* the said stipulation in the policy was known to the plaintiffs, at the time of its indorsement to them.

If, upon these facts, with the facts which the defendant offered to prove, the action is maintainable, a default is to be entered by consent.

Wood & Foote, for the plaintiffs.

Ingalls, for the defendant.

1. The indorsement by Earl was not a blank indorsement, and the plaintiffs therefore had no authority to alter it. Story on Bills, § 206; Story on Prom. Notes, § 138.

2. But if originally a blank indorsement, it ceased to be such when received by the Mariner's Bank as a paper indorsed to them. There was, at first, a blank for inserting the name of the bank to which it might be negotiated. When the Mariner's Bank took it, the indorsement was to them.

So they viewed it, as appears by the action of their cashier in his indorsement. The only name, then, in which the blank could be filled was that of the Mariner's Bank. The insertion of the plaintiff's name in that blank was unauthorized. The indorsement by the Mariner's Bank has been expunged, so that the plaintiffs can make no claim through them. The note therefore has never been negotiated to the plaintiffs.

3. The indorsement by Earl, as agent of the Insurance Company, was a restricted one, for their own use. The defendant, then, is entitled to the same defence as if the suit were by the payees. Story on Prom. Notes, § 138, note; *Nevins* v. *DeGrand*, 13 Mass. 436; *Wilson* v. *Holmes*, 5 Mass. 543; Chitty on Bills, 104; Story on Bills, § 206, 212, 213.

4. The plaintiffs had *knowledge* of the stipulation by the payees, that, in case of loss, the note was not to be paid, but that its amount was to be simply deducted from the amount of the loss. Our account in set-off is for that very loss. We are therefore entitled to have the set-off made.

5. There was no sufficient or admissible evidence that Earl had authority to indorse the note. No appointment, no vote, no record was offered to show such authority, nor did the witness Edwards point out from whom or in what way, the authority was given. Angell and Ames on Corporations, § 277, 281, 283; *Methodist Chapel* v. *Herrick*, 25 Maine, 354.

Whether Earl had such authority, was a question of *law* upon the facts. But no facts were shown, and the *witness* was left to decide the law, and that too, perhaps without any knowledge of the facts. And if he supposed he was acquainted with the facts, they were probably but matters of hearsay. There is then a failure of proof that the note was ever rightfully indorsed to the plaintiffs.

Hathaway, J. — Assumpsit on a note, made by the defendant, payable to the Protection Insurance Company of New Jersey, or order, indorsed and transferred to the plaintiffs, by W. Earl, as agent of said company. The authority of Earl

to transfer it was proved by the deposition of Edwards, in the case, which was competent for that purpose. 2 Greenl. Ev. § 62.

The plaintiffs left the note at the Mariner's Bank for collection. The indorsement of Baker, cashier, for the purpose of collecting it, can have no effect upon the rights of the parties to this suit. The printing on the back of the note, directly over the signature of W. Earl, was merely an unfilled blank, and amounted to nothing. The note, therefore came into the plaintiffs' hands as if those printed words had not been there.

The note was the property of the Insurance Company, unpaid and negotiable, and having been transferred to the plaintiffs in the ordinary course of business by indorsement, before its maturity, they are entitled to recover the amount due upon it, and a default must be entered.

SHEPLEY, C. J., and WELLS, HOWARD and RICE, J. J., concurred.

GLASS *versus* NICHOLS.

In the trial of an action, the record of a former judgment between the same parties or those in privity with them, may be used as evidence.

One who has been adjudged trustee, because holding goods under a sale, which was fraudulent and void as against creditors of the principal defendant, is in privity with him.

An officer, who has attached goods by order of a plaintiff is in privity with him.

Hence such officer, when sued by *such a trustee* for having attached the goods pursuant to such order, may, as a privy to the attaching plaintiff, use in evidence the record of the judgment against the trustee.

REPLEVIN of goods which had been attached by the defendant, a deputy sheriff.

The defendant in the District Court filed three pleas in abatement, grounded upon alleged defects in the service of the writ and in the replevin bond.

To these pleas the plaintiff demurred, protesting however

against any right in the defendant to present more than one plea in abatement.

These demurrers were joined. That Court adjudged the pleas to be bad, and ordered the defendant to answer over.

It was the intention of the defendant to file exceptions to that ruling, but he failed to do so, through the unexpected abolishment of that Court, defeating some amicable arrangement by which the exceptions were to be filed as of term time, though at a subsequent day. As the business of that Court was transferred to this, the defendant now applies for a revision of that ruling.

If, however, no revision, favorable to the defendant, can be had, the parties present the following as an agreed statement of facts; viz: —

The goods were formerly the property of one Longfellow. On Oct. 11, 1849, he transferred them to this plaintiff by a bill of sale, absolute in its terms, under which the plaintiff now claims to hold them. One McLellan immediately afterwards attached them in a suit against Longfellow. This defendant was the officer by whom that attachment was made, by McLellan's direction. This replevin was then sued out to regain possession of the goods.

On Oct. 22, 1849, McLellan sued Longfellow upon another cause of action, and summoned this plaintiff as trustee, who disclosed, claiming ownership of the goods under the sale from Longfellow. McLellan filed an allegation, that the sale was fraudulent as to Longfellow's creditors.

To sustain that allegation, evidence was introduced in the District Court. The adjudication there was, "Trustee charged." Upon exceptions taken, that adjudication was affirmed in this Court. That trustee suit is still pending against the principal defendant.

The earlier suit against Longfellow, (that in which the goods were attached,) has been settled, and the attachment discharged.

This action is defended in behalf of McLellan, and by permission of this defendant.

"If the record, (in that trustee suit,) of said proceedings against Glass as trustee, and of the decision thereon, would, after final judgment rendered, be admissible and conclusive against said Glass in this action," the parties agree that judgment shall be rendered for the defendant; otherwise for the plaintiff.

Gilbert, for the plaintiff.

There is no record, by which this plaintiff can be bound. The record of the *trustee suit*, relied upon by the defendant, it is not competent for him to use. For he was not a party to it; nor, in any legal contemplation, can he be considered as a privy.

The case shows that *this suit* is defended in behalf of McLellan. But he is wrongfully here. He gave no bond of indemnity to the officer, and is not in privity with him. He is not a party, and therefore cannot be allowed to defend; for surely it will not be pretended that he could be constituted a party by the mere permission to him from the officer to come in and defend.

McLellan has no interest. He has received his pay. He attached, not to establish in himself a title to the goods, but merely to get the avails of a sale of them. But the debt, on which they were attached, has been paid. What rights then has he in the case?

Suppose Nichols should recover here, he can have no return of the goods, for the suit upon which he attached them having been settled, and the attachment discharged, he has no claim upon which he can appropriate them or hold them. This shows that there is no privity of McLellan in this suit. How then can the record of the trustee suit be admissible here?

But, if admissible, it proves nothing material. It shows no fraud in this plaintiff. The adjudication was simply, "Trustee charged." This does not show what was the ground of the decision. Neither does the decision in this Court give any further light, or show any thing, except that Glass was chargeable as trustee. How then does it appear

that Glass held the goods fraudulently? He might have been charged on some other ground than that of fraud.

If then, no fraud is shown in the sale from Longfellow, that sale must stand, and the plaintiff must recover.

But suppose the former adjudication would have precluded Glass, upon such a state of facts as was *then* before the Court, yet, the fraud having since been purged, the sale, under which the plaintiff claims, must be confirmed.

Merrill, for the plaintiff.

Rice, J. — The defendant seasonably filed pleas in abatement which were overruled by the Judge of the late District Court, on demurrer. To that decision the defendant excepted, but has never filed his exceptions. What would have been the decision of this Court, had those exceptions been filed and presented, is not material. Not being before us, they cannot be considered.

Hannibal Longfellow was, prior to Oct. 11, 1849, the acknowledged owner of the goods in controversy. On said 11th day of October, Longfellow transferred, by bill of sale, absolute on its face, the goods to the plaintiff. Subsequent to that transfer Samuel McLellan commenced an action against Longfellow and placed his writ in the hands of the defendant, who was a deputy sheriff, with directions to attach said goods as the property of Longfellow, which was done, and thereupon the plaintiff brought this action.

On the 22d of October, 1849, the same Samuel McLellan brought another action, for a different cause, against said Longfellow, and summoned the plaintiff as his trustee, claiming to hold on the ground, that the sale from Longfellow to the plaintiff was fraudulent. The question whether the plaintiff should be held as the trustee of Longfellow was litigated before the District Court, and resulted in a judgment in which he was charged. To this adjudication of the District Judge exceptions were filed and prosecuted in this Court. *McLellan* v. *Longfellow & Trustee*, 32 Maine, 494. In that case, the Court, after excluding certain testimony which

had been admitted in the Court below, proceed to say "there will still remain evidence sufficient, in the opinion of the Court, to show that Glass had in his possession goods and effects of the principal defendant, which he holds under a conveyance that is not *bona fide* but fraudulent as to creditors of the defendant. Under the provisions of the R. S. c. 119, § 69, he is chargeable as trustee."

It is admitted, that the parties in interest, in the case at bar, are the same as in the case referred to above, and that the goods and the bill of sale, by which they are claimed by the plaintiff are also the same. But it is contended, that the record of the decision of the District Court does not show that Glass held the goods fraudulently; the adjudication of that Court being simply, "Trustee charged." This may be true, but it is not material. As that case was transferred from the District Court, to this Court by exceptions, and under the provisions of c. 117, § 1, of the laws of 1849, was reëxamined both as to fact and law and determined by the full Court. Upon that examination the Court found that Glass held the goods under a conveyance that is not *bona fide*, but fraudulent as to the creditors of Longfellow. By that adjudication the parties in this suit are bound. According to the agreement, judgment must be for the defendant.

SHEPLEY, C. J., and WELLS, HOWARD and HATHAWAY, J. J., concurred.

FURLONG *versus* HYSOM.

For articles furnished and delivered to a married woman residing with her husband, necessary and proper for her, though charged to *her* on account, the husband is liable.

Cohabitation, of itself, furnishes a presumption of the husband's assent to contracts made by the wife of necessaries, suitable to his degree and estate.

In a suit against the husband upon such an account, the shop books of the plaintiff, with his suppletory oath, are admissible to show the sale and delivery of the goods.

In such a suit, the jury are authorized to infer an authority to the wife from the husband to purchase the goods on his credit.

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

Indebitatus Assumpsit, on account annexed for balance due on book $11,83. The bill of particulars filed by the plaintiff and used at the trial, was for "goods sold to the defendant's wife;" the debit items, amounting to $21,20, were for articles delivered at various times, such as cloths, trimmings for making them up, clothing, a muff, a pair of shoes and candlesticks. The credit amounted to $9,37, leaving $11,83, the balance sued for.

There was evidence tending to show the defendant's admission of the indebtedness.

The plaintiff introduced his day-book and leger, with the suppletory oath. The books showed, that the account had originally been kept as an account against Sarah J. Hysom, and that during the same period, there was an account kept against the defendant, but that account had been settled and paid. Sarah J. Hysom was the defendant's wife.

The jury were instructed *that* "the defendant would be liable for articles so purchased by his wife and charged to her, if obtained by his permission or consent, and if necessary and proper for her:" —

that the account books, with the plaintiff's suppletory oath, were proper evidence in determining whether the articles were furnished and sold to Sarah J. Hysom; — and

that, if the articles were proper and necessary for her and, if they were sold and delivered as charged in the books, and had not been paid for, the defendant is liable in this suit.

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

Ruggles, for defendant.

That the articles were charged to Sarah J. Hysom, is *prima facie* evidence, that they were sold on her credit alone. If any different presumption could arise from the relation of husband and wife, it was controlled by the circumstances proved in the case. It was then a material fact to be proved by the jury, that the credit was given, not on her credit but on that of the defendant. More especially is it so, since recent en-

actments have authorized credits to married women. The jury then should have been instructed, that they must be satisfied that the articles were sold on the *credit of the defendant.* The omission so to instruct is not supplied by any presumption of law, under the circumstances of this case. The willingness or consent of the husband, even if proved, that his wife might trade with the plaintiff, could not take away the necessity of proof that the credit was given to *the defendant.* Under the recent laws, respecting the property rights of married women, the articles purchased belonging to the wife, and the plaintiff's remedy might be against her property.

There was, therefore, error in the instruction that "if the articles were proper and necessary for her, and if they were sold and delivered as charged in the books, and had not been paid for, the defendant is liable?

There was error in admitting the plaintiff's book, there being no charge in it against the defendant, except what had been settled and paid. And the book, with the suppletory oath, was the only evidence that the articles "had been sold and delivered, as charged on the books." The verdict should therefore be set aside.

The counsel then argued, that the verdict was against law and against evidence.

C. H. Lowell, for the defendant.

Rice, J. — Objection is made because the Judge at the trial instructed the jury that, if the articles sued for, were furnished to Sarah Jane Hysom, (wife of defendant,) and were necessary and proper for her, and were sold and delivered as charged on the plaintiff's book, and had not been paid for, or settled, then the defendant would be liable in this action, to pay the same, with interest, from the date of the writ.

It is contended that the jury should have been instructed, that it was necessary for them to be satisfied that the articles were delivered on the credit of the defendant, before they could find a verdict against him.

The jury were instructed that, "the defendant would be liable for articles so purchased by his wife, and charged to her, if obtained by his permission, or consent, and if necessary and proper for her." This qualification gives the full extent contended for by the defendant.

But the specific instructions objected to, were correct. If the articles were necessaries, the jury had a right to infer authority from the husband. During cohabitation, there is a presumption arising from the very circumstances of cohabitation, of the husband's assent to the contracts made by the wife, for necessaries, suitable to his degree and estate. *Etherington* v. *Parrot*, 1 Salk. 118. The husband is bound to provide his wife with necessaries suitable to her situation, and his condition in life; and if she contract debts due for them during cohabitation, he is obliged to pay those debts. He is bound by her contracts for ordinary purchases, from a presumed assent on his part. 2 Kent's Com. 146. It is a rule of evidence, that the mere fact of cohabitation, or that the woman lives with him as his wife, is evidence that she is his agent to purchase necessaries for herself. *McCutchen* v. *McGahay*, 11 Johns. 281.

In the absence of other testimony, the shop books of the plaintiff, with his suppletory oath, were competent evidence for the consideration of the jury, to prove the sale and delivery of the goods.

Exceptions do not lie to the finding of a jury, as against law or against evidence.

Exceptions overruled,
judgment on the verdict.

SHEPLEY, C. J., and HOWARD and HATHAWAY, J. J., concurred.

Webb *versus* Hall.

A married woman may maintain a suit in her own name alone, to recover possession of land, belonging to her.

Land belonging to a married woman may be conveyed by a deed, executed jointly by herself and husband for that purpose.

A deed so executed is not entirely void as to the wife, though executed when she was under the age of twenty-one years. She may, however, avoid it, after coming of age, by bringing suit for the land.

The tenant in such a suit, claiming under such a deed, will not be accountable for any rents or profits, which accrued prior to notice that the wife intended to avoid the deed.

On Facts agreed.

Writ of Entry.

The land descended to the demandant by inheritance from her father, while she was under the age of twenty-one years and unmarried. She afterwards intermarried. The marriage was subsequent to the Act of 1844, securing to married women their rights in property. In 1849, while she was still under the age of twenty-one years, she united with her husband, who is still living, in a deed, conveying the land in mortgage to the tenant and another person, with covenants of warranty, to secure the payment of a debt due from the husband. After coming of age, in 1852, she commenced this suit, to recover the land.

If the deed is void or voidable, and if, upon the foregoing statement, the demandant is entitled to recover, the tenant is, by agreement, to be defaulted.

Hubbard, for the demandant.

Morrell, for the tenant.

It is not pretended that the demandant can avoid her deed on the ground of being under coverture at the time of its execution. The legal rule which she asserts and relies upon is, that the deed is either void or voidable, because she was then under age. But there is no such rule.

Upon principle, and by immemorial usage, a *feme covert* may bind herself by deed with the concurrence of her husband; — and there is no exception to this rule in favor of the

feme covert, within age. 7 Mass. 21; 4 Con. 56; 4 Mason, 58; 5 Mason, 67.

The incapacity of the minor wife is relieved by the husband's capacity. The married woman had not legal existence. She could therefore convey nothing. It is the husband's act, which vitalizes the deed.

The policy here is analogous to the method of fine and recovery, adopted in England, by which a *feme covert* may pass her title. 2 Black. Com. 353.

This conveyance should be regarded as a release to the husband of the right of control within provisions of the statute of 1844, c. 117, § 20.

SHEPLEY, C. J. — The question presented is, whether a conveyance made by an infant *feme covert* and her husband conveyed her estate, so that she cannot recover it upon her becoming of age.

By the common law, a *feme covert* could not by uniting with her husband in a deed convey her estate. Crus. Dig. T. 35, c. 10, § 4. She could convey it by uniting with him in a fine or common recovery. Idem. c. 5, § 5. Neither by the common law, nor by the statute of 18 Ed. 1, *De modo levandi fines*, were infants bound by fines. They might be revested during their infancy or by statute of 4th Hen. 7, c. 24, within five years after of age. Com. Dig. Fine, K. 3.

These modes of conveyance not being in use during the provincial government of Massachusetts, the estate of a *feme covert* was conveyed by her and her husband, uniting in a deed executed for that purpose. There has been some difference of opinion, whether the validity of such a conveyance rested upon usage merely, or upon a construction of the statute, 9 Will. 3, c. 7. *Fowler* v. *Shearer*, 7 Mass. 14; *Durant* v. *Ritchie*, 4 Mass. 45. If usage be regarded as its true foundation, there is no proof arising out of the history of the law or decided cases, that it gave to an infant *feme covert*, greater power than she would have had by the levy of a fine. If the power be considered as derived from a construction of the statute,

the power to convey was given to those "having good and lawful right or authority thereto," and an infant *feme covert* could not have been so regarded. If the usage could be considered to authorize a *feme covert* to convey without regard to her age or capacity, not only infant but idiotic and insane *femes covert* could make valid conveyances.

The principle, upon which such conveyances were regarded as valid, would seem to be this: — the female being of a capacity to convey her estate when sole, may convey it while under coverture, by the assent of her husband, manifested by his uniting with her in the conveyance. If she were incapable at the time by reason of infancy, idiocy or insanity, such assent of her husband could not impart any legal capacity.

It is provided by the R. S. c. 91, § 5, that the joint deed of a husband and wife shall be effectual to convey her estate. This was not designed to authorize the husband of an insane idiotic or infant wife, who could not as a *feme sole* convey, to do so by uniting with her. For provision was made by another statute, c. 112, § 1, art. 8, empowering this Court to authorize a husband, whose wife was insane, to convey her estate.

A similar question has arisen and has been decided in the State of New York. In the case of *Sanford* v. *McLean*, 3 Paige, 117, the Chancellor says, "the statute which makes valid the deed of a *feme covert*, when executed with her husband and acknowledged by her on a private examination, was never intended to sanction or validate a conveyance by an infant wife." The courts of common law came to a like conclusion. *Priest* v. *Cummings*, 16 Wend. 617, and 20 Wend. 338; *Bool* v. *Mix*, 17 Wend. 119; *Sherman* v. *Garfield*, 1 Denio, 329.

So far as it respects the demandant's right to recover, it is immaterial whether the conveyance be void or voidable. For the parties have agreed, that judgment shall be rendered in her favor, if the conveyance be void or voidable. With respect to the damages, a decision of this question may be important. Although there may be some difference in the decided cases, the weight of authority is in favor of regarding such

a conveyance as voidable only. *Dearborn* v. *Eastman*, 4 N. H. 441; *Boston Bank* v. *Chamberlain*, 15 Mass. 220; *Bool* v. *Mix*; *Sherman* v. *Garfield*; *Boody* v. *McKenney*, 23 Maine, 517.

Can the action be maintained by virtue of our statutes by the *feme covert* in her own name alone?

Although the time is not stated, it would seem to result from the facts agreed, that the demandant must have been married after the Act of March 22, 1844, was in force; which provided, that notwithstanding her coverture she should hold and possess her estate, as her separate property. By the Act of August 10, 1848, a married woman seized or possessed of property, real or personal, is authorized to commence, prosecute or defend any suit, to enforce or protect her rights, to final judgment and execution in her own name, in the same manner as if she were unmarried. She may, therefore, maintain this suit.

It is provided by R. S. c. 145, § 14, that a demandant may recover in the same action damages from the time, when his title accrued. A demandant's title as against a tenant must be considered as first accruing, when he first becomes entitled to immediate possession, from which time the tenant must be regarded as a trespasser. The conveyance of the demandant with her husband being voidable only, the tenant cannot be considered as a wrongdoer before he had notice that she had elected to avoid it. There is no proof of it before the commencement of the suit, and she will be entitled to recover damages since that time only. *Tenant defaulted.*

WELLS, HOWARD, RICE and HATHAWAY, J. J., concurred.

FIELD *& al. versus* HIGGINS.

Under the statute giving the process of Forcible Entry and Detainer of "lands and tenements," a tenement includes, as one of its essential elements, an interest in real estate.

A building, standing upon the land of another by his consent, is property merely personal.

For the recovery of such property, the process of Forcible Entry and Detainer cannot be maintained.

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

Forcible Entry and Detainer.

The respondent owned a building, the upper part of which was used for the residence of a family, and the lower part for a mechanic's shop, standing upon land of one Holland. He employed the complainants to remove it to land of the Lewiston Water Power Company. They accordingly removed it, having made upon it such trifling repairs as were necessary to fit it for the removal; after which they made such further repairs upon it as to fit it for occupation. For these services, charged at $37, they claimed a lien upon it. To perfect that lien they seasonably attached it, and obtained judgment and execution. Upon that execution, the building was sold by the officer at auction to the complainants. After that purchase, they gave to the respondent written notice to quit, which he refused to do. About six months after that notice, they instituted this process of Forcible Entry and Detainer, complaining that the respondent "having had peaceable and lawful entry into the lands and tenements, viz. a messuage of the complainants', situated," &c. "whose estate in the premises was determined, then did and still does refuse to quit the same, although the complainants gave to him due notice in writing, thirty days," &c.

The case was submitted to the Court for such adjudication as "law and justice should require."

H. C. Lowell, for the complainants.

Ludden, for the respondent.

Many points were presented and supported by the respective counsel.

Among other things, Ludden contended that this process cannot lie, as the building in question was property merely personal.

Lowell, in reply. —

The question is not whether the process lies for the possession of personal property, for the complaint alleges the

unlawful detention of the plaintiffs' "*tenement.*" The statute gives this remedy for "any lands or tenements." Is it then a misnomer, to call this building, (occupied, the lower part for a shop, the upper part for a dwellinghouse,) a tenement? *In common parlance*, the term tenement imports not only a separate building, but any distinct section of a block of stores, shops or dwellinghouses. *In the law*, its import is more comprehensive, including all the right, title and interest as appertaining to any of such buildings; upwards and downwards, including light, air and easements, with right of ingress, regress and the like. Such is the species of property for which this form of remedy is provided. That the tenement should stand upon the land of another by his consent, is wholly an immaterial matter.

HATHAWAY, J. — Process for forcible entry and detainer of a building, which had been moved, by the defendant, on to the land of the Lewiston Water Power Company, where it was taken on execution, as the defendants' personal property, and as such purchased by the plaintiffs, at the sheriff's sale thereof, 19 July, 1851.

The first question presented by the case, is whether or not this process can be maintained to recover possession of personal property.

If the building were not personal property, the plaintiffs acquired no title to it, by their purchase of the sheriff, for *as such*, acting under his statute authority he sold it to them. If it were personal property, and they acquired a lawful title to it, and the defendant wrongfully withheld it from them, they might have maintained replevin for it, or trover for its value. *Russell* v. *Richards et al.* 1 Fairfield, 429. "Lands and tenements," only, are the subjects of this process, R. S. c. 128, and the argument of the counsel for the complainants assumes that the building was a *tenement* within the meaning of the statute.

The word *tenement*, in its legal sense, means an estate in land, or some estate or interest, connected with, pertaining to,

or growing out of the realty, of which the owner might be dissiezed. Hence, in an indictment for forcible entry and detainer, it was necessary to allege a disseizin. *Rex* v. *Dorny*, 1 Salk. 260. But disseizin is not a term applicable to property merely personal.

"Real estate consists of lands, tenements, and hereditaments. A *tenement* comprises every thing, which may be holden, so as to create a tenancy in the *feudal sense* of the word." 3 Kent's Com. 401.

There can be no doubt, that an interest in real estate is an essential element of the definition of the word "tenements," as used in the statute. Inst. 6 A. 19 and 20. And the building as claimed to be owned by the complainants, being property entirely personal, this process cannot be maintained, and a nonsuit must be entered.

SHEPLEY, C. J., and WELLS, HOWARD and RICE, J. J., concurred.

TALLMAN *versus* SNOW.

In a deed conveying land with a right to immediate possession, a condition that a third person shall be allowed to have the use and occupation of it for life, *if he shall request it*, is a condition subsequent.

In order to revest an estate, after the breach of a condition subsequent, an entry by the grantor or by those who have succeeded to his right, is indispensable.

ON FACTS AGREED.

WRIT OF ENTRY.

In 1837, Peleg Tallman conveyed to his son, Henry Tallman, a lot of land lying *in Bath*, to be held during the lifetime of Henry, remainder to Peleg Tallman, the second, in fee; "on condition that said Henry and Peleg, the second, shall allow [this demandant] Eleanor Tallman, wife of said grantor, to have the use, occupation and improvement of the same, during her natural life, if she shall request it." Peleg Tallman, the grantor, after giving the deed, occupied the

premises for two or three years, and until he died, in 1841, having, by his will devised to said Eleanor, for her natural life, all his real estate *in Bath*, not otherwise disposed of, with reversion to said Henry. In 1844, Henry conveyed the lot by a deed under which the title came to the tenant.

After the tenant's title accrued, and shortly before this suit was brought, the demandant, by her attorney, demanded of Henry her life estate or an exhibition of his title. In neither respect was this demand complied with. The deed to Henry was not recorded until 1847, after the commencement of this suit, which was brought to recover possession of the lot.

On this statement of facts, the case was submitted to the Court.

Randall, for the demandant.

As the possession remained in Peleg Tallman up to the time when the will took effect, both the deed and the will may be taken together and explain each other.

The deed was upon a condition precedent. It was that, if she desired it, the occcupation was to be allowed to her. That she desired the occupation is proved by the demand which she made. By failure to perform the condition, the title under the deed was forfeited and became void. Her right to a life estate under the will then became perfected. But, as a demand was made before the suit, it makes no difference whether the condition of the deed was precedent or subsequent. *Frost* v. *Butler*, 8 Maine, 225; *Foxcroft* v. *Mallett*, 4 How. 353; *Bean* v. *Whistler*, 7 Watts, 144; *Nason* v. *Blasdell*, 17 Vermont, 216; *Commonwealth* v. *Fiske*, 8 Metc. 238; *Bryan* v. *Bradley*, 16 Conn. 474; *Stearns* v. *Godfrey*, 16 Maine, 158; *Fox* v. *Phelps*, 17 Wend. 393; 20 Wend. 437.

The deed from Henry Tallman, under which the tenant claims, was, of itself, a breach of the condition contained in the deed from Peleg Tallman, and operated a forfeiture. For it deprived him of the means to comply with the condition. The deed from him, therefore, conveyed nothing, and the

tenant is without title. 7 Watts, cited above; 4 Howard, cited above; *Cross* v. *Colman*, 8 Dana, 446.

The demandant's claim therefore is: —

1. That she holds under her husband's will, unless the title of Henry under his unrecorded deed defeats it.

2. That his title does not defeat it, because the life estate is expressly reserved in the deed to Henry.

3. If it was not expressly reserved, yet his deed being only on an express condition, the title was divested by a refusal to perform.

Tallman, for the tenant.

TENNEY, J. — The conveyance of Peleg Tallman to Henry Tallman, by the deed of the former, dated Feb. 16, 1837, was upon condition. It was clearly the intention of the grantor, as shown by the terms of the condition, that the whole estate should pass immediately upon the delivery of the deed to the grantee. And that the request of the demandant to have the use, occupation and improvement of the premises, would not be made till a future time, the grantor being in full life, at the time when the deed was to take effect. Hence the condition was subsequent, and the entire title vested in the grantee, and he could enjoy the estate exclusively till it should be surrendered on the request of the demandant, or until his title should be divested by reason of a forfeiture for the non-fulfillment of the condition.

If the demand for the use, occupation and improvement of the premises contemplated in the condition of the deed, was made in the mode, by the person, and of the one, necessary to make that demand legally effectual, and there was a refusal to surrender it of which we see no occasion to examine and decide, it would amount to a breach of the condition, and there would be a forfeiture. But some further act is necessary to the maintenance of the present suit.

After the breach of a condition subsequent, an entry is needful to avoid the estate, and cause it to revest in the person, who had it originally, or one, who has succeeded to his

rights. Until this, the party who committed the breach, would hold the title notwithstanding. There may have been a dispensation by him, who was entitled to insist upon the forfeiture. Shep. Touch. 154; Litt. § 351; Co. Litt. 218, (b) note 133. The entry is not a matter of form only, which may be dispensed with under R. S. c. 145, § 6, but remains as it was at common law, where it is of substance and intended to cause a forfeiture of the estate. *Marwick* v. *Andrews*, 25 Maine, 525; *Bangor* v. *Warren*, 34 Maine, 324. See *Austin* v. *Cambridgeport Parish*, 21 Pick. 215.

If the demandant by virtue of the condition of the deed from Peleg Tallman, to Henry Tallman, and of the will of Peleg Tallman, her late husband, or both, was entitled to claim the forfeiture and the estate for her life in the premises, the steps indispensable for the enforcement of her rights before the institution of a suit like the present have not been taken. If the deed had conveyed an estate to be determined by limitation, it would have been otherwise, an entry not being required to revest the title. *Frost* v. *Butler*, 7 Greenl. 225.

Plaintiff nonsuit,
judgment for the tenant.

Shepley, C. J., and Howard, Rice and Appleton, J. J., concurred.

Williams, *Pet'r for Mandamus, versus* County Commissioners of Lincoln County.

In a public highway, located but not finally established, individuals can have no vested rights, however advantageous to them such a way might be.

The repeal of an Act, which authorized a course of proceedings by a public officer, invalidates the proceedings, if unfinished, at whatever stage they had arrived.

In like manner, the expiring of the time allowed by the Act for finishing the proceedings, takes away all power to pursue them further, though they had been duly commenced.

A writ of *mandamus* will not be granted, when a compliance with it will be nugatory in its effects.

Petition for Mandamus.

Rice, J. — Mandamus lies to all inferior tribunals, magistrates and officers, and extends to all cases of neglect to perform a legal duty where there is no other adequate remedy. It applies to judicial as well as ministerial acts. If the remedy be judicial, the mandate will be to the officers to exercise their official discretion or judgment, without any direction as to the manner in which it shall be done. If it be ministerial then the mandate will direct the specific act to be performed. *Carpenter* v. *Co. Commissioners of Bristol Co.* 21 Pick. 258.

By an Act of the Legislature, approved Aug. 7, 1849, the county commissioners of Lincoln county, were authorized and empowered to lay out and establish a road over the tide waters of the Sheepscot river, within certain designated limits.

At the September term of the court of county commissioners for Lincoln county in 1849, the petitioners in this case, presented a petition to said commissioners, praying them to exercise the powers conferred by said Act, by laying out and establishing a public highway over said tide waters. After due notice and an examination of the route and a hearing of the parties, the prayer of the petitioners was denied by the commissioners. From this adjudication the petitioners, under the provisions of the Act approved Aug. 2, 1847, appealed to the District Court, by which Court a committee was appointed, which committee after due proceedings being had, made a report reversing the judgment of the commissioners in whole, and in favor of the petitioners. This report was accepted by the District Court, and certified to the court of county commissioners at their next regular term in Sept. 1850, and entered of record, and continued until the next regular term of said court in January, 1851, when the commissioners made a report, locating said road and ordered the same to be recorded. The proceedings on said original petition were then, in conformity with the provisions of R. S. c. 25, § 5, ordered to be continued, to the second next regular session of said commissioners' court, which carried the proceedings forward to the Sept. term of said Court, in

1851, since which time the commissioners have declined taking any further action in the premises.

Some action has been had on a petition for *certiorari*, by this Court, which so far as the present question is concerned is immaterial.*

This Court is now desired, by writ of mandamus, to direct the county commissioners to close the proceedings on the original petition and cause the same to be so entered of record.

Against granting this mandate, two objections are interposed. — *First*, that the petitioners have not such an interest in the road prayed for, as will induce this Court, under any circumstances, to grant the writ; and *second*, that the time has now expired within which the commissioners were authorized to act.

Upon the first objection we do not propose to comment, further than to remark, that this case is distinguishable from the case of *Sanger* v. *The County Commissioners of Kennebec*, 25 Maine, 291, cited by the Attorney for the State, and does not fall within the rule laid down by the Court in that case.

On the second point, it will be necessary to examine the statute of 1849, and see whether the county commissioners have authority to proceed, as desired by the petitioners. If they have not, the writ cannot be granted. The office of a writ of mandamus being to enforce the performance of official duty, the officer cannot be commanded to do that which it was not lawful for him to do without such command. *Gillespie* v. *Wood*, 4 Humph. 437.

The Act of Aug. 7, 1849, contains this proviso, "that the authority hereby granted shall not extend, or be in force beyond eighteen months from the time that this Act shall take effect," which was on the day of its approval.

* Note. — After the reversal, in the District Court, of the county commissioners' adjudication, and a certificate of the same to the court of county commissioners, the proprietors of the Wiscasset Bridge, under the direction of the County Attorney, and for the county, applied to this Court, at its Sept. term, 1850, for a writ of *certiorari*, with a view to quash the proceedings which had then been had in relation to the highway. The wr however, was not granted.

The Act would therefore expire by limitation on the 7th day of February, 1851. At that time the road had been located by the county commissioners, under the order from the District Court, and the report of that location had been duly ordered to be entered of record. But the proceedings were not then finally closed. The road, though laid out, had not then been established.

By the provisions of law those proceedings were necessarily continued, until the second next regular term of said commissioners' court, which was to be held in Sept. 1851, to allow time for those aggrieved by the decision of the commissioners in estimating damages, to present their petitions for redress. This carried the whole matter many months beyond the point of time, at which the Act of 1849 expired by limitation.

It is, however, contended that by the location of the road, within the time limited in the Act of 1849, the petitioner acquired a vested right in the way thus located, and that a duty was thereby imposed upon the commissioners to perform all such further acts as were necessary to establish the way and enable the petitioner to enter into the full enjoyment of the rights supposed thus to be vested in them.

When the Act of August, 1849, expired by limitation, very important contingent rights were undetermined. Those who were damaged by the location of the road were entitled to petition for increase of damages, and to have that question settled by a committee or a jury, and the commissioners in the contingency of an increase of damages were to determine according to the provisions of § 21, c. 25, R. S., whether the road should be laid out subject to such high damages, and if in their judgment it should not be, it would be their duty to enter upon the record of the proceedings, under the original petition, a judgment that the prayer of the said original petition shall not be granted for the reason aforesaid. This requires the exercise of judicial discretion. And it is not an answer to say that no claims for increase of damages were presented, for those claims may have been withheld for the

reason that there was no power under the Act to obtain their allowance.

Thus it will be seen that at the time the Act of 1849 expired, the road prayed for had not been established. No final action had been, or could have been had by the commissioners. All the rights then acquired by the petitioner were only inchoate, not vested. Their position was certainly no better than it would have been if the Act had originally contained no limitation, but had been repealed without any saving clause, on the day on which it expired by limitation. In that contingency all the proceedings which had not been completed, under the Act, would have fallen with the repeal. *Butler* v. *Palmer*, 1 Hill, 324; *Commissioners of Somerset County, petitioners*, 30 Maine, 221.

After the seventh day of February, 1851, the commissioners ceased to have any jurisdiction over the subject matter of the petition, and any further action on their part would have been wholly void. Such being the case, the writ now prayed for, if granted, would be unavailing, and is therefore denied.

SHEPLEY, C. J., and WELLS, HOWARD and HATHAWAY, J. J., concurred.

H. C. Lowell, Att'y to the relators.

Tallman, Att'y General, for the respondents.

FISK, *Petitioner, versus* KEENE *& als.*

In the construction of a will, the intention of the testator, as clearly discoverable from the whole will, is to be effectuated, if it can be done consistently with the established rules of law.

In a devise to a person and his heirs, with a devise over in case of his dying without issue, the words "dying without issue" are construed to mean an indefinite failure of issue; and the word "heirs" to mean heirs of his body.

A devise over, after a devise in fee, cannot take effect as an *executory devise*, unless the event upon which it is to vest must necessarily happen within the prescribed period of a life or lives in being, and twenty-one years, and the period of gestation thereafter.

As it is not matter of necessity that an indefinite failure of issue will happen

within the prescribed period, such a devise cannot operate as an executory devise.

A devise to a person and his heirs, with a devise over, in case he should die without issue, vests in the first devisee an estate in fee tail, and a remainder in the second devisee.

Land was devised to M., his heirs and assigns, with devise over, (in case he should die without "heirs,") to his wife during life or widowhood; and at the termination of her estate, to the devisor's surviving children or their "heirs." *Held;* —

That the devise to M. was not limited to a life estate in him; —

That it could not take effect as an executory devise; —

That it did not vest in M. a fee simple conditional, but did vest in him a fee tail general.

One seized in fee tail may bar the entail, and all remainders, by a conveyance in fee simple.

Such a conveyance vests an indefeasible title in the grantee.

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

Petition for Partition.

Daniel Keene died in 1827, leaving a wife, a daughter and three sons; Abdon, Mark and Howland. He was the owner of several lots of land.

By his will, unskillfully drawn, he devised to his wife one third of his homestead farm, together with his personal estate.

He next devised *all* his real estate to his three sons, their heirs and assigns, except a quarter of the island lot, which he devised to his daughter.

The will then proceeds, "Whereas my son Mark now has no heirs, and should he never have any, I will that his wife Susan have, hold, occupy and enjoy all the share which I have herein given to said Mark, while she remains said Mark's widow, and no longer. And should my said son Mark die without issue, I give and bequeath the share I have given to said Mark, after the death or future marriage of his said wife Susan, to be equally divided among my surviving children, or their heirs."

The will then contains a devise to said Mark, of one acre, called lot A, under and around his house frame. At the making of the will in 1821, Mark was in possession of the acre, and had commenced the building a house upon it. He after-

wards completed the house and continued to occupy the lot until his death in 1845.

The will also contained a devise of "one acre, of equal value," to each of the two other sons, for a house lot, to be selected under certain restrictions. "These three acres are to be considered in the division, when made between my heirs, so that their shares may be equal among my three sons."

Abdon died in 1831, leaving six children. In 1841, four of these children, including the respondents, upon a division of the estate, representing their deceased father, by a quitclaim deed in common form, released to the petitioner all their right in a lot of land, which included lot A, with warranty against claims to be made by themselves or any person under them.

In 1845, Mark Keene conveyed to the petitioner one half undivided of lot A. Lucy, the wife of Mark, died in 1849.

This process was instituted for the purpose of getting one half of lot A set off to the petitioner.

The respondents, Jacob H. Keene and William Keene, two of the sons of Abdon Keene, and grandsons of the testator, pleaded sole seizin.

The case was submitted to the Court for judgment, according to the rights of the parties.

Bulfinch, for the petitioner.

1. The plaintiff has title under the deed of 1845, from Mark Keene, who took the acre, lot A, by devise in his father, Daniel Keene's will. The devise of that acre was unconditional, and gave to the devisee all the estate in the lot, which the devisor had or could devise. R. S. c. 92, § 26. It gave an estate in fee, for it is unreasonable to suppose the father would encourage the son to build the house, and then provide for it a reversioner, who might perhaps be a stranger. Mark acquired title under the will also.

2. The respondents by their own deed, on the division of the estate of Daniel Keene, released and quitclaimed a portion of the land of Daniel Keene, to Mark Keene, and that portion included the lot A, with warranty against themselves and all persons claiming under them. By R. S. c. 91, § 4,

that deed passed all their estate. They have not since acquired any new title, and are estopped now to deny the petitioners' title. By that deed then, so far as these respondents are concerned, Mark obtained title to the lot A. A confirmation of this view is derived from the long acquiescence of the respondents.

Ruggles, for the respondents.

At the death of Mark Keene, in 1845, the title which he had derived from his father's will was terminated. For, by the will, if he should die without issue, the estate was to pass to his widow for her life, and the reversion vested in the other sons of Daniel Keene, or their heirs. Abdon died in 1831. The respondents are his heirs. Upon the death of Mark's widow, in 1849, the estate in fee became the property of Daniel's heirs, and their rights are now all vested in the respondents.

Their deed of quitclaim to Mark, was given in 1841, before their title accrued. For that title did not accrue till the death of Mark without issue. It therefore conveyed nothing. Mark was living, might outlive them, might have children who, according to the will, would have inherited. They had no more title by the will of Daniel Keene than a son has in his father's estate during the life of the father.

"No right passeth by release but the right the releasor had at the time of the release made; as if the son release to the disseizor of his father, all the right which he has or *may* have. After the death of his father, the son may enter against his own release; because he had no right at all at the time of the release, the right at that time being in his father. Coke on Litt. § 344, 265 b.

The release was not of the *land*, but of their *title* only. The word "premises," means merely the thing which had been released; not the land, but the grantor's title only. 13 Pick. 116.

The covenant then cannot operate as an estoppel. For, as they had no title, no action could be maintained on the covenant, there being nothing to which the covenant could

attach. Estoppels are merely to avoid circuity of action. If no action could lie, there could be no estoppel. There can be no estoppel by executory covenants not to claim a right, which is first to accrue afterwards. *Vance* v. *Vance*, 21 Maine, 364; *Gibson* v. *Gibson*, 15 Mass. 106. The deed of 1841 can therefore impart no strength to the petitioner's claim.

SHEPLEY, C. J. — Daniel Keene having a wife, three sons and one daughter, executed his will on April 24, 1821, and died on July 23, 1827. His will was approved on January 22, 1828.

The petitioner claims title to one undivided half of one acre, devised to Mark Keene, by a conveyance from him made on Sept. 22, 1845. Mark Keene died in Sept. 1845, without issue, and his widow died in May, 1849.

For the petitioner it is contended, that the devise of one acre to Mark Keene vested in him an absolute estate in fee; that it could not have been the intention of his father to encourage him to build a house upon it, and then to deprive him of it; that although the devise to him is without words of inheritance, he should be adjudged to take an estate in fee by the provisions of the statute, c. 92, § 26.

The provisions of that section can have no effect upon the case. They are applicable only to devises of lands, thereafter made. Even if Mark was encouraged to build a house upon that acre, his father might conclude, if he should die without issue, that his estate ought to pass to his brothers and their heirs, and might choose to make use of his own power to effect that object.

The acre lots were included in the devise of all his real estate. They were to constitute a part of "their shares" of it. The intention of the testator appears to have been to give to Mark the particular acre, where he had commenced to build, as a part of his share, so that he could not be deprived of it by a division of the whole estate, and to allow each of his other sons to select a favorite acre as a house lot, so that he

could not be deprived of it by a division, and yet to have these acres remain as part of their respective shares. The devise to his widow, upon the death of Mark, is of "all the share which I have given to said Mark." He must have intentionally included the acre in this share or she would have been deprived of her home; and the devise over, after her marriage or decease, upon the death of Mark without issue, is of "the share given to said Mark." There is therefore no sufficient reason to conclude, that the testator intended, that he should take an estate in his acre greater than in the residue of his share.

It then becomes necessary to determine what estate in that share was devised to Mark Keene.

It occasionally happens, that wills drawn by unskillful persons require for their correct construction a knowledge of some of the most recondite and technical doctrines of the law. It may be necessary in this case to notice not only rules of law respecting estates for life, estates in fee simple conditional, and estates in fee tail, but those or some of them respecting contingent remainders and executory devises. This, it is hoped, may not be necessary to any considerable extent.

A rule of construction, to which all others must yield, is, that the intention of the testator as clearly discoverable from the whole will is to be made effectual, if it can be consistently with the established rules of law.

It is therefore insisted for the respondent, that Mark took a life estate only in his share. This position upon examination is found to be inadmissible. The devise is to "my three sons, their heirs and assigns forever." Considered alone this would be a devise of a fee. No change is made of it by any subsequent clause, except upon the contingency of his dying without issue, and it was clearly the intention of the testator, that he should take the estate as first devised, if not affected by that event.

When an estate is devised in fee with a devise of it over upon the happening of a certain event, the first devisee may take an estate in fee simple conditional, and the devise over

may take effect as an executory devise; or he may take an estate in fee tail and the devise over may take effect as a remainder. Which of these results will be produced must depend upon the language used and upon the rules of law established for its construction. One of these rules is, that where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise. *Purefoy* v. *Rogers*, 2 Saund. 380.

Another is, that after a devise of the fee a devise over cannot take effect as an executory devise, unless the event, upon which it is to vest, must necessarily happen within a life or lives in being, and twenty-one years and the period of gestation thereafter. *Duke of Norfolk's case*, 3 Ch. C. 1; *Long* v. *Blackall*, 7 T. R. 100.

The words dying without issue or without leaving issue, are construed to mean an indefinite failure of issue. And a devise over after an indefinite failure of issue cannot take effect as an executory devise; for the event might not happen within the time prescribed. While a devise over upon the death of the first devisee without leaving issue behind him or living at the time of his death, or words of like import, is held to be effectual as an executory devise, for the devise over must then necessarily take effect within the prescribed time. *Pells* v. *Brown*, Cro. Jac. 590; *Roe* v. *Jeffery*, 7 T. R. 589; *Doe* v. *Welton*, 2 B. & P. 324.

Another rule is, that a devise of an estate to a person and his heirs with a devise of it over, in case he should die without issue, vests in the first devisee an estate in fee tail with a remainder to the second devisee. And the word heirs must be regarded as used in the restricted sense of heirs of his body, otherwise the limitation over would be void. *Soulle* v. *Garrard*, Cro. Eliz. 525; *Dutton* v. *Engram*, Cro. Jac. 427; *Chadock* v. *Cowley*, Cro. Jac. 695; *Fitzgerald* v. *Leslie*, 3 Bro. P. C. 154; *Porter* v. *Bradley*, 3 T. R. 143; *Hawley* v. *Northampton*, 8 Mass. 3; *Nightingale* v. *Burrell*, 15 Pick. 104; *Parker* v. *Parker*, 5 Met. 134; *Eichelberger*

v. *Burnitz*, 9 Watts, 447; *Thomason* v. *Anderson*, 4 Leigh, 118; *Hoxton* v. *Archer*, 3 Gill. & John. 199.

By the application of these rules it will not be difficult to determine what estate was devised to Mark Keene.

There is nothing in the will authorizing a conclusion that the devise over could take effect upon the decease of Mark without leaving issue living at that time. It is quite apparent, when the testator in his will says, "Mark Keene has no heirs," he must have meant heirs of his body. For there was no lack of other heirs. The devise over could take effect only on failure of such heirs, or in other words, on failure of issue, and this might not happen within the time prescribed for an executory devise to take effect. The word heirs, as used in the first clause of the devise, must be considered as used in the same sense as when used in the second clause of the devise to him, and thereby restricted to the heirs of his body, for the object clearly intended by the testator cannot be carried into effect consistently with the established rules of law in any other way, and it can be by regarding the devise to Mark not as an estate in fee simple conditional but as an estate in fee tail general.

Mark Keene, appearing to have been seized of the one acre as a tenant in tail, could, by the provisions of the statute, c. 91, § 6, convey it in fee simple and thereby bar the estate tail and all remainders.

His conveyance to the petitioner of one undivided half of it appears to have been duly executed and to have been effectual for that purpose, and he is entitled to have a judgment entered, that partition be made as prayed for.

Wells, Howard, Rice and Hathaway, J. J., concurred.

COUNTY OF SOMERSET.

KENDALL *versus* BATES, *Adm'r.*

Administrators have authority to submit to referees any controverted personal claims, affecting the estates under their care.

To a submission "of all demands except heirship," entered into by parties between whom there existed no controversy respecting inherited estates, no specific demand need to be annexed, inasmuch as the words "except heirship" are, in such case, of no import or effect.

In an award founded upon a submission of "all demands," a statement that the award is in full of "all accounts" to them submitted," is to be understood as meaning "in full of all demands" to them submitted.

SUBMISSION to referees, acknowledged before a justice of the peace.

It is admitted that the administrator had no authority to enter into the submission, except as pertaining to his office by operation of law.

The submission purported to be of an annexed demand, made by the plaintiff against the intestate, "and all other demands on either part, except heirship;" "the report of the arbitrators being made at the next term of the Supreme Judicial ———, to be holden at Norridgewock, after such report shall be made, the judgment therein to be final." No specific demand was annexed to the submission.

The referees heard the parties, and awarded to the plaintiff $197, "in full of all accounts submitted" to them. Their report was made at the term of the S. J. Court, held at Norridgewock, next after the submission was entered into.

The case was submitted to the Court for adjudication, upon a motion to accept the award.

J. S. Abbott, for the defendant.

1. The submission was merely void. An administrator, except when specially authorized by the Judge of Probate, has no authority to submit the affairs of the estate to arbitration.

2. The submission was invalid. No specific demand, signed by the plaintiff, or in his handwriting, was annexed to it. 3 Mass. 242 and 398; 9 Maine, 15; R. S. c. 138, § 3, 4. Neither was it a submission of all demands, because it contained an exception as to all claims resulting from their relation as heirs to a common ancestor.

3. The submission is not made returnable to any court.

4. It is not made returnable within one year from its date. R. S. c. 138, § 2.

5. The award did not conform to the submission. It was made, not upon all the *demands*, but merely upon all the *accounts* submitted.

Stackpole, for the plaintiff.

WELLS, J. — Administrators are authorized to prosecute or defend suits involving the interests of the estates intrusted to their care. One mode of determining controversies, which the law has provided, is a submission to arbitration. Administrators may also discharge claims against the deceased, and having power to decide upon their existence and validity, they can transfer it to another, when disputes arise concerning such claims. Hence it has been held, that they can submit doubtful claims to arbitration. *Eaton* v. *Cole*, 1 Fairf. 137; *Weston* v. *Stewart*, 2 Fairf. 326; *Coffin* v. *Cottle*, 4 Pick. 454; *Bean* v. *Farnham*, 6 Pick. 269; *Bacon* v. *Crandon*, 15 Pick. 79.

The parties had authority by the sixth section of the statute, c. 138, to agree upon the time when the report should be made; and the language of the provision, contained in the submission, "the next term of the Supreme Judicial to be holden at Norridgewock, after such report shall be made, the judgment thereon to be final," sufficiently indicates the court, to which it was returnable. The word court is clearly understood, although not expressed. There was no other tribunal then existing but the Supreme Judicial Court, to which the report could be made.

The third section of the statute provides, that "if all de-

mands between the parties are submitted to the decision of the referees, no specific demand need be annexed to the agreement." No specific demand was annexed to the agreement, and signed by the party making it, as is required to be done, in such case, by the fourth section of the same statute. But "all other demands on either part, except heirship," are submitted, and the question presented is, whether this is a reference of all demands. If the exception would withdraw nothing from the consideration of the referees, which they might lawfully decide, under a general submission of all demands, then it would be useless and inoperative, and all demands would in reality be submitted to them.

The decision of the mere question of heirship, whether Stevens Kendall is heir, without reference to his claims as such, would be productive of no practical result. If the meaning should be considered more extensive, and as embracing what he might be entitled to recover as heir, the inquiry arises, whether there was any property of that description, which, under a reference of all demands, could be legally considered by the referees. They were deprived of power, while acting as referees under the statute, to decide concerning the title to real estate, and the administrator had no authority to grant it, or withhold it, except incidentally where it might be sold for the payment of debts. If the estate was solvent, he might have a share in its distribution. But no claim could exist for that, until there had been a decree of distribution made by the Judge of Probate. It does not appear, nor is it probable, that any such decree was made when the referees heard the parties, nor is it shown that any has been made since. Under a reference of all demands, the referees could not decide upon any not then existing. The exception could not in any point of view limit the proper action of the referees so as to exclude from their consideration all demands then existing between the parties. All legitimate demands were open to their examination, and the exception was inoperative.

The referees find a sum due from the estate to Stevens Kendall. They must have come to this conclusion upon an

examination of the respective demands of the parties, and in pursuance of the submission, and when they add, that they find the sum due "in full of all accounts submitted to us," they must be understood as meaning, in full of all demands submitted to them.

The report must be accepted.

SHEPLEY, C. J., and HOWARD, RICE and HATHAWAY, J. J., concurred.

WILLIAM F. WESTON, *Adm'r, versus* GEORGE B. WESTON.

An administrator is bound by admissions, which his intestate had made.

An assigned note, belonging jointly to two or more assignees, may be released by either of them; and an action upon such note, brought in the name of one of the assignees, may be discharged by either of the co-assignees.

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

ASSUMPSIT upon a note, for $50, dated *January* 7, 1836, given by the defendant, to *William Weston, Jr.*, the plaintiff's intestate.

PLEA, non-assumpsit.

The following were the material facts, as shown by copies from the probate records, which were received in evidence, though objected to.

In 1841, William Weston, Jr., and his mother, Mary Weston, were appointed administrators of the estate of his father, William Weston.

In their inventory of the debts due to that estate, they returned a note against George B. Weston, this defendant, for $50, dated *June* 7, 1836, also a note against said *William Weston, Jr.*, for $300.

In an administration account, *allowed* by the Judge of Probate on April 8, 1845, William Weston, Jr. charged the estate of his father, William Weston, with the amount, $77,75, due upon the $50 note against George B. Weston, representing in the account that the note had been delivered to the father,

in his life-time, to be accounted for on the $300 note against William Weston, Jr., but that it had not been indorsed or in any way allowed for.

The second and final account of administration, rendered by the joint administrators, was settled and allowed on the same April 8, 1845. In that account they charged themselves $77,75, the amount of said $50 note, representing it to be still unpaid; and also charged themselves with what they called "the balance due on said $300 note against William Weston, Jr., after deducting said $77,75, due on the $50 note against this defendant, representing that William Weston, their intestate, in his life-time, had purchased the same in part payment of said $300 note against *William Weston, Jr.*

Upon the settlement of that final account, a balance of $766,10 was found to be in the hands of the administrators, and they were ordered to pay the same to the heirs at law.

The plaintiff offered to prove by oral testimony that, at the probate court on said April 8, 1845, when the administration account of William Weston, Jr. was settled, this defendant was present, and objected to the allowance to said William Weston, Jr. of any more time in which to collect said note against this defendant, and the Judge of Probate thereupon decided that there had been already an unreasonable delay in collecting it, and that said William Weston, Jr. must assume the note, and charge himself with the same in account.

This evidence was excluded.

After the death of *William Weston, Jr.*, this suit upon said $50 note was commenced by his administrator.

Mary Weston, one of said administrators upon the estate of William Weston, having intermarried with Thomas Horn, united with him in giving, under their seals, to this defendant, a discharge from the note in suit, and in forbidding the further prosecution of the action, alleging that the defendant had paid the note to William Weston, her intestate, in his life-time.

The case was submitted to the Court, upon such of the evidence as should be adjudged admissible.

J. S. Abbott, for the plaintiff.

1. If the proceedings in the probate court would be relied on, they should be specially pleaded or set forth by brief statement.

2. It does not appear that the note inventoried, as the property of William Weston, Sen'r, was the same note, now in suit. Indeed they appear to be different, the one being dated in January and the other in June.

3. If however the note inventoried is to be regarded as the one in suit, it became the property of William Weston, Jr., by being credited in the second administration account. It might have become his by satisfying the Judge of Probate that it was inventoried and credited by mistake, or by the Judge of Probate requiring him to assume the same, because of neglect to collect it of the maker. And we offered to prove that such was the actual requirement. The required credit was given, and its amount distributed among the heirs of William Weston, Sen'r. This constituted at least an equitable assignment of the note to *William Weston, Jr.* and his administrator, this plaintiff, is authorized, in this suit to collect its amount.

Again, the note was deemed to have been the property of William Weston, Sen'r, on the ground that he was to have indorsed its amount on the note against William Weston, Jr.; but it not having been so indorsed, the property did not pass.

SHEPLEY, C. J. — Upon your hypothesis, why did not the note become the joint property of *both* the administrators, and not of W. Weston, Jr. alone?

Abbott. — Because it was attempted to be taken in part payment of a note against W. Weston, Jr. But that attempt not having been carried out, W. Weston, Jr. paid the whole on his own note, and took this back. Besides, the widow, by her second marriage, ceased to be an administratrix. W. Weston, Jr. then became sole administrator. The note was payable to W. Weston, Jr., and by whomsoever owned, must

be collected in his name. And it is to him that his mother must look, if she have any just claims.

Webster, for the defendant.

WELLS, J. — The note in suit is payable to William Weston, Jr. the plaintiff's intestate, who with his mother, then Mary Weston, now Mary Horn, was administrator upon the estate of his father, William Weston.

It is said by the defendant, that the note in suit was inventoried as a part of the estate of William Weston. The note contained in the inventory is represented as bearing date in June, whereas the note in suit is dated in January, but in other respects they are alike. But in the settlement of the account of Wm. Weston, jr. in the probate office, in April, 1845, he charges the estate of his father with a note corresponding in date and in other particulars with the one in suit. It also appears, that the amount of the note was allowed in the settlement of the administration account by deducting it from his own note belonging to his father's estate. This evidence is sufficient to show, that the note was the property of his father. The plaintiff represents the son and is bound by his admissions.

The note being the property of the father, the administrator of the son has no control over it, and can maintain no action upon it, except by the consent of the representatives of the father.

If the plaintiff's intestate and his mother charged themselves in their administration account with the note against the defendant, when they had not collected it, it might thereby become their property. In their second account they do so charge themselves with the amount of the note, stating that it is still due. If the payment of the note under such circumstances would transfer the title to it, and authorize the collection of it in the name of the plaintiff, the interest in it would belong to the mother and son, their property in it accruing to them as individuals, in consequence of the payment made by them. It would become the property of both,

and either of them could receive payment of it, or discharge it. Mrs. Horn and her husband, Thomas Horn, have admitted by an instrument under seal, that the note was paid by the defendant to her late husband, William Weston, and they discharged the defendant from it. This they had a right to do, if she was a joint owner of the note with the plaintiff's intestate, and such discharge would put an end to the action.

According to the agreement of the parties, judgment is to be rendered for the defendant.

SHEPLEY, C. J., and HOWARD and HATHAWAY, J. J., concurred.

DANIEL BUNKER *versus* MARY ATHEARN, *Adm'x.*

It is an essential attribute of a promissory note, that it be payable in money.

An instrument in writing, acknowledging the receipt of money from the plaintiff, and promising to pay it upon a note due from him to a third person, and cause it to be indorsed thereon, requires no more than that the promisor should cause the *indorsement* to be made. As he *might* do this *without* the payment of money, his promise does not constitute a promissory note.

An obligation by the administrator of such a promisor, to indemnify the plaintiff for having delivered such money to the promisor, gives no new vigor to the original promise, nor takes it out of the statute of limitations.

A mere *acknowledgment* made by an administrator, of the intestate's indebtedness, will not remove the statutory limitation bar.

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

ASSUMPSIT, commenced October 2, 1852, upon the following instrument, signed by the defendant's intestate, and attested by a subscribing witness.

"For valuable consideration, this day to me paid by Daniel Bunker, of Anson, the receipt whereof I hereby acknowledge, I hereby undertake, promise and agree to pay for the said Bunker, two hundred dollars, and to have the same indorsed upon a note given by said Bunker to Benjamin Hilton, Jr., or George Athearn, together with interest on the same sum from this to the date of the indorsement upon said note, said note dated about the first of the year 1832, and was made payable

in five years, and I do further agree with the said Bunker, that if I do not procure the indorsement as aforesaid, within six months from the time the said note becomes due, to pay him the said sum of two hundred dollars, with interest from this time.

"Anson, April 9, 1836."

The plaintiff also introduced a bond under seal, made by this defendant as administratrix, in the penal sum of $500. This bond was never delivered to the plaintiff, but was lodged in the probate office, from which it was taken merely to be used as evidence in this suit. It was conditioned that, "whereas, in the beginning of the year 1832, the said Bunker gave his promissory note to one George Athearn, or Benjamin Hilton, Jr., for the sum of ——— dollars, and afterwards on the ninth day of April, 1836, the said Jesse Athearn being then in full life, for a valuable consideration, undertook to cause to be indorsed on said note above described, the sum of two hundred dollars, within six months from that date, and on failure thereof to refund or pay the same sum to said Bunker, with interest, and whereas the said George Athearn had before that time left home on a voyage to sea, and has never since returned, and the above described note has not been found, and the said George is supposed to be dead, and the note is supposed to be lost, and the said Jesse Athearn having received the above sum on account of a debt due him from said George, and had a good right to receive it and to retain it to his own use; and the administrator of the estate of said Jesse Athearn is ready to account with the legal representatives of said George Athearn, whenever thereto requested.

"Now, therefore, if the said Mary Athearn shall effectually indemnify and save harmless the said Bunker, against any claim that may be made on him on account of the above sum of $200, paid by him to said Jesse Athearn, this obligation is to be void."

The case was submitted to the Court upon an agreement, that if, upon the foregoing testimony, the action is not maintainable, a nonsuit shall be entered.

Webster, for the plaintiff.

The instrument declared upon is not within the statute of limitations. It was attested by a subscribing witness, and it is a promissory note.

In order to constitute such a note, no particular form of words is necessary. Chit. on Bills, 9th Am. Ed. 148, 149.

Any promise, which, from the time of making it, cannot be performed without the payment of money, is a promissory note. Bailey on Bills, c. 1, § 2.

The essential qualities of notes are, that they be for the payment of money only, and that such payment be absolute and not contingent, either as to the amount, event, fund or person. Chit. on Bills, 152.

The instrument declared upon in this suit possesses all those requisites. It could be complied with only by the payment of money. If it could be discharged by the procurement of an indorsement on another note, that indorsement could be procured only by the payment of money.

The real import of the paper is, that the signer will pay this plaintiff $200, and interest, with a stipulation by Bunker that, if the signer paid the amount to one of Bunker's creditors, it should be allowed as a payment to Bunker.

It is certainly as near to the ordinary form of a promissory note, as that declared upon in *Grant* v. *Vaughan*, Bur. 1526.

It is no more uncertain or contingent than the note in *Briggs* v. *Lapham*, 12 Metc. 474.

But if the paper cannot be treated as a promissory note, the bond given by the defendant takes the case out of the statute of limitations. It is a renewal of the promise. It is an express, written acknowledgment that the original promise has never been performed.

An admission by an executor or administrator, after six years, that a contract is undischarged, takes the contract out of the statute. *Baxter* v. *Penniman*, 8 Mass. 133; *Brown* v. *Anderson*, 13 Mass. 201; *Emerson* v. *Thompson*, 16 Mass. 429; R. S. c. 146, § 19.

The statute makes no distinction as to the requirements to

renew a promise, whether on the part of the original promisor or his administrator.

J. S. Abbott, for the defendants.

WELLS, J. — By the statute, c. 146, § 7, the limitation of six years does not "apply to any action brought upon a promissory note, which is signed in the presence of an attesting witness," &c.

By the statute of 3 and 4 of Anne, c. 9, one of the qualities of a promissory note is, that it must be payable in money. And it has been held uniformly, that it must be payable in money absolutely and unconditionally. Story on Promissory Notes, § 22. If it provides for the performance of some other act, or in the alternative, it loses a distinctive quality of a promissory note. *Cook* v. *Satterlee*, 6 Cowen, 108; *Jenney* v. *Herle*, 1 Ld. Ray. 1361; *Dennett* v. *Goodwin*, 32 Maine, 44. The Act of 1821, c. 62, § 10, exempted from the operation of the limitation, provided in that Act, attested notes for the payment of money. It is not apparent, that the Legislature intended by the R. S. to alter the law in this respect. And such has been the construction of similar statutes in Massachusetts. *Com. In. Co.* v. *Whitney*, 1 Metc. 21. The term promissory note must have been used in the statute, in the sense in which it had previously been employed to designate a note payable in money. The instrument, upon which the suit is founded, not only provides for the payment of money for the plaintiff, but that the same should be indorsed upon a note given by the plaintiff to Benjamin Hilton or George Athearn, and in case the indorsement is not procured, that the amount should be paid to the plaintiff. The indorsement would have been a satisfaction of the requirements of the instrument, and an act which might have taken place without the payment of money, and it cannot be regarded as a promissory note.

In the defendant's bond to the plaintiff, she recites the circumstances under which the instrument in suit was given, and the undertaking of her husband to procure the indorse-

ment. But she makes no promise to pay it, nor does she admit it to be due. She agrees to indemnify the plaintiff against any claim that may be made on him on account of the money paid by him to her husband. While she does not acknowledge any present indebtedness or promise to repay the money, she makes a new contract merely for the purpose of indemnity, if the plaintiff should be compelled to pay his note. It was not her purpose to give any new vigor to the old, but to create a new contract.

Against the defendant, as administratrix, a mere acknowledgment, from which a new promise might be inferred if made by the debtor himself, would not be sufficient to take the case out of the statute ; there must be an express promise by her to charge the estate. *Oakes* v. *Mitchell, Adm'r*, 15 Maine, 360. The statute, c. 146, § 19, was not intended to enlarge the liability of administrators and executors, but to require written evidence of what had been previously shown by parol testimony. *Plaintiff nonsuit.*

SHEPLEY, C. J., and HOWARD, RICE and HATHAWAY, J. J., concurred.

PALMER *& al. versus* FOGG.

An obligation to draw logs to a stream is complied with, by drawing to the stream at a point most convenient to the obligor, though less convenient to the obligee than some other neighboring point on the stream.

The reduction to writing of a business contract precludes each party from proving its particular provisions by showing what the negotiation was, which terminated in the writing.

A written memorandum by one of the parties to a contract, in which they had been jointly interested, that he would equalize the expenses incurred under it, has no tendency to prove that there had been any intervening modification of it.

But, upon the question whether there had been a modification, such written memorandum might show that such modification was not considered to be unreasonable.

A certificate, in the caption of a deposition, that "the deponent was first

sworn," is, (unless controlled by other parts of the caption,) sufficiently evidential that the oath was administered *before* the giving of the deposition.

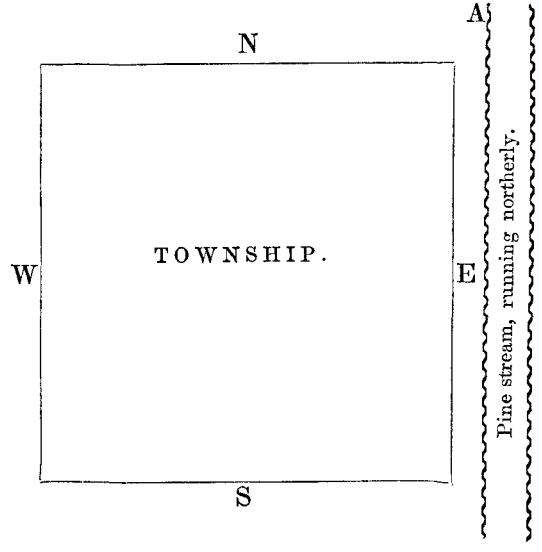
When a deposition, in its caption, purports to have been taken before a commissioner, appointed to take depositions in another State, his official character and the genuineness of his signature are to be presumed.

When, after the taking of a deposition, the term of the Court at which it was returnable has been abolished, and its business transferred to a subsequent term, the deposition may be rightfully opened and filed at such subsequent term.

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

Assumpsit.

Fogg contracted with the proprietors of a timber township of land, that he would cut and haul logs at a stipulated price per thousand feet, putting on eight or ten teams of six oxen each. Four or more of the teams were to be located on the *Eastern* part of the township and to haul into the Pine stream. The other teams were to haul to other waters. That stream was a short distance East of the township, running Northwardly. There was a landing place upon it at the point A, from which lumber could be conveniently run.



Above the point A, the stream was obstructed by rocks,

making it impracticable to drive logs except at large expense. *Before* that contract with the proprietors was made, the plaintiffs had examined the stream, and concluded that A would be the place, to which the logs from the East part of the township should be hauled.

After making that contract, it was stipulated between these parties, in writing, that the plaintiffs should have half the contract, and "be equal" with Fogg; "the division to be made equal as to the operation as can be got at by lotting and bidding for chance, after going on the land."

The teams were put on, and the contract with the proprietors complied with. Fogg's teams were located upon the East part of the township, and hauled to Pine stream, at the point A. He claimed that this part of the hauling was more expensive than the rest, and that, to make the thing equal, he should be allowed twenty-five cents a thousand for that hauling more than the plaintiffs should have for what they hauled, as their location was the most favorable.

On the trial, the plaintiffs contended that the increase of expense, incurred by Fogg, in hauling to point A, was merely voluntary on his part, and that a hauling into the Pine stream *at the nearest distance*, would have been a fulfillment of his obligation, under the contract with the proprietors, and that he was not bound to inquire from what position on the stream, the logs could be most cheaply driven.

And, upon this point, the Judge so instructed the jury.

The defendant insisted that the contract between himself and the plaintiffs had been modified, so that the chances should be equalized on settlement.

On this point evidence was introduced by both parties.

The defendant called one Corson to testify to a conversation between the defendant and James Palmer, one of the plaintiffs. This evidence was objected to, because the arrangement, at the close of the discussion, was put into writing, signed by Palmer and placed in the defendant's hands.

The witness was allowed to testify, *de bene esse*. He stated the admissions and declarations made by Palmer. The

defendant then introduced the writing, and the Judge directed the jury to disregard the evidence of Corson.

The part of the paper, deemed by the defendant to be material, was as follows: —

"I hereby agree with Joshua Fogg to be my part, in every respect, of expense in obtaining our pay for the lumbering business the past winter; also agree to an equal division of chances of teams on their location rights, as to make them equal in regard to worth to haul and value. James Palmer."

The Court, in giving a construction to this writing, said that it did not purport to contain any admission by the signer that there had been a modification of the orignal contract, but that it was evidence of an independent agreement, and that it was not competent for one of the plaintiffs to make a new agreement, in reference to the former transaction, thereby varying essentially the former contract, so as to affect the rights of his co-plaintiffs, unless they assented to the new agreement, or ratified it afterwards, or unless the plaintiffs were co-partners in the transaction. The Judge further instructed the jury, that the paper might be important, as having a tendency to show that Palmer did not consider the modification of the original contract to be unreasonable; and that thus, upon the question whether there had been a modification, the paper might have a legitimate bearing.

The plaintiffs introduced three depositions, taken in Wisconsin, returnable to the June term, 1852. Prior to the month of June, that term was abolished, and its business transferred to the October term, at which the depositions were opened and filed.

The defendant seasonably objected to the depositions, —

1. Because they were not opened and filed at the term for which they were taken, but were opened and filed at a term, when the same could not lawfully be done.

2. Because it did not appear that the deponents were sworn before the depositions were given.

3. Because, though required by the defendant, the signature and authority of the person taking the depositions were not shown.

These objections were overruled.

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

J. S. Abbott, for the defendant.

Hutchinson and *Leavitt*, for the plaintiffs.

HATHAWAY, J. — By the terms of the contract, Fogg was to haul the logs into "Pine stream."

The Judge instructed the jury, that "*under the contract* Fogg had the legal right to land the logs in Pine stream without regard to the question whether they could not be run, as the stream then was, he not being required to inform himself from what points in the stream timber could not be run."

There was no stipulation in the contract as to any particular place in Pine stream, where the logs should be landed, and of course, landing them in the stream was a literal fulfillment of it. The instruction was right.

The defendant objected to the admission of certain depositions purporting to have been taken before a commissioner, in Wisconsin, appointed by the Governor of this State. —

First, because it did not appear, that the deponents were sworn before the depositions were given. *Second*, because the signature and qualifications of the person taking them were not shown, and *Third*, because they were not filed at the term of the Court for which they were taken."

The captions of the depositions state expressly, that the deponents were *first sworn*. They appear to have been taken, on notice given to the adverse party, and the counsel for the defendant claims under the thirtieth rule of this Court, that it was incumbent on the plaintiffs to *prove*, that they were taken and certified by a person legally empowered, &c. But by the R. S. c. 134, such commissioners and their official acts, are placed upon the same footing with justices of the peace, and their official acts within this State. Hence, authentication *aliunde* is not required. *Bullen* v. *Arnold*, 31 Maine, 583.

The depositions were returnable to the term of the Court

to be holden in June ; they were opened and filed at the term held in October next ensuing. The statute of 1852, c. 246, abolished the June term, and transferred all its business to the term to be holden in October, at which term the depositions were properly filed and opened.

Hiram Corson's testimony as to Palmer's conversation with Fogg was properly excluded. The conversation was reduced to writing and signed by Palmer. The witness stated, that "the paper written and signed by Palmer embodied the substance of the conversation and admissions of Palmer and the agreement which took place, and stated verbally by the parties as he (the witness) understood it."

The writing signed by Palmer was introduced, and was, of course, better evidence than Corson's recollections. The construction given by the Judge to that writing of Nov. 2, 1842, signed by Palmer, was clearly correct, and his instructions concerning the use which might be made of it as evidence, were sufficiently favorable to the defendant.

Exceptions overruled.

Judgment on the verdict.

SHEPLEY, C. J., WELLS, HOWARD and RICE, J. J., concurred.

INHABITANTS OF DETROIT, *petitioners*, *versus* COUNTY COMMISSIONERS OF THE COUNTY OF SOMERSET.

The R. S. c. 25, § 4, requires county commissioners, in locating a highway, to "cause durable monuments to be erected at the angles thereof."

As a discharge of that duty, they may adopt, as monuments, county or town lines, or natural objects, as trees, rocks or banks of rivers.

So "the top of a narrow horseback," on which a location is made, extending through many courses and distances, may be adopted as furnishing a sufficient monument at each of the angles.

Writs of *certiorari*, for the purpose of quashing the proceedings of county commissioners in the establishment of highways, are grantable only at the discretion of the Court.

Of the departure from statute requirements, which may be tolerated in such proceedings.

Petition for a writ of certiorari.

The boards of county commissioners of the counties of Waldo and Somerset, acting jointly upon a proper petition, adjudged that a county highway, running into both counties, should be located and established. Pursuant to that adjudication, the commissioners of Somerset located that part of the way which was in their county. Their report of the location, so far as necessary to be transcribed, was as follows: — "Beginning on the top of the horseback, on the West line of Detroit and the East line of Burnham, being the line between the two counties; thence following the top of a very narrow horseback the following courses and distances, [specifying five different courses with their distances without referring to any monuments,] to the East line of Burnham; thence N. 22°, E. 13 rods in Burnham to the West line of Detroit; thence [specifying four different courses with their distances, without referring to any monuments;] thence N. 8° 40′, W. 15 rods across the Sebasticook river; thence, [specifying three courses with their distances, without referring to any monuments,] to the West line of Detroit; thence [specifying nineteen different courses with their distances, without referring to any monuments,] to [a specified] town road; all the aforesaid distances on a narrow horseback, excepting across Sebasticook river;" thence four or five other courses, with their distances, and referring to a tree, or a stake, or a rock, for a monument at the end of each of the distances to a described point of termination. "Said described line being the centre of the road which is four rods wide." The commissioners adjudged that no person sustained any damage by the location, and allowed the towns two years, in which to make the road passable. Their report then proceeds to state that, "the aforesaid survey is delineated upon a plan, accompanying this report which makes a part of the same." The report bears date Aug. 14, 1846, and was returned and entered at the county commissioners' court at its October term, 1846. At that term, it was not recorded or ordered to be recorded; but was thence continued from

term to term until the October term, 1848, that all persons aggrieved by the location might have opportunity to be heard. At which term, no person having appeared to object thereto, and no damages having been claimed, the report was accepted and the road established, and the proceedings upon the petition closed.

This is a petition for a *certiorari*, with a view to quash the proceedings of the commissioners of Somerset county, in establishing the road.

The petitioners offer the following reasons: —

1. That the return of the doings of the commissioners does not exhibit an accurate plan or description of the highway.

2. No monuments at the angles of the road so laid out, were erected and described in their report.

3. That the plan of said highway, returned with and as a part of the return of the doings of the commissioners, was not seasonably recorded, and has not yet been recorded.

4. Because the aforesaid return of the doings of said commissioners and the plan of said highway, were not recorded, nor was either of them recorded, or ordered to be recorded at the regular session of said county commissioners' court, held next after such proceedings had been had and finished, and because neither was recorded, or ordered to be recorded, until the October term, 1848, of said court.

5. Because the original petition and proceedings were continued, after the return was made, and the proceedings therewith connected had been had and finished, until the fifth regular session thereafter, no petition for redress having been presented, touching any claim for damages, and there being no other good or legal cause therefor.

Abbott, for the petitioners.

1st. & 2d. As to the first and second objections, it is contended that the description is imperfect and defective. The law requires, (R. S. c. 25, § 4,) "that durable monuments should be erected at the angles." These monuments ought to be referred to in the return of the commissioners. In this

highway there are above thirty different courses; thirty angles, without any monument; without any means of determining the place of the angle upon the face of the earth, except by course and distance; a very unsatisfactory mode, likely to lead to future disputes and litigation; and not conformable to the express requirements of the law.

3d. The statute requires, (c. 25, § 3,) that the commissioners shall make "a correct return of their doings" "with an accurate plan" "to the regular session of said county commissioners' court to be held next after such proceedings shall have been had and finished; *and shall cause the same to be duly recorded.*"

This phrase, "*the same*" embraces as well "*the plan*" as "*the return.*" But *the plan* has *never been recorded. Besides, in this case, the plan is referred to in the return, not as a distinct matter, but as a part of the return itself.* The commissioners say in the last line to their return. —

"The aforesaid survey is delineated upon a plan accompanying this report, which makes a part of the same."

4th. The statute requires that *the return* should be made to the regular session of said court, next after the proceedings, and that it should be *then* recorded. [c. 25, § 3 and 5.) From an examination of these two sections, it is quite apparent, that the return should have been then recorded and the recording not have been delayed until after all the subsequent proceedings had been closed.

Such was the construction given to these two sections in the case of *Inhabitants of Starks* v. *Co. Com. Somerset Co.*, June term, 1849, not reported. For this defect alone, the writ in that case was granted, upon full argument, and the record was quashed for this cause at the June Term, 1851, by consent and without argument.

5th. The return and proceedings therewith connected were finished the 14th of Aug. 1846; the next regular session was in Oct. 1846, to which it was made. The statute requires, that it should be continued "*until their second next regular session, to be held thereafter.*" [c. 25, § 5.] *And if no*

petition be then presented, the proceedings shall be closed, and so entered of record.

In this case there was no such petition, and yet there was a continuance until their fourth next regular session, being the 5th, after making their report.

Hutchinson, County Att'y, *contra.*

TENNEY, J. — One of the alleged defects in the record is, that the return of the commissioners does not exhibit an accurate plan or description of the highway referred to. No such want of accuracy is perceived, and none is attempted to be pointed out in argument, and this point may be regarded as abandoned.

Another ground for the writ prayed for, is, that it is not stated in the return of the commissioners, that durable monuments were erected at the angles of the location. R. S. c. 25, § 4, requires the erection of such monuments by the commissioners, though it is not provided in terms, that it shall be shown by the return. This objection, to the record, has not a sufficient basis, even if the evidence of this requirement, ought to be in the return.

The commissioners may undoubtedly adopt natural objects as monuments as well as to establish those, which are entirely artificial. And it does not appear from the return, that this part of the commissioners' duty was disregarded, but it is evident that it was intended to be performed. In the commencement of the description of the laying out of the highway, they begin their location upon the top of a horseback at a place described, "thence following the course of a very narrow horseback, the following courses and distances, viz," &c. And after running many courses and distances, without always describing a monument at the end of each, they add, "all the aforesaid distances are on a narrow horseback, excepting across Sebasticook river." If the commissioners in any part of their location had bounded it upon the bank of a river, or a town line, it cannot be doubted that monuments would be indicated with sufficient exactness; and when they

say that the several courses and distances described, are upon the top of a narrow horseback, it is not apparent, that it is not equally a reference to durable monuments at the angles. That such was the purpose of the commissioners is manifest from the fact, that when they leave the top of the narrow horseback, they specify particularly the objects as monuments at the termination of the several courses and distances, through the residue of the description.

The defect, that there was a continuance in the commissioners' court, of the original petition and the proceedings under it, beyond the second next regular session to be held thereafter, has been decided not to amount to a loss of jurisdiction of the court, and a material error, there having been no application in behalf of proprietors of lands, on account of damages estimated, or omitted. *Orono* v. *County Commissioners*, 30 Maine, 302. The petition for *certiorari* in the case now before us, in this respect, is on account of a supposed defect in the record similar to the one exhibited in the case referred to.

The duty of the commissioners to cause their returns to be recorded, as required by R. S. c. 25, § 3, has been affected by statute of 1852, c. 221, § 1, in which it is provided that the record shall be made "whenever the proceedings in relation thereto shall be completed, and the said return, pending such proceedings, shall remain upon the said commissioners' files in the custody of their clerk, for the inspection of interested parties."

The Legislature, by causing the general statute to be so amended, manifestly designed that the evidence of the proceedings, in cases therein referred to, accruing subsequent to this amendment, should not be treated as essentially defective, for the reason only, that those proceedings were not spread upon the records.

The same chapter provided, in § 2, a cure for such defects, which had occurred previous to the Act of amendment. This last provision is annulled by c. 26, § 1, of the statutes of 1853, so that the amendment in the statute of 1852, as

it now stands, may be regarded as prospective only. The question however, whether the writ shall be granted or not, is to the discretion of the Court. There is no suggestion, that the return of the proceedings in the case before us, were not made to the clerk and remained upon his files, open to the inspection of interested parties; and none that the petitioners had not full knowledge thereof. If so, they were in possession of all the facts now deemed by the Legislature as material. In the exercise of a discretionary power, it is ordered by the Court, that the petition be dismissed.

SHEPLEY, C. J., and HOWARD and APPLETON, J. J., concurred.

COUNTY OF KENNEBEC.

READ *versus* DAVIS.

One, contracting to pay money, upon receiving a payment to himself from a third person, does not defeat or diminish his liability by a surrender of his authority to receive such payment to himself.

His liability, however, is at an end, if by means of the insolvency of such third person, or for any other cause, the contractee could not be damnified by the surrender.

In such a case the burden of proving, that the contractee could receive no damage from the surrender, is upon the contractor.

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

ASSUMPSIT. The following facts appeared in evidence. — In 1838, the plaintiff, being indebted to the defendant, conveyed to him a small farm. This conveyance, though intended only for security, was by an absolute deed. The plaintiff afterwards obtained ownership of two small adjoining lots worth $200, a wood lot and an orchard, convenient to be owned in connection with the farm. On June 14, 1843, the indebtment amounted to $359,52. The plaintiff, having

permission to sell the farm, out of which to raise money for paying the debt, entered into a negotiation with Lauriston Stetson, which resulted, Nov. 13, 1843, in an arrangement, as follows, viz. — The two small lots were conveyed to the defendant, who thereupon gave to Stetson an obligation to convey to him the whole of the land, on condition that Stetson should pay him six hundred dollars, according to notes then given, at six annual payments, with interest; and the defendant gave to the plaintiff the note upon which this suit is brought, being a note of $167,50, and interest payable in four years, "provided and as soon as Lauriston Stetson should pay the defendant" $400.

Stetson went into the occupation of the land, and at different times made payments to the defendant, amounting to about $110. In the fall of 1846, Stetson left the State, and made known to the defendant that he did not wish to keep the farm, and would pay nothing more toward it. Thereupon the bargain between them was rescinded, without the consent or knowledge of the plaintiff. The defendant's bond to convey the land, and Stetson's notes for the $600, were all canceled. At that time, Stetson had no attachable property, and in Nov. 1847, when $400 of notes had become fully payable, he was unable to pay that sum, but at the end of the six years, that is, at the expiration of the last note, he could have paid the amount of all the notes, and had attachable property in Massachusetts, more than sufficient to secure them. In 1849, the defendant admitted that he had received from Stetson and from one Bates, who had occupied the land, and for damage done by locating the rail road upon it, nearly $300.

In 1851, the defendant received of one Cook $369,26, for which he gave him a bond to convey to him the original farm.

The parties then agreed, that the Court should draw inferences as a jury might, and render judgment upon nonsuit or default, as the law should require.

Vose, for the plaintiff.

The legal construction of the note is, that it should be

paid in four years, if Stetson should then have paid so much as $400; otherwise, as soon as he had paid so much.

It was founded upon a just consideration.

It was the defendant's duty to receive the money on the notes from Stetson. Instead of so doing, he gave up and canceled them, taking back his own bond to convey the land. This is to be deemed a *payment* of the whole $600.

But if not a *payment*, it was a transaction by which the defendant precluded himself from all right to receive the money on the notes. The plaintiff's rights could not be defeated by any such arrangement.

When the defendant voluntarily, and without consent of the plaintiff, released Stetson from the obligation to pay the notes, he became *immediately* liable to the plaintiff. This suit, however, was not brought until after the six years expired. The defendant holds the plaintiff's property and cannot be allowed, by such a stratagem, to avoid paying for it. The proof clearly shows, that the notes against Stetson were good and collectable, and there is neither law nor equity in the defence.

May, for the defendant.

We make no objection to the legal construction, given by the plaintiff to the note in suit. But the contingency upon which it was to be paid, even according to that construction, has not occurred.

The note was payable to the plaintiff, only upon Stetson's *payment* to the defendant of $400; not upon Stetson's mere *liability* to pay. The defendant was under no obligation to incur expense in attempting to collect it. The question then is, has Stetson paid the $400? We answer in the negative. The payment was to be made *under the bond* and upon the notes for the purchase of the land. Before Stetson could claim a conveyance, he was to pay the notes. He was not to buy up the notes by a cancellation of the bond. Until he paid $400, *upon the notes*, the plaintiff had no claim for money. But Stetson never paid. He failed to pay, and how can a failure to pay be considered a payment?

The rescission of the contract between Stetson and the defendant was about three years after the notes were given; interest on them had amounted to $108; whereas the payments were only $110. The bond had been forfeited, for the obligee had not paid either of the early installments, and he then refused to pay the notes or take the land. At that time he had not the means to pay. The notes, then, might well be considered worthless. These worthless notes the defendant exchanged for a bond, which by ceasing to have any vitality had become equally worthless. Is it not a mockery of justice to call that transaction a payment of $400? Neither in fact nor by any pretence of evidence, did the plaintiff, from any and all sums, receive so much as $400. The utmost extent of pretence is to the amount of not quite $300.

The two small pieces of land were placed in the defendant's hands merely in trust to be held for the plaintiff in case Stetson should fail to pay. If Stetson paid, all the land was to be conveyed to him by the defendant, who was also to pay to the plaintiff the note now in suit. The plaintiff was to be paid so soon as Stetson had paid four out of the six hundred dollars, and for the remaining $200, the defendant would hold security on the land. Thus, as Stetson in fact failed to pay, the two small lots were held by the defendant in trust, the whole consideration having come from the plaintiff, and equity would decree a conveyance to him by the defendant.

In any event, the plaintiff was secured. He was to have his money, if Stetson paid so much as $400. If Stetson did not pay so much, the plaintiff was entitled in equity to the two lots. Thus, Stetson having failed to pay, the plaintiff's remedy is in equity for the land, and this action upon the note is not maintainable.

TENNEY, J. — The counsel of the respective parties, in their arguments, agree in the construction of the note in suit, that the defendant promised the plaintiff to pay him the amount thereof, in four years, if Laureston Stetson, should then have

paid the defendant the sum of $400. If at that time, the sum of $400 should not be paid, payment was to be made on the note in suit, as soon as that sum should be paid by Stetson, afterwards.

The note purports to be for a valuable consideration; and the facts in the case show, that on April 17, 1838, the plaintiff conveyed his farm to the defendant, as security for certain indebtedness to him; that on June 14, 1843, that indebtedness was the sum of $359,52. Afterwards the plaintiff negotiated with Stetson for a sale of the farm, worth $400, and two other parcels of land worth $200, which the plaintiff by his own means, had procured to be conveyed to the defendant as necessary appendages of the farm. In pursuance of an arrangement between the plaintiff and Stetson, the defendant gave to the latter a bond, to convey to him all this real estate on the payment of six hundred dollars, in yearly payments of one hundred dollars and interest annually, according to his six notes. The bond, the notes of Stetson, and the note in dispute, were all given on Nov. 23, 1843, and are parts of the same transaction. Before August, 1849, and previous to the institution of this suit, which was Nov. 17, 1849, the defendant had received in payments from Stetson, and from the income of the land, described in the bond, including a sum from the Androscoggin and Kennebec Rail Road Company, as the consideration of a parcel of the farm conveyed to them, about the sum of $300. On Oct. 3, 1851, the defendant, in consideration of the sum of $369,26, previously paid, gave to one Cook a bond to convey the farm to him, not including the other two parcels described in the bond to Stetson. In Dec. 1846, the defendant not insisting upon a forfeiture of Stetson's right under the bond, but upon his request, voluntarily, surrendered to Stetson his six notes, and the bond to him was canceled, without the consent or knowledge of the plaintiff.

Stetson did not pay the sum of $400, within four years of the date of the note in suit, and was relieved of all liability to do so, in about three years, by the act of the defendant.

And it is insisted by the plaintiff, that the payment has failed to occur through the fault of the defendant. If this proposition is established by the facts, on the application of a well settled principle of law, the note is to have the effect, which would have been given to it by a fulfillment of the condition.

By the terms of the note, the defendant was not to be exonerated from its payment by the failure of Stetson, to perform promptly his several promises; on the other hand, it seemed to be apprehended, that the amount of $400 might not be paid within four years; and to secure the plaintiff from risk, of losing his claim, against the defendant, it was not only stipulated that, if Stetson should pay $400 in four years, without reference to the time, when he was bound to pay each hundred dollars, and interest on the whole annually, the condition of the defendant's note would be performed; but the plaintiff was entitled to the amount of his note, whenever after the period of four years, that amount should be paid by Stetson.

Stetson's notes being given up, upon a surrender of his rights under the bond, before the time, when these parties, according to the agreement in the note, contemplated that Stetson had the right to pay, and would pay his notes, the defendant has done that, which would of itself prevent the fulfillment of the condition; and if he shows that by adhering to the contract between himself and Stetson, the fulfillment of the condition, would have been impossible, it is not perceived, that the plaintiff has been the loser. But he certainly disregarded the understanding between himself and the plaintiff, implied by the whole transaction, and in order to relieve himself from liability, the burden is upon him to show, that the abrogation of his contract with Stetson has not been, and could not have been injurious to the plaintiff. This he has failed to do. But it is shown on the other hand, that Stetson, though unable to pay the amount of $400, in four years, had the means of paying the entire consideration of all the land described in the defendant's bond to him, at the maturity of the note last payable. Under this evidence

he can with no propriety contend, that the payments would not have been made, in fulfillment of the condition of his own note, when he has by his own free act, totally unauthorized by the plaintiff, destroyed the means of ascertaining, whether the condition would have been fulfilled, but has rendered performance absolutely impossible, under the agreement.

It is contended for the defendant, that the plaintiff has mistaken his remedy; and that as he paid for the two parcels of land near the farm, which he caused to be conveyed to the defendant, he is entitled by a suit in equity against the defendant to obtain a title thereto. We are not now called upon to decide in advance such a question. But it is manifest, that the defendant had a valuable and ample consideration for the note, which he gave the plaintiff. He has now that consideration in his own hands for which, under a contract, as yet executory, he has received a sum, which, with other receipts of money on account of the farm, is a sum equal to that, which if received of Stetson, would have been a performance of the condition. He has wrongfully done that, which relieved Stetson from all obligation to make the payment, that would have been a performance of the condition, and not having shown, that such payments would not have been made, it is not improper to say, that the rescission of the contract between him and Stetson has precluded the performance of the condition. *Defendant defaulted.*

SHEPLEY, C. J., and HOWARD, RICE and APPLETON, J. J., concurred.

STONE, *Administrator, versus* PEACOCK.

In relation to an alleged sale of articles, if it be not shown that it was the intention of the parties to make the sale absolute and complete, the property does not pass so long as any act upon it remains to be done by them.

One, having purchased and paid for a specified quantity of an article, acquires no title to it, until separated from the residue.

Until such separation, the claim of the vendee rests in contract, for a breach of which the remedy is by action.

A purchase of growing crops, though paid for, passes no title against the creditors of the vendee, until possession or delivery be had.

Unless such possession and delivery be had, prior to the death of the vendor and to the issuing a commission of insolvency upon his estate, the title is in the administrator in trust for creditors.

UPON FACTS AGREED.

TROVER for fifteen tons of hay.

In 1850, James Marston occupied a farm in Gardiner. On April 2, he conveyed to P. Sheldon all the crops, including the hay to be raised upon the farm, by a bill of sale under seal, it being agreed between them that Marston was to keep possession of the farm and manage it, and harvest and sell the crops; that Sheldon should pay all expenses attendant upon the raising and harvesting the same; and then should sell them, and after deducting for such expenses, and for a note of $100, which Sheldon had signed for Marston, pay the surplus to one of Marston's creditors.

The farm yielded about 45 tons of hay, which Marston cut and placed in the barn. He then asked the defendant to press it; but as Marston was known to be insolvent, the defendant refused to do it, unless secured for the service.

It was then agreed that the defendant should do the pressing at $1,75 per ton, and take pay in a bill of sale of fifteen tons of the hay, which was given as follows; "Edward Peacock bought of James Marston fifteen tons of hay, it being the same which said Peacock is now pressing in his, (Marston's,) barn — price, $8,00 per ton. Received payment by pressing. Sept. 21, 1850. James Marston."

The defendant pressed 45 tons, 598 pounds, in bundles of from 300 to 375 pounds, the weight being marked upon each bundle. These bundles, including said fifteen tons, were all packed up together in the barn. Marston requested the defendant to take his fifteen tons away, but it was neglected until after Marston's death in December of the same year.

The plaintiff was appointed administrator. The whole of the hay was inventoried and appraised as the property of Marston.

The defendant then, without the knowledge or consent of the plaintiff, took away the fifteen tons, for which this suit is brought. Upon the estate of Marston, a commission of insolvency has been issued.

Danforth & Woods, for the plaintiff.

Evans & Clay, for the defendant.

TENNEY, J. — The facts in this case being agreed, and no objection made to their competency, each must have its proper effect; and from them the design of the parties is manifest. The plaintiff's intestate was insolvent, and consequently, the defendant was unwilling to perform the service desired by the other party without security or advance payment. The amount of the hay does not appear to have been known with certainty till it was pressed. A bill of sale absolute in its terms, for fifteen tons of the hay, was given to the defendant, the consideration of which was the work *to be* performed by him upon the hay. The price for pressing each ton was fixed by the parties, and nothing in the case tends to show, that this price was afterwards to be disregarded, or that there was to be substituted therefor a new contract for the performance of the labor, in consideration of one gross sum for the whole quantity, without reference to the exact amount. The purpose was, to give the defendant an opportunity to obtain compensation for pressing the hay without risk of loss.

The hay was pressed and piled together after this bill of sale was executed. If fifteen tons of it were the absolute property of the defendant, this would not be expected. Neither would it be natural, that Marston should pay the defendant for pressing his own hay, before the service was performed thereon. The form of the bill of sale does not preclude the hypothesis, that it was intended as security, or property, from which payment could be obtained after the work should be done, and the amount thereof ascertained. The case of *Warren* v. *Jewett*, 12 Mass. 300, is in this respect quite analogous to the one at bar.

Notwithstanding such was the character of the transaction,

the defendant was entitled, by virtue of the agreement, to have possession of the quantity of hay mentioned in his bill of sale. But it does not appear, that any delivery was taken, or that he had any other possession, than what was necessary to enable him to press it. Did the hay vest in the defendant, so that he had a perfect title, and was authorized to take it away? The rule of law in this respect seems to be well settled. When some act remains to be done, in relation to the property which is the subject of the sale, and there is no evidence to show any intention of the parties to make an absolute and complete sale, the performance of such an act is a prerequisite to a consumation of the contract; and until it is performed, the property does not pass to the vendee. *Riddle* v. *Varnum*, 20 Pick. 280. And a party having contracted for the purchase of a certain quantity of an article, and paid for the same, he is entitled to have the part purchased, separated from the whole quantity, but until such separation, he has no property in any specific quantity. *Young* v. *Austin & al.* 6 Pick. 280; *Merrill* v. *Hunnewell*, 13 Pick. 213. Until a delivery, actual or constructive, the claim of a vendee rests in contract for the breach of which the remedy is by action. *Brewer & al.* v. *Smith*, 3 Greenl. 44.

In the case before us, after the execution of the bill of sale, something was to be done further to complete the contract and transfer the property. There were forty-five tons, from which the fifteen tons, named in the contract were to be taken; no particular portion was designated as belonging to the defendant. The hay might have varied in quality, and it was probably of unequal value, and an important act remained to be done, in which both parties had the right to participate, unless this right was waived.

It is contended however, that the necessity of a delivery is superseded by the actual possession by the defendant. The plaintiff's intestate was never out of possession of the hay, till his death. The defendant appears to have had possession, for the sole purpose of the performance of the service which he had agreed to perform for Marston. The separa-

tion between the fifteen tons and the residue was not attempted, and the possession of the defendant did not abridge the prior right of the other party.

It is insisted, that the plaintiff's intestate waived the opportunity to assist in making the division, by the request to the defendant to take away his hay. If there was a certain specific number of bundles of the hay, agreed by the parties to be that of the defendant; or if it was a fact, that the hay was of uniform quality and value, and nothing remained to be done to vest the hay in the defendant, excepting to separate a certain number of the bundles, the request to take away that belonging to him, might have given him the right to do so, and the subsequent possession might be sufficient to perfect his title. But this request under the facts of this case by no means implies, that Marston waived all right to a voice in the selection of the hay, and intended to surrender the entire quantity mentioned in the bill of sale. But it is rather to be inferred, that the request was made that the parties might proceed to determine the price of the hay, which the defendant was entitled to receive, having regard to the quality; and to separate so much as the labor, at the sum agreed upon for each ton, would be worth. But nothing of the kind having been done the property did not vest in the defendant.

Was Marston so far divested of his interest in the hay by the agreement with Sheldon, that the administrator of his goods and estate had no authority to commence this action? This agreement is not a lease of the farm on which the hay grew, and Sheldon had no right whatever to the possession of the land. The object of the parties to this contract was, that Sheldon should have the crops, which were expected to be raised upon the farm. No possession was ever taken by him of the produce of the farm, either actual or constructive. If Sheldon had paid a *bona fide* consideration for the crops, perhaps he might have been entitled thereto, after they came into existence during the life of Marston. *Ludwig* v. *Fuller*, 17 Maine, 162. But the notorious insolvency and death

of the plaintiff's intestate, together with the commission of insolvency, brought into the case his creditors as a new party; and they are represented by the plaintiff as administrator. The hay came to his hands after the death of the intestate, and the facts agreed are insufficient to enable Sheldon to divest this possession. He stands at least as a purchaser, not having taken delivery against the creditors of Marston, who had the property in possession by the administrator. *Waite, Appellant*, 7 Pick. 100; *Wildridge* v. *Patterson, adm'x*, 15 Mass. 148. *Defendant defaulted.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1853.

COUNTY OF WASHINGTON.

COLUMBUS INSURANCE COMPANY *versus* EATON *& al.*

In a trustee process, if no tangible property of the principal defendant has been attached, and if neither he nor the supposed trustee reside within the State, the Court has no jurisdiction.

In such a suit, a judgment rendered against the trustee, is merely void.

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

ASSUMPSIT upon an unnegotiable promissory note.

The defence was that, in a suit brought by McAdams and others against these plaintiffs, in the District Court for this county, the defendants had been summoned and charged as trustees of these plaintiffs.

In the trustee suit, the writ described the Columbus Insurance Company, (then defendants, but plaintiffs in this suit,) to be of Columbus, in the county of Franklin and State of Ohio; and also described these defendants, (then the supposed trustees,) to be of St. Stephens in the county of Charlotte and Province of New Brunswick.

That writ was served upon these defendants, the then sup-

posed trustees,) by a reading of the writ in their hearing, and upon the insurance company, then defendants, by attaching a chip as their property and by leaving a true and attested copy of the writ at the last and usual place of abode of Noah Smith, Jr., their agent.

The case was submitted to the Court; a nonsuit or default to be entered according to the law of the case.

Downes and *Cooper*, for the plaintiffs, among other considerations, urged that the said adjudication, charging these defendants as trustees, was merely void, because the Court, by which the adjudication was made, had no jurisdiction; inasmuch as neither the then defendants or their supposed trustees were of this State; no service having been made upon said defendants and no property of theirs having been attached.

Chase, for the defendants.

HATHAWAY, J. — Assumpist on the defendants' promissory note, not negotiable, made by them payable to the plaintiffs. The defence was that the said Henry F. and Joseph E. Eaton had been adjudged the plaintiffs' trustees, by the Court in Washington county, for the amount of the note, in a joint action brought by John McAdams, Henry F. Eaton, Joseph E. Eaton and James G. Kimball; and it appears that the defendants were summoned as the plaintiffs' trustees in the suit, and were defaulted, and were adjudged trustees.

But the plaintiffs contend that the defendants cannot avail themselves of the proceedings in the foreign attachment, because, they say, the two Eatons were both plaintiffs and trustees in that suit. This proposition would be correct if such were the facts presented by the report. But the case does not show that the Eatons, who were plaintiffs, and the Eatons, who were trustees, are the same persons; there is no proof of their identity except that they had the same names, and place of residence. If they were the same persons, and the plaintiffs wished to avail themselves of that fact, they should have

established it, by the necessary proof upon proper pleadings. *Bellknap & als.* v. *Gibbens & trustee*, 13 Met. 471.

In the trustee process, " The President and Directors of the Columbus Insurance Company," who were the defendants, were described as of the State of Ohio ; and Henry F. Eaton and Joseph E. Eaton, two of the plaintiffs in that process, and Henry F. Eaton and Joseph E. Eaton, who were summoned as, and adjudged, trustees therein, were described as of St. Stephens in the Province of New Brunswick.

The case does not find that the insurance company appeared in, or answered to that suit. The Court had no jurisdiction over them, so as to render a judgment personally binding on them, or binding upon their property or credits in the Province of New Brunswick. Story's Conflict of Laws, § 549.

In *Lovejoy* v. *Albee*, 33 Maine, 414, the Court held that § 12 of c. 119, of the R. S., has reference to a case in which this Court has jurisdiction of the suit, between the principal parties ; but the Court did not obtain such jurisdiction in the process of foreign attachment against the Eatons, as the plaintiffs' trustees, and according to the decision in *Lovejoy* v. *Albee*, the judgment charging them as such, was "merely void."

It is unnecessary to consider the other questions presented in the case, and, as agreed by the parties, a default must be entered.

Shepley, C. J., Tenney, Rice and Appleton, J. J., concurred.

Tucker *versus* Wentworth & *al.*

A school district, not formed by the town, in pursuance of statutory provisions, has no corporate powers.

If there be a school district, claiming to exist as such, without any act of the town, the appointment by the town, of an agent for such district, will not, of itself, give the district a legal existence.

Such a district cannot, by its vote, authorize the assessment of taxes for any purpose whatever.

Tucker *v.* Wentworth.

An assessment of taxes, made by the assessors of a town, pursuant to the vote of such a district, raising money for the erection of a school-house, is illegal.

Any inhabitant of such a district, whose property shall be distrained, by virtue of the assessors' warrant to collect such a tax, may recover its value in a suit against the assessors.

Two or more districts uniting according to the arrangement pointed out in the statute of 1847, c. 25, § 3, do not thereby abolish the original districts or create a new one.

That arrangement merely authorizes the several districts to use a portion of their school money, in concert with each other, for greater facility in the instruction of their more advanced scholars, without impairing the rights or obligations of each of the original districts to maintain its own schools.

ON FACTS AGREED.

TRESPASS *de bonis asportatis.*

School districts numbered one and two in Cherryfield, at separate meetings, duly called for that purpose, each voted to unite together, according to the statute of 1847, § 3, which provides that a district may "join with one or more other districts, for the purpose of uniting the more advanced scholars of each district into one school; and when any districts shall so determine, they may appropriate such a proportion of the school money of each district as the scholars attending the school aforesaid would be entitled to draw, *per capita.*"

To carry out that purpose, the inhabitants of the two districts afterwards held a meeting, and voted to form both districts into one, called the Union district. At the annual meeting of the town, which soon occurred, an agent for the Union district was chosen and sworn. The Union district then proceeded by vote to raise $2800, for the erection of a school-house, and their clerk certified the vote to the assessors of the town, and they assessed the same upon the inhabitants of the Union district, and issued their warrant to the collector of taxes. In virtue of such warrant, the collector seized and sold two cows, belonging to the plaintiff, for the payment of $19,21, his proportion of the tax, he being one of the inhabitants of the Union district. For that taking, this action is brought against the assessors.

If the defendants are liable to the suit, they are to be de-

faulted, and judgment rendered against them for $30, with costs.

Walker, for the plaintiff.

School district corporations are of very limited powers. R. S. c. 17, § 2, 28; R. S. c. 14, § 56.

It is by the act of the town, that its school districts are to be established. The divisions are to be by territorial lines. *Withington* v. *Eveleth*, 7 Pick. 106; *Frye* v. *School District in Athol*, 4 Cush. 250; *Barrett* v. *Porter*, 4 Cush. 487.

The Union district was not formed by any vote of the town. That district then had no legal existence, and the choice of the district agent was therefore a mere nullity.

The power of raising taxes pertains only to districts created by act of the town. R. S. c. 17, § 28. And it is to *such* districts only, that the provisions of stat. 1847, § 3, applies.

The assessors are liable. Integrity and faithfulness on their part can be no defence. For the tax being illegal, they were not bound to assess it.

Burbank, for the defendants.

The two districts, by joining themselves together, constituted one district. Stat. 1847, c. 25, § 3. The provision of the Act was, that two or more districts might "join," for certain purposes. When joined, they became, for those purposes, a single district.

The power of towns, by the Act of 1789, c. 19, was to determine and define the limits of school districts. No express power to make any subsequent alteration was given. Yet towns, though unauthorized by statute, assumed to make such alterations, and these alterations were sustained. *Richards* v. *Daggett*, 4 Mass. 534.

There may, then, be school districts, though not established under any statute provision. The Union district of Cherryfield, then, may have a valid existence, even if not sustainable under the Act of 1847. The town chose an agent for the district, and thereby adopted or recognized the district, for the case raises no doubts or difficulties, as to its territorial limits.

It therefore became the right and duty of the new district

to provide for the instruction of the more advanced scholars, and of each of the original districts, in their individual capacity, to instruct the less advanced scholars.

What school-house, then, should the more advanced class occupy, and by whom would it be owned?

The Union district, being legitimately formed, had the rights and privileges of other districts; just, as where a man is born in a free government, he has, without further legislation, the right to "life, liberty and the pursuit of happiness."

School districts have the authority to raise money, and cause it to be assessed for the erection of school-houses. The vote, therefore, of the Union district, to raise $2800 for that purpose, was valid.

In assessing that tax, the assessors performed but an imperative duty. On receiving from the district clerk a copy of the vote, duly authenticated, no option was left to them. R. S. c. 17, § 29 & 30. It was not theirs to inquire into the legal formation of the district. It was theirs to assess, "being responsible only for their own personal faithfulness and integrity. R. S. page 748; *Mosher* v. *Robie*, 2 Fairf. 135. That these defendants, as assessors, acted with faithfulness and integrity, is not denied. They, therefore, cannot be liable in this suit.

The money has been collected, according to the vote. The house has been built, and the Union district is now using it for the prescribed purpose of educating its more advanced scholars. To whom, but the district, does the house belong? Shall its own inhabitants, after enjoying its benefits, repudiate an arrangement, so consonant to their own good, to the good of the community and to the statute provisions?

Shepley, C. J. — School districts established as provided by statute, c. 17, are by the twentieth section made bodies corporate with certain powers. If there could be school districts not so formed, they would not be bodies corporate. Nor would they have the powers conferred upon them.

The inhabitants of the town only, at their annual meeting,

can determine the number and limits of their school districts, and divide and discontinue them, and annex one of them to another. They cannot delegate this power to others. Nor will the appointment of an agent for a school district, which has no existence, create one.

By the Act approved on July 31, 1847, c. 25, § 3, a school district is authorized "to join with one or more other school districts for the purpose of uniting the more advanced scholars of each district in one school."

The existing districts, which should so join, were not intended to be, and they were not abolished. They were to continue for the instruction of their own scholars, and for the appropriation of such portion of their school money for the instruction of the united and more advanced scholars as such scholars would be entitled *per capita* to draw.

No power to form a new district composed of those thus joining was conferred upon them. If one might be so formed, school districts could be formed without any vote or act of the inhabitants of the town; and the number of the districts in a town might be nearly doubled without its vote or authority. It is not perceived, that there can be any necessity for a construction, that would authorize a new district to be formed and another school-house to be built. School districts, that would join for such purposes, might not have been expected to have occasion to use their school-houses during the whole year for the instruction of other scholars. If there be any omission to authorize a place to be provided for the instruction of the scholars more advanced, this Court is not authorized to supply the defect.

The assessors of towns are relieved from liability for making assessments by the provisions of the statute c. 14, § 56, as amended, only when they are "required by law to assess any tax upon any school district." When there is no school district, which can vote to raise the money, the assessors cannot be required by law to assess a tax on persons, who are not members of such a corporation as attempts to order the assessment.

The records of the town would inform the assessors, whether such a school district existed.

Defendants defaulted. —

Judgment by agreement for $30.

TENNEY, RICE, APPLETON and HATHAWAY, J. J., concurred.

STUART *versus* MCDOUGALD *& al.*

The liability of a surety on the bail bond, is an interest which precludes him from testifying as a witness for the defendant.

That interest may be discharged by a deposit with the clerk, for the benefit of the witness, if the judgment should be against the defendant.

Such deposit may be effectually made by *any person*, of his own money.

When such deposit is made by a third person, of his own money, for the benefit, contingently, of the witness, the plaintiff, even after judgment in his favor, has no rights in the money.

The Court, therefore, cannot order it to be applied in payment of the judgment.

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

TROVER. — The defendants offered one Stickney as a witness. He was, however, a surety on the bail bond, given by the defendants in this action, and was, for that reason, objected to.

D. Tyler, the defendants' attorney, by leave of Court, deposited $100, of *his own money*, with the clerk, "for the benefit of the witness, in case of his liability on the bond." The judgment was for the plaintiff. The docket entry was, "$100 deposited to relieve interest of Stickney."

The plaintiff then moved for leave to take the $100 from the custody of the clerk, to be applied to the satisfaction of the judgment. Tyler, the attorney, resisted the motion, but the Judge ordered the money to be applied to the satisfaction of the judgment. To that order Tyler excepted.

J. Granger, in support of the exception.

Chase and *Whidden*, *contra.*

The docket entry must alone control. The statement, contained in the exception, that the money belonged to Tyler, is

therefore of no effect. The deposit was "to relieve the interest of Stickney." Why? How?—It was to stand subject to the payment of the debt and cost, if the plaintiff should recover. The plaintiff did recover, and the Judge's order rightfully appropriated the deposit to that payment.

If Tyler could have withdrawn the money, Stickney's liability would remain unrelieved. If it could not be appropriated upon the judgment, it was of no benefit to the plaintiff. But who can doubt that the object of the deposit was to put us in a better position. *Roberts* v. *Adams*, 9 Greenl. 9.

SHEPLEY, C. J.— Their surety on a bail bond being offered as a witness for the defendants, their attorney, to obviate that objection, "deposited with the clerk, as his own money, for the benefit of the witness, in case he should be liable on said bond, $100."

The plaintiff having recovered judgment, the Court on his motion ordered the sum so deposited "to be applied toward the satisfaction of the plaintiff's judgment."

The surety on the bail bond was not liable, except contingently and collaterally to pay that judgment. The money was not to become the property of that surety, unless he should be liable on his bond to pay the judgment. It was not deposited to pay that debt, but to render the witness competent, by securing to him the means wherewith to pay his bond without being subjected to any loss. The plaintiffs could not rightfully claim to have that money applied in payment of their debt, until they had shown, that they were entitled to maintain a suit against the surety on the bail bond.

The case of *Roberts* v. *Adams*, 9 Greenl. 9, differed much from this case. In that case the money was offered to be deposited by the plaintiff "for the use of the defendants" to discharge the interest of an indorser of a writ. It was the money of the party against whom a judgment for costs was recovered, and it was deposited to pay those costs.

In this case, the money was not deposited by the debtors,

or for their use, or for the use of the plaintiffs, or to pay their judgment. *Exceptions sustained, and order rescinded.*

TENNEY, RICE and HATHAWAY, J. J., concurred.

SMALL *& al. versus* SMALL *& al.*

The Act of 1845, authorizing county commissioners to grant permits for the cutting of timber upon the public lots, was repealed in 1848.

That repeal terminated the county commissioners' authority to grant such permits.

While the authority was with them, their permits could operate for no longer time than one year.

Thus a permit for cutting *all* the timber upon a public lot, though to be cut in such quantities yearly as the Act allowed, was *held* to be inoperative at the end of one year, and to furnish no protection to the purchaser to cut after that time.

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

TRESPASS, for cutting and hauling timber subsequent to *December* 12, 1850, from two lots of timber land, which had been reserved for public uses.

A statute was passed in 1845, as follows; — "The county commissioners of the several counties are hereby authorized to *grant permits* for cutting timber on any of the lots reserved for public uses, in unincorporated timber townships, in their respective counties, *not to exceed a permit for one six-ox team on any one lot in each year.*

The defendants introduced and relied upon a permit, (which had been duly assigned to them,) dated August 31, 1847, and signed by the county commissioners of that period, acting under that statute and granting to certain purchasers authority "to cut and haul all the pine, spruce and hemlock, and all other timber from the public lots in township No. 10, adjoining Steuben and township 16, middle division, not to exceed enough for a six-ox team on any one lot each year, and we have received a note for the payment of the same."

On the above mentioned *Dec.* 12, 1850, the Land Agent, under an Act of that year, conveyed the timber on said public lots, by deed of that date, to the plaintiffs.

The defendants had knowledge of that deed, and were requested to take no more timber from the lots. They, however, continued to cut and haul from that time till March 20, 1851. For that cutting and hauling, this suit was brought.

It was agreed by the parties that if, in the opinion of the Court, the acts of the defendants were rightful, a nonsuit is to be entered; otherwise the action to stand for trial.

Burbank, for the plaintiffs.

B. Bradbury, for the defendants.

HATHAWAY, J. — The State, being the principal, authorized the county commissioners, as its agents, "to grant permits for cutting timber on any of the lots reserved for public uses, in unincorporated timber townships, in their respective counties, not to exceed a permit for one six-ox team on any lot *in each year*, the said permits to be granted by public auction to the highest bidder." Stat. of 1845, c. 149.

This statute was repealed by the Act of 1848, c. 82, and the custody of the lands given to agents to be appointed by the Governor and Council; and the Act of 1848 was repealed by the Act of 1850, c. 196, and the custody of the land given to the Land Agent of the State. The Land Agent sold the timber to the plaintiffs by deed dated Dec. 12, 1850, and between that time and March 20, 1851, a portion of the timber was cut and taken away by the defendants, claiming a right to do so under a permit from the county commissioners, dated August 31, 1847.

The authority of the county commissioners to grant permits, was manifestly to be exercised annually. They could not, of course, sell the timber in a lump to be taken away in an indefinite period of time. Their authority was determined by the repealing Act of 1848; and the plaintiffs, claiming title under the Land Agent's deed of Dec. 12, 1850, had the paramount and only valid title to the timber, and, according

to the agreement of the parties, the action must stand for trial.

SHEPLEY, C. J., and TENNEY, RICE and APPLETON, J. J., concurred.

INHAB'TS OF EASTPORT *versus* INHAB'TS OF EAST MACHIAS.

The selectmen of a town are, by statute, empowered to adjudicate upon the question of insanity, when applied to for a warrant to send a person to the insane hospital for that cause, and also to adjudicate upon the *residence* of such person.

They are also required to keep a record of their doings in such cases, and to furnish copies of the same to any person interested.

In a suit brought by the town, adjudged by the selectmen to be the *residence* of such insane person, in order to recover for expenses incurred in maintaining him at the hospital, an attested copy of the selectmen's record is admissible in evidence.

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

ASSUMPSIT.

A complaint, in writing, was made to the selectmen of Eastport, signed by one M. B., in the following words : —

"To the selectmen of the town of Eastport.

"M. B. of Eastport, makes complaint and says, that Elizabeth Howard is insane, and he believes it will be for her comfort and safety that she be removed to the insane hospital. Wherefore he prays that an examination into the facts may be made, and that such steps be taken as the law provides in such cases."

The action of the selectmen, as appears by the record of their doings, was as follows, viz. : —

"Upon the foregoing complaint, the undersigned, selectmen of Eastport, having inquired into the condition of the above named Elizabeth Howard, who is now in this town, and after hearing the testimony necessary to understand the case, are of opinion that she is insane, and that her comfort and safety will be promoted by a residence at the insane hospital, at Augusta. We therefore order that she be forthwith removed to

Augusta, and delivered to the care of the superintendent of the insane hospital, to be detained until she shall become of sound mind, or be otherwise legally discharged. Given under our hands," &c.

In pursuance of that order, the said Elizabeth was carried to the insane hospital, and maintained there six months at an expense of $89,05, which the plaintiffs paid.

To recover that sum this action was brought, the plaintiffs alleging, in their declaration, that her legal settlement was in the defendant town.

To establish their case, the plaintiffs introduced a copy, attested by said selectmen, of the record of the complaint and of their adjudication thereon, though the admission of the copy was objected to by the defendants. The verdict was for the plaintiffs, and the defendants excepted to the admission of said copy.

J. A. & S. H. Lowell, for the defendants.

It was necessary for the plaintiffs to prove the *insanity* as they have alleged. To make out the insanity, they introduced a copy of the record of the doings of their selectmen. That certificate was improperly admitted; —

1. Because selectmen are not by law constituted certifying officers.

2. Because said selectmen were not physicians, nor adepts, nor persons having experience or skill to determine and decide upon questions of sanity or insanity.

3. Because the certificate was wholly *exparte*, and merely the hearsay of an opinion formed by persons, not recognized as adepts or as skillful to decide such questions.

4. Because the *insanity* was a matter of fact, to be proved by evidence of the acts and condition of the pauper, from which the jury could deduce or infer the fact of insanity. But the record was not evidence, to be weighed and judged of by the jury; it was merely an expression of opinion of the selectmen; a mere begging of the question to be proved.

5. Because, if the alleged pauper had been insane, better

evidence than the record might and ought to have been introduced to show that fact.

It may be urged, because c. 33, of the Laws of 1847, § 17, provides that selectmen in such cases "shall keep a record of their doings, and furnish a copy to any person interested, who may call and pay for the same," that such "copy" is to be received as evidence of the *insanity* of persons sent to the insane hospital. But no such intention is expressed in the statute. In an action by the *hospital* against the *plaintiff town*, such record might be evidence. It could be evidence for no other purpose. To go farther than this, would be an unwarrantable construction of the statute. But, even if the *record itself* could have been admissible *between these parties*, the *copy* of it, however attested, was not receivable.

Hayden, for the plaintiffs.

SHEPLEY, C. J. — The only question presented is, whether a copy of the decision of the selectmen of the town of Eastport, that Elizabeth Howard was insane, duly authenticated by the selectmen, was properly received as evidence.

By the Act approved on August 2, 1847, c. 33, § 8, the selectmen of towns are constituted a board of examiners, and are authorized to call before them, and to hear testimony and to decide, whether the person, against whom complaint has been made, is insane. They are required by the seventeenth section to keep a record of their doings, and to furnish a copy of it to any person interested on payment therefor.

Over their decision, the town, in which the person alleged to be insane resides, has no control. Their certificate, sent to the hospital and stating the residence of the insane person, is by the eleventh section made sufficient evidence to render such town liable for the expense of commitment and support; and the town may recover that expense of another town, as if incurred for the ordinary expense of a pauper; and yet such person is not to be deemed a pauper.

When a town desires to recover such expense of another town, it must prove, that such a decision by the selectmen has been made. That decision could not be proved by parol

testimony, when the act requires, that a record of it should be made. It must be proved by a production of that record, or by a transcript or duly authenticated copy of it. It is by the Act made a public record, and to a copy of it all persons interested are entitled. It might not be possible to furnish such copies, if the original record were liable to be transported from place to place as testimony. There might be many records of such cases in one book of records, and if that book only could be used as testimony, it might be still more difficult to furnish copies to those entitled to them. To avoid such inconveniences, and to preserve the record more safely, the law permits duly authenticated copies of all public records and documents to be received as evidence.

The Act having made it the duty of the selectmen to furnish copies, the copy duly authenticated by them was properly received as evidence. *Exceptions overruled.*

TENNEY, RICE and HATHAWAY, J. J., concurred.

MACHIAS HOTEL COMPANY *versus* COYLE.

To maintain assumpsit, there must be a privity of contract between the parties.

The party in interest, for whose benefit a promise has been made in the name of his agent, may maintain suit thereon in his own name; but only when there was a consideration derived by one party from another party to the suit.

One, uniting with others in a joint stock association for a business enterprize, by signing a general subscription-promise, stipulating that each should pay for his shares, but making no provision for becoming a corporation, cannot in a suit by the corporation, afterwards created for completing the enterprize, and consisting of some or all of the other associates, be held *by the mere force of the subscription* to pay for his shares; there being no privity of contract.

In such a suit by the corporation, no liability can be deduced from expenditures made by the unincorporated association; there being no privity of contract; nor from expenditures made by the corporation itself, there being no consideration.

ON FACTS AGREED.

ASSUMPSIT.

The writ contained a special count upon the defendant's promise, and also the common money counts.

Some of the inhabitants of Machias associated, with a view to get a public hotel established in that town, and procured subscribers in aid of that purpose. The paper subscribed was in the following form: —

"The undersigned, being impressed with the absolute necessity of providing a suitable building in this village to accommodate the public as a hotel, hereby promise and agree to pay to such person as those who become subscribers hereto, shall hereafter appoint as their treasurer, the sums of money set against their names respectively, the sum of twenty-five dollars to be considered as a share, and the first three or any other three of the subscribers hereto, whenever the amount of five thousand dollars shall have been subscribed, to be authorized to call a meeting of the subscribers to take such action in regard to procuring a lot for the proposed hotel, and building the same, as they shall deem expedient.

"Each subscriber to be entitled to votes in proportion to his number of shares. "Machias, Aug. 4, 1851."

To this paper about eighty persons appended their names, subscribing for a few more than two hundred shares. Among these persons, the defendant, by his agent, subscribed for two shares.

Several meetings of these subscribers were duly called, at which most of them attended. At one of these meetings they chose a building committee and a treasurer, and appointed an agent, who procured from the Legislature an Act, passed in February, 1852, incorporating six of their number, with their associates and successors, by the name of the Machias Hotel Company, which was afterwards duly organized.

Prior to the passage of that Act, the association had expended one thousand dollars toward the erection of the hotel. The corporation then stepped in, taking the benefit of the purchases made and of the labor performed by means of that expenditure, and then expended an additional sum of $4000.

The defendant though requested by the treasurer of the

association and also by the treasurer of the corporation, refused to pay the sum, ($50,) which he had subscribed, and this suit is brought to recover the same. He never attended any of the meetings, either of the association or of the corporation.

Several of the subscribers to the paper, including the defendant, did not associate with the corporation, or recognize any of their doings.

The case was submitted to the Court for a decision, "as the law, applied to the facts, may require."

R. K. & C. W. Porter, for the plaintiffs.

I. The defendant's promise will support *assumpsit* for money laid out and expended. Every sound principle demands, that where persons expend money for public benefit, on the faith of mutual promises, no one should be allowed to throw his share of the burden upon his associates. And to this effect the law is well established. *Homes, Adm'r of Larkin*, v. *Dana*, 12 Mass. 190; *Farmington Academy* v. *Allen*, 14 Mass. 172; *Chester Glass Co.* v. *Dewey*, 16 Mass. 94; *United Society* v. *Eagle Bank*, 7 Conn. 456; *Religious Society* v. *Johns*, 7 Johns. 112; *Bryant* v. *Goodnow*, 5 Pick. 228.

The same is laid down as a legal principle by Chitty on Con. 505; Angell & Ames on Corporations, 476 and seq.

In *Foxcroft Academy* v. *Favor*, 4 Maine, 382, though decided in favor of the defendant, in a suit on a subscription for the establishment of an academy, the doctrine established as above, was fully recognized, and the action failed merely for want of a money count and for want of proof that money had been expended.

In *Farmington Academy* v. *Flint*, referred to in *Farmington Academy* v. *Allen*, the same point was decided in the same way.

Limerick Academy v. *Davis*, 11 Mass. 113, and *Bridgewater Academy* v. *Gilbert*, 2 Pick. 579, at first sight appear to militate against the principle contended for. But, in the first suit, the ground on which the Court base their decision for the defendant, was want of privity in the parties, and they

suggest that a money count might have sustained the action. In the second, Gilbert had notified the trustees of his refusal to ratify his agreement, before expense incurred, and for good reason, i. e. the removal of the academy.

In the case at bar, the money count is depended on; and it is admitted that there had been an expenditure of $5000, on the faith of that subscription paper, before and after incorporation. A part of that expense, $1000, was expended within a very few days from the time of the defendant's subscription, Sept. 4, 1851.

II. It was proper to bring the action in the name of the Machias Hotel Company, instead of the names of the individual subscribers or their treasurer.

1. A promise to pay an agent will support an action by his principal. Chitty's Plead. 5, 8; *Warren Academy* v. *Starrett*, 15 Maine, 443; *Garland* v. *Reynolds*, 20 Maine, 45; *Gilmore* v. *Pope*, 5 Mass. 491; *Niven* v. *Spikeman*, 12 Johns. 401; *Pigot* v. *Thompson*, 3 Bos. & Pull. 147.

2. The "Machias Hotel Co." is identical with the associated subscribers, and succeeds to their right of action. *Medway Cotton Manufacturing Co.* v. *Adams*, 10 Mass. 360; *Commercial Bank* v. *French*, 21 Pick. 486; *Lowell* v. *Morse*, 1 Met. 473; *Charitable Association* v. *Baldwin*, 1 Met. 359.

The charter was procured by the act of the association, and in pursuance of its vote, and was accepted at a meeting of the original subscribers.

That it was intended by the subscribers to get a charter of incorporation, is an irresistible inference from the character of the enterprize.

The property purchased and the labor done for the *association* vested in the *corporation*, so soon as the charter was obtained.

The action then is brought by the associated subscribers, or those of them who, on the faith of the mutual ageement, have expended their money. Can it be that they have lost their right to recover merely, because they sue by the name given them by the Legislature?

If it is objected, that the defendant did not join in the procuring a charter, and cannot be bound by it, the reply is, that on the faith of the mutual subscription, much of the money was raised and expended, before the charter was procured.

This suit is not brought against the defendant as a stockholder, but merely to recover the money expended by the associates on the faith of his promise.

B. Bradbury, for the defendant.

The action cannot be maintained. There was, in fact, no consideration for the defendant's promise, nor does the paper, signed by him, import any. *Limerick Academy* v. *Davis*, 11 Mass. 113; *Farmington Academy* v. *Allen*, 14 Mass. 175; *Bridgewater Academy* v. *Gilbert*, 2 Pick. 579; *Foxcroft Academy* v. *Favor*, 4 Maine, 383.

The only ground upon which an action of this description can ever be maintained is, that by reason of the contract the plaintiffs were led to confide in the engagement of the defendant so far as to advance their own money for him, so that equity and good conscience require of him a reïmbursement.

Now if there be any obligation upon this defendant to make any reïmbursement, it is not to these plaintiffs, but to his co-subscribers, and the suit should be in their name, and not in that of the plaintiffs.

The promise of the paper was to pay to the treasurer of the associates. There is, therefore, no privity of contract between these parties.

There was no authority, conferred by the paper, upon any body to procure a charter for a company from the Legislature. Nor did the defendant ever subsequently assent to any such procedure, and he is not bound by it. He attended no meeting of the subscribers, and was bound by none of their doings. He never became one of the company, for he was not named in the Act of incorporation, and never took any interest or part in it.

Shepley, C. J. — The subscribers to the paper, bearing date on Aug. 4, 1851, associated for the purpose of building

a hotel. Each agreed to take and pay for a certain number of shares to such person as should be appointed their treasurer. The paper is wholly silent respecting any design of the subscribers to become a body corporate. It contains no authority for any one to make application for an Act of incorporation or any authority for the subscribers to vote or act upon that subject.

By an Act, approved on Feb. 18, 1852, some of the subscribers were incorporated by the name of the Machias Hotel Company. By a comparison of the names of the corporators and their associates with those of the subscribers, it appears, that several of the latter did not become members of the corporation. It does not appear, that they in any manner assented to or recognized its proceedings as affecting them or their interests. The defendant did not.

The amount subscribed by the associates could not have been promised by or for the corporation. The promise of the defendant was not made to the corporation or to any one acting for it. If the promises of the associates were binding, each had a personal interest in the performance of the promise of every other, of which he could not be deprived without his consent.

A valid promise may be made to an individual, or to a joint stock company, or to a corporation, by description or in the name of an agent; and an action may be maintained, in its own proper name, by such person, association or corporation. But this is true only, when the consideration, which is the essence of the contract, is derived by one party from another party to the suit. (This remark can have no reference to negotiable paper.) In such cases the agency or the name, by which one party acts, may be disregarded, and the suit may be maintained in the name of the party, for whose benefit the contract was made.

It is admitted that this suit cannot be maintained upon a promise of the defendant made to others, with whom the corporation is not identified, while it is insisted, that it can be on

the count for money laid out and expended for the use of the defendant.

There is no proof of an expenditure of money by the corporation at the request of the defendant, express or implied, or for a purpose from which he could derive any benefit. The corporation does not appear to have expended money, except for property or purposes of its own, in which the defendant has no interest.

It is admitted, that the associates, before the Act of incorporation was obtained, expended one thousand dollars. If the property, thus procured by individuals, was conveyed by them to the corporation, the defendant could probably derive no benefit from that expenditure. If he could, or if those individuals retain the property and can be considered as holding it in trust for the associates, the corporation, not being identified with those whose money was expended, cannot claim to have conferred a benefit upon the defendant by its expenditure. The essential difficulty is, that there is no proof of any consideration between these parties, either by benefit received by one or injury sustained by the other.

Plaintiff nonsuit.

TENNEY, RICE, HATHAWAY and APPLETON, J. J., concurred.

INHABITANTS OF HOULTON *versus* INHABITANTS OF LUBEC.

The Act of Feb'y 11, 1794, respecting support of paupers, continued in force until 1821.

Under that Act, no illegitimate child could have a *derivative* settlement, unless the mother herself, at the time of its birth had a settlement.

No settlement acquired by the mother, after that time, could be imparted to such child.

Under that Act no residence, short of ten years, in a town could give a settlement there.

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

ASSUMPSIT to recover for expenses incurred for pauper supplies.

The case was submitted upon testimony, for a nonsuit or default as the facts and the law require. The facts, as found by the Court, are reported in the opinion.

Tabor, for the plaintiffs.

J. C. Talbot, jr. for the defendants.

HATHAWAY, J. — Assumpsit for necessary supplies furnished two pauper children of Minsdell Tyrrell, wife of William Tyrrell. By the deposition of David E. Corliss, in the case, it appears, that he went to Narraguagus, now the town of Cherryfield, where he lived about two years, and while there in March, 1804, he, having a lawful wife then living in New Hampshire, married Polly Tucker; that he next moved to Lubec, then called "Quoddy," where they resided until April, 1824, and then moved to New Brunswick. During their residence in Lubec, in 1814 or 1815, she became the mother of a daughter named Minsdell, who continued to live with them till her mother died in 1826, and afterwards with Corliss till 1831, when she married William Tyrrell, a foreigner and soldier in the United States' service, stationed at Hancock barracks in Houlton, and she subsequently became the mother of the paupers, as appears by Joseph M. Spencer's deposition in the case.

Corliss having a lawful wife living, at the time of his marriage with Polly Tucker, her daughter Minsdell was illegitimate, and the plaintiffs contend that the paupers, through their mother Minsdell, derived a settlement in Lubec from their grandmother Polly Tucker who, they alleged, had a legal settlement there, at the time of Minsdell's birth, in 1814 or 1815.

The question of her settlement must be determined according to the provisions of the statute of Massachusetts, passed Feb. 11, 1794, c. 34, which was the law in force upon that subject from the time of its enactment until the passage of the law of this State, upon the same subject, in 1821, c. 122.

By the second section of the statute it is provided "that illegitimate children shall follow and have the settlement of

their mother, at the time of birth, if any she shall then have within the Commonwealth, but that neither legitimate or illegitimate children shall gain a settlement by birth in the places where they may be born, if neither of their parents shall then have any settlement there."

If Polly Tucker had gained a settlement in Lubec, when her daughter Minsdell was born, it was gained either by the tenth or twelfth mode prescribed by the statute. The twelfth mode requires that a person gaining a settlement by residence should be a citizen of the age of twenty-one years and should reside in the town for the space of ten years together, &c., but it is not proved, that she resided there ten years prior to the birth of Minsdell, and the case furnishes no evidence concerning her age. She did not therefore gain a settlement by the twelfth mode. But it is said in argument that the town of Lubec was not incorporated until 1811, and that she was a resident there at the time of its incorporation, and it appears by the Act of incorporation, passed June 21, 1811, that the *whole territory*, subsequently constituting the town of Lubec, was embraced in, and was part of the town of Eastport, which, by that Act, was divided, and a part thereof incorporated into the town of Lubec. These facts would render her case subject to the provisions of the *tenth mode* of gaining a settlement, where a new town is incorporated, composed of part of an old incorporated town, but they do not aid the plaintiffs in establishing her settlement there, for the same means and qualifications, and the same time of residence are required by the tenth mode as by the twelfth.

It may be true, that Polly acquired a settlement by her subsequent residence in Lubec, but that would not affect the settlement of her daughter, for an illegitimate child cannot gain a new derivative settlement under the mother, but retains that which the mother had at its birth. *Biddeford* v. *Saco*, 7 Maine, 270; *Fayette* v. *Leeds*, 10 Maine, 409.

The plaintiffs having failed to show that the paupers had a settlement in Lubec, a nonsuit must be entered.

TENNEY, RICE and APPLETON, J. J., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1853.

COUNTY OF YORK.

EARL *versus* ROWE.

A devise of the net profits of land is, by legal intendment, a devise of the land itself.

So a direction by the testator that A. B. *shall receive for his support the net profits of the land*, is a devise of the land itself.

The authority of the Probate Court, under R. S. c. 108, § 1, to make partition of real estate among heirs and devisees, not being limited as to time, may be exercised when occasion calls, though many years after the estate has been settled.

Where no dispute has been raised, respecting the proportion, *if any*, to which an heir or devisee is entitled, partition may be made by the Judge of Probate, unless such proportion appear to *him* to be uncertain.

If his opinion as to such proportion be erroneous, the remedy is by appeal.

ON FACTS AGREED.

TRESPASS, *quare clausum.*

John Rowe devised his real estate to his son Ephraim. After the death of Ephraim, he subjoined a codicil to his will, disposing of the land as follows; viz: — "I bequeath the land to the three sons of my late son Ephraim, now

minors, in equal proportions as they shall arrive at twenty-one years of age, and in case of the death of either of them before the age of twenty-one years and unmarried, then his share shall descend to the surviving brother or brothers, and for the better support and education of my grandchildren before named, I do hereby give and bequeath all the profits arising from the estate before named, to my daughter-in-law, Keziah Rowe, until and for the term, that my grandsons shall attain the age of twenty-one years, and in case she shall at that time remain the widow of my late son Ephraim Rowe, then she shall receive for her support, one third part of the net profits of the aforesaid bequeathed estate, so long as she shall remain such widow and no longer."

One of the three grandsons died under age and unmarried. The title of the survivors became vested, by a deed and by a levy, in this plaintiff.

The said Keziah Rowe, this defendant, yet remains the widow of said Ephraim.

In defence she relies upon a claim under the codicil to a life estate in common and undivided in one third of the land, and upon a decree of the Court of Probate assigning to her by metes and bounds her one third, being the parcel upon which the alleged trespass was committed.

The questions submitted to the Court for decision are,

First, whether Keziah Rowe took a life estate in common and undivided in one third of the land; and

Second, if so, "whether the Judge of Probate had authority to set out and assign such third to her, and whether she has a right under such assignment to the sole and exclusive occupation of the part so assigned, and whether the proceedings of the Probate Court, in making the partition, were valid or void."

N. D. Appleton, for the defendant.

An estate granted to a woman during widowhood is a life estate, determinable upon her marriage. 2 Black. Com. 120; 4 Kent's Com. 26; *McLellan* v. *Turner*, 15 Maine, 436.

The bequest to the defendant of "one third of the net pro-

fits of the aforesaid bequeathed estate," was a devise to her of that proportion of the land. If a man devises the rents and profits of land, the land itself passes. Comyn's Dig. Devise, N, 1, p. 400; *Parker* v. *Plummer*, Cro. Eliz. 190; *Kerny* v. *Derrick*, Cro. Jac. 104; *South* v. *Alleine*, 1 Salk. 228; 4 Dane's Abr. c. 115, a. 7, § 13, p. 534; 1 Saund. 186; 4 Kent's Com. 536; Roberts on Wills, 401–2, 529.

So a devise of the *income* of real estate conveys the land. *Reed* v. *Reed*, 9 Mass. 372.

And it makes no difference whether the words used are rents and profits, income, net income, profits or use. *Andrews* v. *Boyd*, 5 Maine, 199. The words, "use and income of all my estate personal and real," do not constitute a legacy, but they vest an estate for life in the real estate. *Larned* v. *Bridge*, 17 Pick. 339; Comyn's Digest, Devise, N, 7; *Briggs* v. *Harford*, 22 Pick. 288; *Watts* v. *Howard*, 7 Met. 478.

The language used by the testator, that the widow shall *receive one third of the net profits*, is sufficient to pass the land, if such was the intention of the testator. Any words which show the intent of the testator to dispose, are sufficient for a devise. It is not necessary that any technical or artificial form of words, should be used in a will.

In construing a will, the *intention* is to govern, if not repugnant to the rules of law, and the whole will is to be taken together. Comyn's Digest, Devise, N, 1; *Drury* v. *Morgan*, 18 Pick. 295; *Russell* v. *Elden*, 15 Maine, 193; *McLellan* v. *Turner*, 15 Maine, 436; *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Sheldon* v. *Purple*, 15 Pick. 528; *Crane* v. *Crane*, 17 Pick. 422.

It is apparent from the will that it was intended, she should have the land. What he had previously given to the son, he distributed to his widow and three sons. He expressly gives the whole *profits* to her, until they attain twenty-one years, and after that devises them between her and them. In no other way could the bequest be so beneficial to her. He intended she should have a house on the farm where she had so

long resided, during widowhood. He clearly placed great confidence in her for good management, and meant to be liberal. Nor did he intend to deprive her of a *home*, or make her dependent upon the mercy of her sons, when they attained full age, if she remained unmarried.

The Probate Court had jurisdiction to set off to the widow, her part in severalty, and the proceedings are legal. R. S. c. 108, §§ 1, 2, 3, 4. The action of the Judge was not restricted by the provisions of the 3d §. The shares or proportions were not in dispute, nor did they appear to the Judge to be *uncertain*, or that *he thought them proper* for the consideration of a jury in a court of common law. It was for him to *decide*, whether or not to take action in the case. If he did, and erred, the only remedy was by appeal. Statute of 1821, c. 51, § 35, *proviso*, compared with the 3d § of c. 108, R. S. The phraseology only is changed; the meaning is the same in both.

Shepley, C. J. — Suppose the proceedings before the Judge of Probate were legally inoperative, and suppose you are right in claiming for her an interest in the land, can this action be maintained?

Can trespass *quare* be sustained by one co-tenant against another?

Is it not therefore immaterial whether the Judge of Probate had or had not jurisdiction?

Appleton. — So far as relates to this particular suit, your Honor must be correct. For ulterior purposes, however, it is desirable that we have a decision upon the validity of the probate proceedings. And we respectfully contend that the Judge of Probate had jurisdiction, and that his decree is conclusive, and, if not appealed from or reversed, cannot be questioned in a collateral suit, unless fraud is clearly shown, or unless there is a defect apparent on the face of the proceedings. *McNeil* v. *Bright*, 4 Mass. 303; *Commonwealth* v. *Pejepscot Proprietors*, 7 Mass. 430; *Fish* v. *Homer*, 1 Pick. 435; *Loring* v. *Steineman*, 1 Met. 204; *Pierce* v. *Irish*, 31 Maine, 254; *Paine* v. *Stone*, 10 Pick. 76.

D. Goodenow and *J. S. Kimball,* for the plaintiff.

I. The will does not give Keziah Rowe an interest in the real estate, after her sons arrive at the age of 21 years.

The first clause gives her all the profits till the sons are 21. The language is "I give and bequeath," &c. The sons are not to have the real estate, till they become of age.

This no doubt gives her the control of the real estate, till that time.

Then circumstances change, and the language of the will changes with them.

Thus, if she shall remain a widow, she shall receive for her support one third of the net profits.

Receive of whom? Of her sons, or of the executor, or of the land?

It comes within the opinion of HALL, C. J., in *South* v. *Alleine,* 1 Salk. 228, which is the better opinion. That was a devise of the rents and profits for life.

Why was a different language used?

She shall receive, instead of, I give or bequeath to her net profits, instead of profits?

The case of *Reed* v. *Reed,* 9 Mass. 372, was a devise of the income for life.

Baker v. *Dodge,* 2 Pick. 619, was a devise, upon condition.

The case of *Andrews* v. *Boyd,* 5 Greenl. 199, was a devise of certain portions of the buildings. And the estate was "to be held for the payment and fulfillment of every article above mentioned."

We submit then that the widow, at the bringing of this suit, had no interest in the land. *Lord* v. *Lord,* 3 Fairf. 88; 1 Saund. 181; *Andrews* v. *Boyd,* 5 Greenl. 199; 3 Comyn's Digest, Devise, I; *Baker* v. *Dodge,* 2 Pick. 619.

II. The Judge of Probate had no jurisdiction to set off the land to the defendant.

1. It was not real estate subject to partition.

2. It does not appear, that the estate was being settled in the Probate Court.

3. Her share or right was in dispute, and the question

should be settled at common law. The Judge of Probate is not to settle the meaning of a controverted will. R. S. c. 108, § 3; *Small* v. *Small*, 4 Greenl. 220.

The proceedings of the Probate Court were therefore merely void. *Smith* v. *Rice*, 11 Mass. 507.

SHEPLEY, C. J. — The first question presented for decision is, whether John Rowe by his will devised to Keziah Rowe one third part of his estate for life. It is not denied, that by the codicil an estate was devised to her during the minority of her sons, while it is insisted for the plaintiff, that her estate then terminated, and that she was to receive for her support one third part of the net profits in the nature of a legacy to be paid by her sons, who were then to become the owners of the whole estate.

The effect of a devise of the "occupation and profits" of land, when there was no devise in terms of the land, became early a subject of judicial consideration, and the decision was, that it was in substance a devise of the land. *Paramour* v. *Yardly*, Plow. 540. And a devise of "half the issues and profits" of the land was decided to be a devise of half of the land. "For to have the issues and profits and to have the land is all one." *Parker* v. *Plummer*, Cro. Eliz. 190. The rule established by these cases has continued to be the settled rule of construction; and any terms equivalent to these have been regarded as a devise of the estate for such time as the issues, incomes, rents or profits were devised.

While this general rule is admitted, it is insisted, that the language used in the codicil exhibits a different intention.

The language used is "she shall receive for her support one third part of the net profits of the aforesaid bequeathed estate so long as she shall remain such widow and no longer."

The words "she shall receive" having been used to confer a right are equivalent to a declaration, that she shall be entitled to receive. The use of the word receive does not therefore authorize an inference, that she was to receive the profits from her sons and not from the estate. It is said that its use

in connection with the words "net profits" exhibits an intention, that she should receive from her sons one third of the profits after all charges for repairs, taxes and expenses, had been deducted. This assumes, that it must have been his intention to subject her and them to the inconvenience, and to the constant danger of litigation, to determine yearly, what the net profits of the estate were or would be. It is more reasonable to conclude, that the word "net" was used to guard against a claim on her part to have one third of the income without being subjected to the payment of one third of the taxes and repairs. It is quite probable, that the testator did not contemplate a division of the estate; and that he expected, that the mother and her sons would manage the estate together; and the use of the word net would then be appropriate to determine more exactly the extent of her rights; and it might be useful to make it certain, that she was to be chargeable with one third part of the taxes and repairs.

In the case of *Parker* v. *Plummer*, the devise was of half the issues and profits to the wife during life, "bearing and allowing half the charges thereof." It was therefore in effect a devise of the net issues and profits. The words "bearing and allowing half the charges thereof" communicate the idea, that the charges were not by the testator expected to be made upon each half separately, but upon the estate as a whole; and yet they did not prevent the conclusion, that she took an estate for life.

But the effect in such a devise of the phrase "net income," has been determined by the case of *Andrews* v. *Boyd*, 5 Greenl. 199. It was in that case said "the income of an estate means nothing more, than the profit which it will yield, after deducting the charges of management; and the devise of one third of the net income of it, was decided to be a devise of one third of the land.

By "net profits" the testator in this case could have meant only the profits accruing to the widow after the taxes and expenditures for repairs had been paid out of what would be ob-

tained from the estate. If she took an estate in one third part of the land there would be a charge upon it, and she would obtain no more or less from it, than the testator intended that she should.

To decide, that one third of the estate was devised to her, is to give effect, so far as it respects the amount to be taken from the owners of the other two thirds to be appropriated to her support, to the exact intentions of the testator, and to do it in the mode best suited to promote the harmony and comfort and least troublesome and expensive to all interested in the estate, and to afford the most perfect security to the devisee of the profits. This more perfect security of the profits to the devisee of them has ever been considered as one of the strongest reasons for the establishment and continuance of the rule.

The first question must be answered affirmatively.

It remains to be considered, whether the Court of Probate was authorized to cause one third part of the estate to be assigned to her.

It is provided by statute, c. 108, § 1, that the Court of Probate in which the estate of any deceased person is settled, or in course of settlement, may make partition of all his real estate lying within this State, among his heirs or devisees under the restrictions contained in this chapter. This power is sufficiently extensive to include a case like the present, if no restriction be in the subsequent sections. The exercise of the power is not limited to any particular time or number of years after the estate is settled. The provisions of the second section show, that the estate might be expected to be divided in certain cases long after the decease of a testator and the settlement of his estate; for a partition of a remainder or reversion is authorized after the termination of a life or particular estate created by devise.

The restrictions contained in the third section did not deprive the Court of Probate of jurisdiction in this case. The shares or proportions of the respective parties do not appear to have been in dispute. If the widow was entitled to any

share, there could be no doubt, that she was entitled to one third, and that the two thirds were owned by others.

The jurisdiction is not restricted, because the share or proportion was "uncertain, depending upon the construction or effect of any devise, unless it shall appear to the Judge to be uncertain." If he should exercise jurisdiction in a case, in which the proportion did not appear to him to be uncertain, and his opinion should be erroneous, the aggrieved party would have a perfect remedy by an appeal from his decision or decree.

This question must also be answered affirmatively, that the proceedings are valid.

TENNEY, WELLS, HOWARD and APPLETON, J. J., concurred.

WALDRON *& al. versus* PORTLAND, SACO & PORTSMOUTH RAIL ROAD COMPANY.

To support trespass for an injury done by a party in the exercise of his lawful rights, it must appear that no neglect or want of care on the part of the plaintiff cooperated in producing the injury.

In such a suit, it is for the plaintiff to show the exercise of ordinary care on his part, and the omission of some duty or the commission of some wrong on the part of the defendant by which the injury was produced.

If the injury be such as must have occurred wholly from the carelessness of one of the parties only, the plaintiff must show that it was on the part of the defendant.

ON FACTS AGREED.

TRESPASS for a cow, alleged to have been killed by the rail road engine.

The defendants' rail road was laid through the plaintiffs' land, with a reservation of a road, crossing on grade with cattle guards.

The defendants built the cattle guards on each side of the plaintiffs' crossing road, and erected good and sufficient fences on each side of the rail road through the plaintiffs' lands, with guard fences extending to the cattle guards. The defendants also built and kept in repair bars across the plaintiffs'

road on each side of the railway, and their road-master and other employees had been accustomed, whenever they saw the bars down, to put them up in their place.

The plaintiffs' land on both sides of the rail road was occupied for pasturing. The part of the pasture on the east side of the rail road had no watering place, and they were accustomed to put their cattle into the eastern part of the pasture a part of the day, and then let down the bars, and turn their cattle across the rail road from the eastern to the western part of the pasture for the purpose of watering.

As the train was passing at about 9. o'clock in the morning of June 22, 1847, the engine struck the plaintiffs' cow as she was crossing the track in the plaintiffs' reserved road from the east to the west part of the pasture and caused her death. At that place, by reason of a projecting ledge, the cow could not be seen on the track by the engine man, in season to reverse the engine and avoid collision.

At the time of the accident, there were three bars on the eastern side, the lower bar in its place, and the other two with one end on the ground. On the western side there were only two bars, both lying on the ground.

One witness would testify, that he had been across there twice in April and May and found the bars down.

The fence and bars at that place were built with four boards of 6 or 8 inches in width, and of the proper legal height; and three bars might have been put up, upon the eastern side, so as to prevent the cow from passing through.

There is no evidence in the case to show which side of the rail road the cow was turned into, on the day she was killed.

If, upon the foregoing statement of facts, the Court shall be of opinion that the action can be maintained, judgment is to be rendered for the plaintiffs, otherwise for the defendants.

Leland, for the plaintiffs.

Eastman and *Hobbs*, for the defendants.

APPLETON, J. — To entitle the plaintiffs to recover they

must prove that the loss they have sustained, occurred without fault on their part and in consequence of the neglect of the defendants. *The Tonawanda Rail Road Company* v. *Munger*, 5 Denio, 255; *Moore* v. *Abbott*, 33 Maine, 46. The plaintiffs, though guilty of neglect or want of care, may recover if such neglect or want of care was not an efficient and coöperating cause in producing the injury. *Kennard* v. *Burton*, 25 Maine, 39. "If," says BRONSON, J. in *Rathbun* v. *Payne*, 19 Wend. 399, "both parties were equally in the wrong, neither can maintain an action against the other. Indeed it has been said that a plaintiff suing for negligence must be wholly without fault." The exercise of ordinary care on the part of the plaintiffs, and the omission of some duty or the commission of some wrongful act on the part of the defendants, must concur to entitle the plaintiffs to recover.

The facts as agreed upon seem to exonerate the defendants for all negligence or want of care at the time of the loss, which is the subject of this suit. The plaintiffs' cow was crossing their reserved road and could not be seen by the engine man in season to reverse the engine for the purpose of avoiding collision, and it does not appear nor is it alleged that the cars were moving with undue speed or that there was the neglect of any needful precaution on the part of the defendants.

The defendants, if responsible, can be charged only in consequence of the non-performance of some previous duty obligatory upon them either by the provisions of some statute or of the common law. The neglect, if any, which must entitle the plaintiff to recover, consists in not keeping up the bars of the plaintiffs' reserved road at the points where it crosses the rail road. This must be affirmatively shown to have been the neglect of the defendants.

The guards and guard fences of the reserved road were suitable and in good repair, but the bars across the plaintiffs' reserved road were down on each side of the railway, so as to afford no obstruction to the free passage of animals. But for this the loss would never have arisen. When this careless-

ness occurred and who should be held responsible for it, does not appear from the evidence as reported. The plaintiffs may reasonably be presumed to know at what hours the defendants' train passes and they should exercise ordinary prudence in selecting the time when they will drive their cattle over. If the plaintiffs or their servants took down the bars at the time the cars were about to pass and chose to leave them down for his cow to pass, without any care on their part, they must be considered as voluntarily assuming the risk thus incurred. If at some previous time they had left them down for the more convenient passage for their horses and cattle to and fro over the brief space occupied by their reserved road, they must abide the consequences. The reservation was for their benefit and in its enjoyment, they should not expose to danger the lives or the property of others. The evidence wholly fails to show whether the plaintiffs have or have not exercised ordinary care.

As the evidence does not show how long the bars had been left down, nor when, nor by whom, we cannot say that the defendants have been guilty of any negligence, for we know neither what they have done nor what they have omitted to do.

The case finds that the company had built and kept in repair bars across the plaintiffs' road, on each side of the rail road, and that the road master and those in the employ of the defendants, had been accustomed, whenever they saw the bars down, to put them up in their place. From these facts the plaintiffs ask the Court to infer the existence of a contract by which the defendants have agreed at all times to put up the bars when found down. If the contract had been proved, it does no appear that the defendants or their servants were aware of their position or that from the length of time they had remained down, they were in fault for not knowing their situation and replacing them. But while a corporation may enter into engagements more or less onerous, their existence must be established by satisfactory proof. The evidence adduced wholly fails to satisfy us that any engagements of the nature supposed have been entered into. As remarked by

SHAW, C. J., in *Bradley* v. *The Boston & Maine Rail Road*, 2 Cush. 537, "the defendants may have done what they did for the better security of their own trains, or for the safety of their conductors and passengers."

It was held to be the duty of the rail road company in *Quimby* v. *Vermont R. R. Co.* 23 Verm. 393, to erect and maintain such fences and cattle guards upon the road as will prevent horses and other animals from passing them. The statute of 1842, c. 9, § 6, requires every rail road corporation to erect and maintain substantial, legal and sufficient fences on each side of the land taken by them for their rail road, when the same passes through enclosed or improved lands. This duty, as between the corporation and their passengers, exists in full force at all times. If it be the duty of the defendants to maintain and replace the bars, when those for whose use a way is reserved, have taken them down, still it must coëxist with the preservation of the entire rights of those for whom the reservation is made. Those who have an easement over the track of a rail road as well as the corporation, if they have rights to assert, have likewise duties to perform. While the plaintiffs may at any time take down the bars of their reserved way, it would be absurd to require the defendants to have a servant at all times ready to replace them. The plaintiffs must exercise their rights with a due regard to those of the defendants. *Trow* v. *Vermont Central R. R.*, 6 Law Rep. N. S. 83; *March* v. *N. Y. & E. R. R.* 14 Barb. 364.

As the evidence leaves it entirely uncertain whether the injury was occasioned by the fault of the plaintiffs or the negligence of the defendants, the action cannot be maintained.

Plaintiffs nonsuit.

SHEPLEY, C. J., and TENNEY and HOWARD, J. J., concurred.

JOHNSON *& al. versus* STILLINGS.

By the statute of 1847, (amendatory of the Act of 1844, to secure to married women their rights in property,) a subsequent conveyance of land by a husband directly to his wife is made effectual to pass the title, unless the creditors of the husband may be thereby defrauded.

ON FACTS AGREED.

WRIT OF ENTRY.

The land demanded was the property of Mark Lord and Betsey Lord, his wife, under a conveyance made to them jointly in April, 1848, and was paid for out of the avails of land sold, which belonged to the said Betsey and to said Mark in her right. In June, 1848, the husband, by a deed of quitclaim in common form, conveyed to the wife all his rights in the land, to hold to her, her heirs and assigns. The wife died on June 9, 1852, and the husband died on the 10th of the same June. Mark Lord left no children, and the property is not needed for the payment of his debts. This suit is brought by the collateral heirs of said *Betsey* to recover the land against the collateral heir of said *Mark*.

Goodenow, for the demandant.

Clifford, for the tenant.

1. Husband and wife are regarded as one person in law, and where land is conveyed to them, they are not seized of moiteies, but of the entirety of the estate; and the survivor takes the whole. *Harding* v. *Springer*, 14 Maine, 407; *Shaw* v. *Hearsey*, 5 Mass. 521; 2 Kent's Com. 132; *Fox* v. *Fletcher*, 8 Mass. 27; *Barnum* v. *Abbot & al.* 12 Mass. 474; *Motley* v. *Whitemore*, 2 Dev. & But. 537, (N. C.;) *Jackman* v. *Stevens*, 16 Johns. 110; 2 Black. Com. 183; Co. Litt. 187; *Doe* v. *Howland*, 8 Cow. 277; *Brownson* v. *Hall*, 16 Ver. 309; *Jackson* v. *McConnell*, 19 Wend. 175; *Fairchild* v. *Chastelloux*, 1 Penn. 176; *Needham* v. *Branson*, 5 Ire. 426; *Taul* v. *Campbell*, 7 Yerg. 319; *Gibson* v. *Zimmerman*, 12 Miss. 385.

2. A deed made directly by husband to his wife is void. *Martin* v. *Martin*, 1 Maine, 394; *Osgood* v. *Breed*, 12 Mass.

525; *Adams* v. *Kellogg*, Kerby, (Conn.) 195; *Marston* v. *Norton*, 5 N. H. 205; *Herrington* v. *Herrington*, Walker, 322; *Abbot* v. *Hurd*, 7 Blackf. 510.

3. Statutes enacted in derogation of the common law are to be construed strictly. *Melody* v. *Reab*, 4 Mass. 473; *Gibson* v. *Jenney*, 15 Mass. 206. It is said by PUTNAM, J. in *Commonwealth* v. *Knapp*, that "it is an established rule that a statute is not to be construed so as to repeal the common law, unless the intent to alter it is clearly expressed.

4. Thus far, the course of judicial decisions in this State upon this subject indicates a pretty close observance of this rule. *Trask* v. *Patterson*, 29 Maine, 499; *McLellan* v. *Nelson*, 27 Maine, 129; *Greenleaf* v. *Hill*, 31 Maine, 562.

5. The statute of 1847 does not so far change the common law as to give any effect to a deed directly from husband to his wife. *Swift* v. *Luce*, 27 Maine, 285.

WELLS, J. — The demanded premises were conveyed to Mark Lord and his wife in April, 1848. The husband survived the wife, but on the eighth day of June, 1848, he conveyed the premises to her by a deed duly executed. The demandants are the heirs at law of the wife, and if the conveyance to her is valid, they are entitled to recover.

By the common law, the legal union of the husband and wife made them one person, and hence they could not contract with each other. *Martin* v. *Martin*, 1 Greenl. 394.

By the Act of August 2, 1847, c. 27, § 1, it is provided that "any married woman may become seized or 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, exempt from the debts or contracts of the husband."

If there had been no further provision, it might have been fairly inferred, that the Act did not contemplate the acquisition of property by the wife directly from the husband. But in the second section of the Act there is a further provision, that "the said first section shall be subject to the proviso, that if it shall appear that the property so possessed, being pur-

chased after marriage, was purchased with the moneys or other property of the husband, or that the same being the property of the husband, was conveyed by him to the wife directly or indirectly, without adequate consideration and so that the creditors of the husband might thereby be defrauded, the same shall be held for the payment of the prior contracted debts of the husband."

The whole Act must be taken together to ascertain its meaning. The second section regards a conveyance under the Act as made by the husband directly to the wife, by virtue of the first section. It recognizes such a direct conveyance as one that may exist under the power previously conferred, and in case of fraud, loads the property transferred with the prior debts of the husband. By providing what should be done in case the husband should convey directly to the wife "without adequate consideration and so that the creditors of the husband might thereby be defrauded," the sense of the statute very clearly indicates, that a married woman may become seized or possessed of property directly from her husband.

Before the existence of the statute, the husband could convey to trustees for the use of his wife, or to a third person, who might convey to the wife, and the Legislature must have intended to allow that directly to be done, which might have been done indirectly.

The demandants are entitled to recover, and a default must be entered.

SHEPLEY, C. J., and TENNEY, HOWARD and APPLETON, J. J., concurred.

CLEAVES *versus* JORDAN.

Each chapter of the Revised Statutes is itself a statute.

Thus, the chapter 30, entitled "Of Pounds and Impounding Beasts," is a statute, and may, in penal suits, be referred to as a statute of the State.

In a penal suit upon that statute, an allegation that the act complained of was committed contrary to an Act of the State entitled, "Of Pounds and Impounding Beasts," is equivalent to an allegation that the act was committed contrary to the form of the statute.

On Demurrer.

Debt, to recover a penalty, not less than five nor more than twenty dollars, for rescuing swine taken up to be impounded. The declaration alleges that the swine were going at large without a keeper, "contrary to an Act of the State entitled, Of Pounds and Impounding Beasts," and that the rescue was "contrary to the Act aforesaid."

The defendant filed a general demurrer, to which there was a joinder.

Shepley and *Hayes*, in support of the demurrer.

The act complained of was not an offence at common law. At the common law, *pound breach* was an offence; but as to cattle, *taken upon the highway*, it was lawful to *rescue* them, before they were impounded, even on their way to the pound. 3 Black. Com. 12, Portland Ed. of 1807.

The swine were not *distrained*, but were taken up for the purpose of obtaining a penalty. Such a proceeding was unknown to the common law.

1. The plaintiff's declaration is defective in substance, in not alleging that the acts of the defendant, which are the foundation of this suit, were committed "contrary to the form of the statute in such case made and provided."

The 38th § of c. 172, of the R. S. has rendered this allegation unnecessary in *indictments and complaints;* but the rule, which has so long made it essential *in penal actions* founded on statutes, has never been abrogated or modified by statute or relaxed by the Courts.

In *Heald* v. *Weston*, 2 Greenl. 348, a judgment was reversed, because there was no allegation in the original writ, that the offence was committed "against the form of the statute in such case made and provided."

In *Barter* v. *Martin*, 5 Greenl. 76, it seems to be doubted whether in an action upon a statute, the omission of the words *contra formam statuti*, can be supplied by other words of equivalent import. In that case the Court also say that "the use of this phrase has in so many cases been held to be *mat-*

ter of substance, that it seems to be too late to question their authority.

The same rule is also recognized in *Palmer* v. *York Bank*, 18 Maine, 166.

In *Hobbs* v. *Staples*, 19 Maine, 219, it was held that the judgment in an action for a penalty given by statute is erroneous, if it do not state the offence to have been committed against the former statute.

In *Nichols* v. *Squire*, 5 Pick. 168, it was held that a declaration upon a penal statute alleging, that *by force of the statute* an action had accrued, but not alleging that the offence had been committed *contra formam statuti*, is insufficient. In that case, the Court remark, that "as all penal actions partake of the nature of a criminal prosecution for an offence, it may be good policy to require strictness in the proceedings."

In *Haskell* v. *Moody*, 9 Pick. 162, it was held that in penal actions the declaration must conclude with *contra formam statuti*, or something equivalent, and that it is not sufficient to say "an action hath accrued to the plaintiff by force of laws and Acts aforesaid."

The same rule is reiterated in *Reed* v. *Northfield*, 13 Pick. 99.

Indeed, this rule is too well established to need further citation.

We submit, then, that the words used in the declaration were not equivalent to the words "*contra formam statuti*," and that therefore the declaration is bad.

2. The declaration *does* contain the words "contrary to an Act of the State, entitled of Pounds and Impounding Cattle." And it is rendered bad, because it *does* contain them. The words of themselves constitute a defect in substance, in the declaration, because no such Act has ever existed in this State as an Act entitled "of Pounds and Impounding Beasts."

The volume, known as the Revised Statutes of Maine, contains an Act for revising the public laws of the State; — an Act to amend the Revised Statutes; — an Act passed at

the extra session in 1840; — several Acts passed in the year 1841; — and the general repealing Act; but it contains no Act entitled "of Pounds and Impounding Beasts."

The Act of revision is entitled, "an Act for revising, arranging and amending the public laws of the State." This Act includes twelve titles with 178 distinct chapters; and these twelve titles, with their subdivisions of 178 chapters, compose together *but one Act, entitled* "an *Act* for revising, arranging and amending the public laws of the State."

The distinct chapters of this Act are not themselves Acts, any more than are the distinct sections of a public law.

At the commencement of this suit, there was no Act, entitled "Of Pounds and Impounding of Beasts," and its allegation is that the act of the defendant was contrary to an Act which never existed. The action therefore seeks to recover a penalty by force of a statute nihility.

Emery and *Loring*, for the plaintiff.

WELLS, J. — It is contended on the part of the defendant, that the declaration is bad, because it is not alleged, that the offence was committed against the form of the statute. The allegation, after describing the offence, is, "contrary to an Act of the State, entitled Of Pounds and Impounding Beasts."

The statute c. 172, § 38, relates to indictments and complaints, and does not include penal actions. They were probably omitted from inadvertence, for it can hardly be supposed that the Legislature intended to require less strictness in criminal than in civil proceedings.

In the case of *Lee* v. *Clark*, 2 East, 333, it is said by LAWRENCE, J., that the reason why the count should conclude *contra formam statuti* is, "that every offence for which a party is indicted is supposed to be prosecuted as an offence at common law, unless the prosecutor, by reference to a statute, shows he means to proceed upon it, and without such express reference, if it be no offence at common law, the Court will not look to see if it be an offence by statute." And it is further said in the same case, as the ultimate opinion of the Court, "that in

all cases, where the action is founded on a statute, it is necessary in some manner to show that the offence on which you proceed is an offence against the statute."

But no exact and precise form of words could be necessary; any language, which clearly communicates the idea, would be a compliance with the rule. Hence it is said by STORY, J. in the case of the *United States* v. *Smith*, 2 Mason, 150, "all that is required is, that some phrase should be used, which shows that the offence charged is founded on some statute." *Commonwealth* v. *Stockbridge*, 11 Mass. 279.

The language of the plaintiff's declaration very clearly indicates, that the action is founded on a statute, and for an offence committed in violation of it.

It is contended by the defendant's counsel, that "chapter 30, of Pounds and Impounding Beasts" cannot be called an Act, but only a chapter of an Act, by which the statutes were revised. But although in the arrangement of the statutes, it is called a chapter, still it is an Act of the State. Each chapter is a statute or Act upon the subject to which it relates.

The demurrer must be overruled and the declaration adjudged good.

SHEPLEY, C. J., and TENNEY, HOWARD and APPLETON, J. J., concurred.

BLAKE *versus* JUNKINS.

In a bastardy process, in order to entitle the complainant to be a witness for herself, it must be proved by other evidence that, *at the time of her travail*, she accused the respondent as the father of the child.

Such an accusation is too late, if not made until the child has been expelled from the body of the mother, though made before the connecting cord is severed and before the child has breathed.

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

BASTARDY PROCESS. The complainant had, in due form, charged the respondent as the father of her child.

At the trial, in order to show, that she was competent to be a witness, another witness was introduced, who testified,

that she was with the complainant during all the time of her travail, that nothing was said of the paternity of the child, until it had been expelled from the body of the mother; that after it was expelled, and before the cord connecting it with the mother had been severed, and, as the witness thinks, before the child had breathed, some person said "now they will say the child is not Junkins'." To which the complainant immediately replied, — "I take God to be my witness, it is his and no one's else."

The Judge considered that the accusation was not "made at the time of the travail," and excluded the complainant as a witness.

If that exclusion was proper, a nonsuit is to be entered.

Tapley, for the complainant.

Eastman & Leland, for the respondent.

APPLETON, J. — The right on the part of a complainant in a bastardy process to testify in her own cause is derived entirely from R. S. c. 131, and unless a compliance with its provisions is clearly shown, she cannot be a witness. The eighth section among other things provides that if "at the time of her travail" she shall "accuse the same man with being the father of the child, of which she is about to be delivered," &c. "she shall be a witness in the trial of the cause, unless she would be an incompetent witness in the trial of any other cause, by reason of conviction of some crime." In this case after the child had been expelled from the womb of the mother but before the connection between them had been severed, certain inquiries were made of and answers given by the mother in relation to the paternity of the child. The answers then given were offered in evidence and were excluded. The accusation of the putative father must be made by the mother at the time of her travail with the child "of which she is about to be delivered." Now were the answers given when the mother was about to be delivered of her child? In ordinary language or in the most strictly scientific use of terms, could the mother be said to be about to be delivered of a child, after that child had left the womb?

The word delivery was used in its ordinary and accustomed acceptation. The best writers on medical jurisprudence as well as the decisions of our Courts concur in this, that after the child has passed from the body of the mother a delivery of the child has taken place. The language of the R. S. is similar to that of the bastardy Act of 1821 and the judicial construction given the latter must be considered as affirmed by the legislative reënactment of its provisions. *Dennett* v. *Kneeland*, 6 Green. 460; *Bacon* v. *Harrington*, 5 Pick. 63. The cases are decisive of the question raised in this cause. The testimony offered was rightly excluded.

Nonsuit ordered.

SHEPLEY, C. J., and TENNEY, WELLS and HOWARD, J. J., concurred.

WHITTEN *versus* HANSON.

Land, held in co-tenancy and lying between known monuments, was divided into lots upon a plan, which exhibited the width of each lot; and an assignment of the lots among the co-tenants, was made according to the plan.

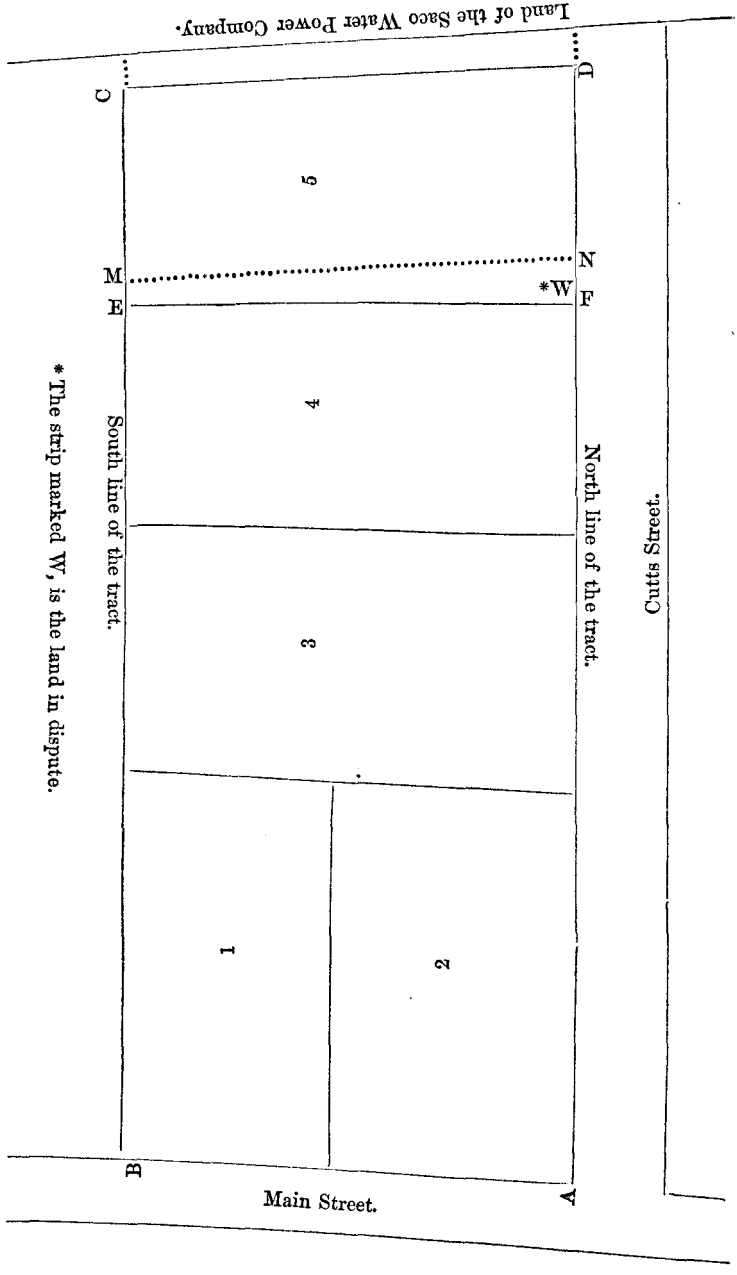
The plan however was erroneous, the distance between the exterior sides being greater than it represented. *Held*, that the surplus was to be divided among the several lots, in proportion to the respective widths.

ON FACTS AGREED.

WRIT OF ENTRY.

The tract A B C D was owned by the demandant and his co-tenants. On its North side, it extended from Maine street along Cutts street 298 feet to land now belonging to the Saco Water Power Company. On its South side, it extended from Maine street $279\frac{4}{10}$ feet to land of said company.

Intending to make an amicable partition among themselves, the co-tenants carried their title deed to one Thos. Quimby, and requested him, from examining the deed to make a plan of the land. He made no survey of the land, but drew a plan, as exhibited by the black lines on the annexed diagram, extending the North line $289\frac{38}{100}$ fect and the South line, $272\frac{4}{10}$ feet from Maine street, and laid down therein the lots No. 1, 2, 3, 4 and 5.


Land of the Saco Water Power Company.
C
D
5
M
N
*W
E
F
4
South line of the tract.
North line of the tract.
Cutts Street.
3
1
2
B
A
Main Street.
* The strip marked W, is the land in dispute.

The co-tenants made a division according to the plan, and lots No. 4 and 5 were assigned and released to this demandant, who afterwards conveyed lot No. 5, according to the plan. Under that conveyance the tenant now holds the lot, having gone into the occupation of it and erected a fence on its Eastern line, E. F., according to the plan.

A recent survey shows *that* there was an error in Quimby's plan; — *that* the North side of the tract between Main street and the land of the Water Power Company, instead of being $289\frac{38}{100}$ feet, as exhibited on the plan, is in fact 298 feet; and its Southern side, instead of being $272\frac{4}{10}$ feet, as exhibited on the plan, is in fact $279\frac{4}{10}$ feet; thus leaving on the North side, $8\frac{62}{100}$ feet and on the South side 7 feet more than was computed for the aggregate of the five lots.

The demandant claims to press the tenant's lot up to the true line of the Water Power Company, letting lots 1, 2, 3, 4 and 5 be enlarged, each one in proportion to its width, thus apportioning the surplus among them all. Upon this basis, the demandant claims from the tenant the narrow strip E, M, N, F.

J. Shepley and *Hayes*, argued for the demandant, and cited *Moody* v. *Nichols*, 16 Maine, 23; *Brown* v. *Gay*, 3 Greenl. 126; *Wyatt* v. *Savage*, 2 Fairf. 429; *Lincoln* v. *Edgecomb*, 28 Maine, 275; *Mosher* v. *Berry*, 30 Maine, 90, and cases there cited.

J. M. Goodwin, argued for the tenant, and cited *Davis* v. *Rainsford*, 17 Mass. 210; *Blaney* v. *Rice*, 20 Pick. 62; *Magoun* v. *Lapham*, 21 Pick. 137; *Thomas* v. *Patten*, 13 Maine, 329; *Kennebec Purchase* v. *Tiffany*, 1 Greenl. 219.

Wells, J. — The demandant, Thomas H. Cole and Stephen W. Dearborn were owners, as tenants in common, of the Cutts lot. For the purpose of making a division of the lot, they employed Thomas Quimby to make a plan of it. He made a plan without viewing the land, and without any actual survey or admeasurement. A division was made between the owners corresponding to the plan, to which reference is made in the deeds of partition. Lots numbered four and five upon the plan were conveyed to the demandant, who conveyed

number five, "meaning to describe number five on a plan of the Cutts lot," to William H. Hanson, and the tenant has the title of William H. Hanson. The question between the parties relates to the dividing line of lots four and five. Those lots are laid down upon the plan as of the same width, and contiguous to each other.

By an accurate admeasurement, as appears by the plan of Eliphalet Nott, of the tier of lots lying on the southerly side of Cutts street, there is an error in Quimby's plan. The northerly line of the tier is eight feet and $\frac{62}{100}$, and the southerly line is seven feet, longer than these lines are stated to be on Quimby's plan. There are no monuments to mark the boundaries between the lots, while the exterior boundaries were certain and fixed. As it was not the intention to leave any surplus, but to divide the whole land, the case falls within the principle of *Brown* v. *Gay*, 8 Greenl. 126, and *Mosher* v. *Berry*, 30 Maine, 83. There is nothing to prevent the application of this rule to the several lots, and each one will be entitled to its share of the surplus in proportion to its length of line from Maine street to the land of the Water Power Company.

If the line of the lots is run from Main street so as to include number four, and that of number five is run from the land of the Water Power Company, upon which it is bounded by the deed of the demandant, then the two lots four and five would not meet, as they should do by the plan, and as was clearly intended by the parties.

Quimby did not run or mark any lines upon the earth, but the plan represents the five lots as embracing all the land on the south of Cutts street, and as adjoining each other. And the division, which was intended to be made, cannot be carried into effect without giving to each lot its due proportion of the surplus. *Tenant defaulted.*

Shepley, C. J., and Tenney, Howard and Appleton, J. J., concurred.

Cole and Wife, *in equity, versus* Littlefield.

A testator gave to his wife certain property for her own separate use; also his homestead farm, for her natural life, "as a home for herself and their children," also the income of all his estates, to be paid to her, as she should require, for her support and the support and education of their minor children, with a further direction that if there should be a surplus of income for any year, after supplying the wants of his wife, it should be invested by his trustee as a fund, from which to make up the deficiency of income of any subsequent year, and the residue of the fund to be distributed among the children after coming of age; —

Held, that it is for the wife to adjudge how much of the income is requisite for the support of herself and children, and that the trustee is bound to pay to her the whole income if she request it; —

Held, also, that she is to hold such income *in trust*, and that the guardian of the children may, by application to the equitable jurisdiction of the Court prevent any waste or misapplication by her.

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

Bill in Equity.

The female plaintiff was the wife of Eliab Littlefield, under whose will her claims, as presented in this bill, are alleged to have arisen. The testator, after giving to her "all his household furniture for her own use;" "also his homestead farm, to hold for her natural life, as a home for herself and their children," proceeds as follows: —

"Also after paying my just debts and other charges, the entire income of my whole estate, to be appropriated to the use of my beloved wife, for her own and our children's support, said children to receive a liberal English education, and to be supported in every way in a liberal but economical manner."

He then appointed this respondent to be the guardian of his children, and the trustee of his estate, "to pay over to his said wife said income from said estate as she requires, her receipt being his voucher." At the end of each year, should there be a surplus of funds, after supplying the wants of his wife, said surplus to be invested; and should, in any year, the income from his estate be insufficient to defray the expense of his family, the trustee is to draw on the surplus fund to make up the deficiency.

The testator then proceeded, "As each of my children arrives at the age of twenty-one years, should the surplus fund aforesaid accumulate, the trustee is to pay over to said child his equal proportion of what has accumulated of this fund; said child also to be entitled to his proportion of any accumulation which may take place after the receipt of his proportion. Should either of the children be removed by death, his or her proportion to be divided equally among the survivors. A division of this fund among the children shall be made annually after the youngest child becomes of age.

"The whole of my said property which is not hereby given absolutely to my wife, is to be held by said trustee in trust for my said wife and children until they shall be entitled to receive the same absolutely, under the terms of the will."

The testator then, after making to each of his children some large legacies and devises, proceeds as follows: —

"In case of the decease of either of said children before they come into possession, should they die without issue, his or her portion to be divided among the survivors. But should they have issue, said portion to go to his or her children.

"All the residue of my property, to be ascertained as near as possible, after paying my debts, I give and bequeath unto my beloved wife, to hold to her absolutely.

"It is my will that each child after he becomes of age, and receives his first dividend of the surplus fund, shall receive annually his portion of any accumulation which may take place after."

The bill charges that the respondent took upon himself the trust, collected the incomes of the estate, amounting to about one thousand dollars annually, and that he refuses and neglects to pay the same to the complainant for the use of herself and children, as she required, or such part thereof as is necessary for her and their reasonable, liberal and economical support and maintenance, as required by the will, and particularly that she demanded the same of him on January 1, 1850, which he refused to pay.

The answer of the respondent asserts *that* he had annually

settled his account as trustee with the Judge of Probate; — and *that* he had at different times paid over to the complainant divers sums; and he exhibits to the Court the amounts of the income of each year; how much of it he had paid to the complainant annually, and that the balance had been from time to time invested to constitute the fund required by the will; and he avers *that* he has exercised his best discretion in the management of the estate and in the discharge of the trust, consulting equally the interest of all concerned, as he understands it; — *that* the sums which he has paid over to the said Susan B. have been, in his opinion and belief, ample for the support of her and her said children and for defraying the expenses of giving said children an opportunity to receive a liberal English education and to support them every way in a liberal, but economical manner, especially in connection with the benefit derived from the homestead, given by the will as a home for her and her said children; — *that* he has paid all the taxes and made all the necessary repairs on the homestead; — *that* by the terms of the will he was led to suppose that the testator, who was his brother, intended to confide to him a discretion, to be exercised according to his judgment as trustee, and he still remains of that opinion, and is so advised; — and *that*, if the opinion of the Court should be otherwise, and their judgment is substituted for his, and should differ from his, after hearing such evidence in the case as he proposes to offer, he will most cheerfully comply with their orders and directions in the premises, and will feel relieved from a portion of the responsibility, which he now supposes to rest upon him.

It was then agreed that the case should be decided upon the bill and answer.

The Judge decreed that the respondent should pay to the complainant the income of the estate in his hands, as she requires. To this decree, the respondent excepted.

N. D. Appleton, for the complainant.

1. By the will, the entire income of the testator's whole

estate is expressly given to the complainant, his widow, as a *legacy*. *Learned* v. *Bridge*, 17 Pick. 339.

2. The will provides for the payment of the legacy by the trustee. He is *to pay to her the income as she requires, her receipt being his voucher.* This would be a valid and substantial bequest to the wife independently of the express bequest before given. The testator uses the language of *command.*

The provision in the will, which allows the trustee to invest any surplus, is not inconsistent with the former clauses, as it depends upon the *condition* of there being a surplus, and harmonizes perfectly with the intention before expressed.

An express and positive bequest cannot be taken away by implication or inference. 2 Jarman on Wills, 525–6.

3. The complainant has a right to the whole income, to be applied according to *her own* discretion. *Her* judgment is to be the rule.

4. The testator intended to confide to his wife's discretion the trust of supporting and educating their children.

If the trustee was to be the judge of the expenditures necessary for her and the family, he must exercise a *reasonable* discretion, not an *arbitrary* or *capricious* one. To enable him to exercise such a discretion properly, she must keep an account of her expenditures, and make an exhibit to him. This the will no where contemplates.

If the testator had intended to give a discretion in this matter to the trustee, he would have expressed it. On the contrary he is to pay over as she *requires.* The word requires is here to be understood in its usual and ordinary sense, which is to *demand, to ask of right*, and by authority, and not to ask as *favor*, nor to *request.* In this last sense, it is said by Dr. Webster to be rarely used.

If she should fail to support and educate the children, and thereby to fulfill the trust, the Court might then interfere and compel the execution of that trust.

D. Goodenow, for the respondent.

The income is not bequeathed to the wife, as is the household furniture and the residuum. It is appropriated as a fund

to draw from; — 1. To support the wife. 2. The children. 3. To educate the children. 4. Surplus to the children, as each shall arrive at the age of 21, and is to be held by the trustee, in trust for said wife and children.

The trustee is responsible for a *faithful* execution of the trust, according to the will, and obliged to *pay over* at the expiration of the trust to *those* entitled to receive, and *all* that they are entitled to receive. R. S. c. 110, 111, Testamentary Trustees.

What is the meaning of the words "as she requires?"

We say "as she needs" for the objects specified.

In the case of testamentary trusts, the action of the Court is to be "subject to any provisions contained in the will;" and it is forbidden to "restrain the exercise of any powers, given by the terms of the will." *Morton* v. *Southgate*, 28 Maine, 41.

A fortiori, the Court should not take away the *power*, given by the will to the trustee *to create an income fund;* by a decree that the whole income shall be called out of his hands, and that too without the *necessity* contemplated by the testator.

The bill should allege what has been the *actual deficiency*, if *any* thing, and a demand for that amount, and not a general demand for the *whole income.*

Shepley, C. J. — The testator bequeathed to his wife, now the female plaintiff, all his household furniture, and the homestead wherein he dwelt, during her natural life, and the entire income of his whole estate. He appointed the defendant his trustee, and directed "the whole of my said property, which is not hereby given absolutely to my wife, is to be held by said trustee in trust for my said wife and children, until they shall be entitled to receive the same absolutely under the terms of this will." The will contains the following clause — "All the residue of my property to be ascertained as near as possible, after paying my debts, I give and bequeath unto my beloved wife absolutely."

The intention of the testator is thus clearly exhibited to

make a distinction between that which was given absolutely to his widow, and which was not to be held by the trustee, and that which was not so given, and which was to be held by the trustee. That it was not his intention to give the income absolutely to his widow is apparent, because he includes it among the property to be held by the trustee, and directs him to pay it over to her, to invest any surplus of it, and to divide such surplus among his children; and also because the income "is to be appropriated to the use of my beloved wife for her own and our children's support." The disposition to be made of any surplus income remaining yearly, after sufficient has been appropriated to support his wife and children, is inconsistent with a bequest of the whole income to the widow absolutely as her own property.

The trustee is directed to draw upon that surplus, if in any year the income should be insufficient to defray the expenses of the family. If the surplus fund should accumulate, the trustee is directed to pay to each of the testator's children, when of age, his equal proportion of it; and to divide the surplus annually among the children after the youngest becomes of age.

The construction insisted upon for the widow, that the whole annual income is bequeathed to her, as her own property absolutely, would be inconsistent with these provisions and subversive of these purposes of the testator.

If any surplus of income remain, and should be invested in accordance with the directions of the will, it would by this construction be her property, and her children, when of age, would not be entitled to it; and in case of her decease, her administrator could recover the whole surplus of the trustee and deprive the children of all benefit of it.

The bequest to her is however of the "entire income of my whole estate," and she is entitled to it in some character or capacity, which will not occasion a conflict between this and other provisions of the will.

No form of words or mode of expression is necessary to create a testamentary trust.

Words of request or desire, or words expressive of full confidence, that the devisee will do an act, or that the testator has no doubt that the devisee will dispose of the property, in a manner named, have been considered sufficient to charge the devisee with a trust. Fonbl. c. 2, § 4, note (H); *Wright* v. *Atkyns*, 1 Tur. & Russ. 143.

In the case of *Pushman* v. *Filliter*, 3 Ves. 7, the testator bequeathed to his wife all his personal estate "desiring her to provide for my daughter Anne out of the same," and the property was considered to be held in trust, so far as it respected the support of the daughter.

In this case the bequest was not only made "to be appropriated" "for her own and our children's support" but she is directed how to support and educate the children, and any surplus, that might remain after accomplishing these purposes, is to be invested by the trustee to be by him divided among the children.

The intentions of the testator can only be executed by regarding the income as bequeathed to the wife in trust, to be by her appropriated, so far as needed, to her own support and to the support and education of their children, leaving any surplus remaining as a bequest to the children. The rules of law fully authorize such a construction of the language, and the intentions of the testator may be fully executed by it.

It remains to consider, who is to determine the amount, which may be required or necessary for these purposes.

No authority is by the will conferred upon the trustee to do it. No discretion is confided to him respecting the support of the widow, or the support and education of the children. He is protected by the receipt of the widow, as his voucher, for the amount to be paid to her from the income. He is directed to pay over to the widow "the income from said estate as she requires." He could not be charged as trustee with any breach of trust, should he wholly neglect to attend to the expenditure of the income paid over to her for the purposes named. Admitting the word "requires" to have been used in the sense of needs, the support of herself and children, and

their education, being confided to her, she must judge of her own and of their necessities, and she is entitled to call upon the trustee to pay to her such portion of the income, as she may from time to time determine to be necessary for those purposes.

No court or tribunal is by the terms of the will authorized to interpose to determine the amount to be annually paid for those purposes. It might be essentially varied by the illness or health of herself or of the children. Nor is the widow by the will constituted the exclusive judge of the amount. She is simply placed in the position of a trustee.

Every trustee is accountable to a proper tribunal for a faithful execution of the trust. The widow in this case is not without responsibility, nor the children without an adequate remedy to correct or to prevent any extravagant expenditure, or waste, or misapplication of the income. If the guardian of the children, who are entitled to any surplus, has any just cause to conclude, that the widow is conducting unfaithfully in the execution of the trust, he may cause a bill to be filed in their names, and obtain an account of the manner in which the trust has been executed; and thus any abuse of the trust may be corrected or prevented by this Court, although it is not in this suit entitled to determine the amount to be annually paid to the widow.

The decree, to which exceptions have been taken, is not wholly free from objection. It requires the trustee to pay, upon the requisition of the widow, "the income of the estate in his hands." This might include not only the annual income but the whole of the surplus fund. The bill does not allege that any part of the income was improperly withheld from her before the first day of January, 1850. Whatever had been carried to the surplus fund before that time, must be considered as done without objection, and therefore not to be recalled except upon a requisition made by her on account of the income of some year proving to be insufficient. There is no allegation in the bill, that the whole income has proved in any year to be insufficient. She cannot therefore be entitled to claim from that fund any thing for their support or education during the past years.

A decree may be drawn and entered, that the former decree be reversed; and that the trustee pay to the female plaintiff such portion of the annual income received for the year 1849, and for the several years since that time to the first of January, 1853, as she may require.

As this suit appears to have been instituted to have the rights of the respective parties clearly ascertained, and as both parties are presented in the capacity of trustees, no costs are awarded to either, but the costs of both parties may be a proper charge upon the income.

TENNEY, HOWARD and APPLETON, J. J., concurred.

HARMON *& ux. versus* SALMON FALLS MANUFACTURING COMPANY.

In manufacturing establishments, it is competent for the employers to introduce prudential and effective regulations to be observed by the operatives employed.

To secure regularity and faithfulness on the part of such operatives, the regulations may, in themselves, provide for a forfeiture of wages, in case of willful non-compliance.

A person entering such an establishment, as an operative, with knowledge of such a provision in its regulations, is considered to have assented to it, though he have not signed it.

Such an assent constitutes a valid contract.

No suit at the common law, nor process in equity jurisprudence, can be maintained against the employer to recover for wages, forfeited under such a contract.

That such operative had knowledge of such a provision in the regulations, may be inferred from the employers having delivered to him a printed copy of them.

When the regulations, known to the operative, provided for a forfeiture of wages, in case of his leaving the service without having given previous notice, if he would rely upon having quit by the employer's consent, or upon having fulfilled the term, for which he had contracted to labor, the *onus probandi* is upon him.

ON FACTS AGREED.

ASSUMPSIT, brought by Franklin L. Harmon and Almeda, his wife, for labor performed by her before marriage. She

labored for the company 18 days. In that time she wove 53 pieces at 13 cents each, amounting to $7,41. "The company, in addition allowed her, as due to her, 10 cents for board, making in the whole, $7,51, due to said Almeda." To recover that sum this suit was brought, after a demand made.

She began to labor on Sept. 27, 1847. On that day, and before the labor commenced, the company, at their counting-room, delivered to her a printed paper containing, among others, the following: —

"General Regulations."

"Any person, intending to leave the company's employ, must give notice to her or his overseer, two weeks at least previous to leaving, and continue to work till the expiration of the notice.

"Those who leave contrary to this regulation, (cases of sickness excepted,) will not be settled with or paid, till such notice is regularly given and worked out.

"The foregoing regulations will be regarded as an express contract between the corporation and all persons in its employ; and all who continue to work for the corporation will be considered as agreeing to the terms here stated, particularly those relating to the * * * notice of leaving."

She then proceeded to work, her name being registered for the weaving department. At the end of 18 days, she quit the service, not being sick, and without having "given or worked out" the prescribed notice.

The case was submitted to the Court for a decision according to the principles of law, with power to draw inferences, as a jury might.

Luques, for the plaintiffs.

The services having been performed, the plaintiffs are entitled to recover, unless precluded by force of the "General Regulations."

The plaintiffs' claim consists of two items, different in character: —

1. One is for a small sum of ten cents, admitted to be

"due to her for board." So far as relates to this item, no defence is presented. For it cannot be supposed that the company's "regulations" will be offered as a defeat to such a charge. The regulation pointing out the consequences of omitting to give notice of quitting has reference and applicability only to amounts due for labor performed. For the board, then, the plaintiffs are clearly entitled to recover.

2. The company claims that that regulation, of itself, constitutes an *express contract* with such laborers as had been apprized of it.

But there can be no valid contract, where there is no *certainty*. The only period of time mentioned in the regulation is the two weeks. If that constituted a contract, it could not reach beyond that period. Where labor continued more than two weeks, there would be an indebtment for the excess.

But the regulation constituted no contract, even for the two weeks, because there was no *mutuality*. The company were left at full liberty to dismiss the laborer at any moment. Suppose a laborer to have been dismissed, would the company have been bound to pay for two weeks services after the dismissal?

The regulation is silent as to its duration. It was too indefinite as to the things to be done, and the payments to be made under it, and can, therefore, have no validity.

It does not appear that Almeda quit without the consent of the company, or that she had not labored as long as she agreed to. There is no clause of forfeiture in the instrument, nor is the money, *admitted* by the company to be due to her, claimed by them as a forfeiture.

Again, it is not even pretended that the company suffered any damage by want of notice of quitting.

The plaintiffs present, as exactly in point, the cases of *Hunt* v. *The Otis Company*, 4 Metc. 464; *Britton* v. *Turner*, 6 N. H. 481; and *Fuller* v. *Brown*, 11 Metc. 440.

J. N. Goodwin, for the defendants.

This case, though trifling as to the amount immediately in controversy, involves principles of deep importance, especially

to those, who are conducting the business of our large manufacturing establishments.

Almeda's work was commenced and continued with a full knowledge on her part, of the terms of the General Regulations. One of their provisions was, that the regulations should become an express contract with each laborer. She then, by entering upon the service, with such knowledge, recognized and adopted the regulations as a part of her contract, though she did not subscribe them. *Patcher* v. *Swift*, 6 Washburn, 292; *Whitesell* v. *Crane*, 8 Watts & Sargent, 369; *Hubbard* v. *Coolidge*, 1 Metc. 93.

Almeda's earnings, including the allowance for board, came to $7,51. The allowance for board was, equally with the thirteen cents per piece, a part of the compensation for her labor.

For the company was to find her board or pay an equivalent in money. Those earnings she forfeited by quitting the company's employ, without having given the stipulated notice.

The plaintiffs' counsel insists that the "regulation" on which we rely, was ineffective, because destitute of the *certainty*, and of the *definiteness* requisite in a contract. But this position is unsound, and is fully repelled by the case, *Hunt* v. *The Otis Company*, cited by himself.

The company, from the nature of its business, cannot beforehand fix more exactly the time of each operative's services.

The stipulation in the regulations, as we respectfully submit, became a binding contract on the part of the laborer, such a contract as is indispensably necessary for protection against "strikes" and such losses as must almost certainly ensue from a sudden cessation of operatives to carry on the machinery.

A compliance with the stipulation, contained in the "General Regulations," is a condition precedent to a recovery. A performance must be averred and proved. Chitty on Con. 7 Am. ed. 737, 738.

The plaintiffs claim to recover, because the case does not show that Almeda left without the consent of the company, or that she had not worked out the time for which she agreed.

If such be offered as an excuse for quitting, the *onus probandi* is upon the plaintiffs.

But our defence is also met by the position, that the "regulation" could not take effect, as a contract, for want of mutuality.

It is not, however, necessary that similar acts should be stipulated for by both parties. A stipulation for an equivalent constitutes sufficient consideration and mutuality. *Fuller* v. *Brown*, 11 Metc. 440. That there was a forfeiture of the earnings, though the word "forfeiture" is not used in the instrument, we cite *Henessey* v. *Farrell*, 4 Cush. 267.

Luques, in reply.

There is no ground for considering the contract, if one was created by a knowledge of the Regulations, to have been the contract of *hiring*. The contract of hiring was an earlier and a separate one. The Regulation contract, if any, was wholly an independent one. It might perhaps be the foundation of a suit, but most clearly could not defeat the action brought upon the contract of hiring. *Britton* v. *Turner*, 6 N. H. 48; *Hartwell* v. *Jewett*, 9 N. H. 249; *Dyer* v. *Jones*, 8 Vermont, 205; *Gilman* v. *Hall*, 11 Vermont, 210; *Booth* v. *Tyson*, 15 Vermont, 515.

But the notice of the regulation never rose so high as to become a contract. To do that, the laborer must have subscribed it. *Hunt* v. *Otis Co.* above cited.

There could be no forfeiture, for that word is not used in the instrument.

The mere handing of the paper, all unexplained, to the laborer, without intimation that it was to become a contract, was viewed as merely directory. It was received as a mere intimation of the company's wishes, as to the hours of work and mode of behavior; and was probably never read. The labor has been performed. The defendants have had the

benefit of it. And it is trusted that their injustice, in withholding the pay, will receive no sanction from this Court.

SHEPLEY, C. J. — The case is presented for decision upon facts agreed; the amount claimed is small. The principles involved are alleged to be of importance. It is not difficult to perceive, that they may be so. A corporation or an individual employing several hundreds of persons, may have contracted to furnish large quantities of manufactured goods for sale or exportation, at certain times; and if the persons employed to perform the labor, may in violation of their agreements, and without loss of wages leave the machinery at rest until other persons can be procured to take their places, no confidence can be reposed in the manufacturer's ability to fulfill his contracts, and he can obtain no indemnity for losses occasioned by the fault of others. To offer to such an employer the right to have a legal contest, and the chance thereby to recover damages for the injury he may be able to prove that he has suffered by a violation of each laborer's contract, is little less to him than solemn mockery. The manufacturer and all his laborers would know, that the trouble and expense of such suits would prevent any attempt in that mode to obtain redress. The only valuable protection, which the manufacturer can provide against such liability to loss, and against, what are in these days denominated "strikes," is to make an agreement with his laborers, that if they willfully leave their machines and his employment without previous notice, all, or a certain amount of wages that may be due to them shall be forfeited. While courts of justice should not attempt by construction to make such agreements between the employer and those employed, they should not shrink from the duty of causing them, when fairly made, to be honestly and faithfully executed; or attempt by construction to aid a party to avoid the penalty to which he has agreed to expose himself for a willful violation of his contract.

The rule of law, that one who makes a contract, must perform it before he can maintain an action founded upon it, un-

less he can present a legal excuse, is too important for the prosperity of business, for the security of honest dealings, and for the maintenance of good order in the community, to be lightly regarded. If there has at any time appeared to be a relaxation of it, that has long since ceased to be so in this state.

One who will willfully violate a contract, and thereby expose himself to an agreed penalty or forfeiture, cannot expect to obtain relief by the rules of moral right and wrong, or by those of equity jurisprudence or the common law.

There is indeed a class of cases, in which a party who has violated his contract, has been permitted to make it the foundation of a suit to recover compensation for services performed by virtue of it. These are cases, so far as they rest upon sound legal principles, in which there has been no willful violation or in which there has been a waiver of that performance, or other legal excuse.

It appears to have been supposed by some, without just reason, that the cases of *Hunt* v. *The Otis Company*, 4 Met. 464, and of *Fuller* v. *Brown*, 11 Met. 440, exhibited a relaxation of the law affirmed in the cases of *Stark* v. *Parker*, 2 Pick. 267, and of *Olmstead* v. *Beale*, 19 Pick. 528. The case of *Hunt* v. *The Otis Company*, appears to have been decided upon the ground, that the regulation of the company "did not contain in its terms the stipulation, that in case of quitting without giving the four weeks notice, the wages accrued should be forfeited." While it is said, "had this been the case the plaintiff would then fall within the penalty." It is also stated if the construction then given to the regulation should produce injurious effects to the defendants, "they have only to enlarge their rule by adding to it a clause of forfeiture of wages accrued, and a requisition that operatives entering into their service shall sign it." This last remark is relied upon as deciding that the regulations of a company will not be binding upon those employed, unless they signify their assent by subscribing to them. That this could not have been the intention of the Court is quite apparent, for the whole case rests upon the position, that the plaintiff was bound by the regula-

tions of the company not subscribed by him. If he were not so bound, the regulations, whatever might have been their true construction, could have presented no defence, and the elaborate opinion to ascertain and enforce the adopted construction, would have been an useless production.

That a person may be bound by a regulation, stipulation, or notice, to which he has not subscribed his name is shown by many decided cases; — by insurance cases, in which the party assured has been uniformly held to be bound by the stipulations contained in his policy; by cases against common carriers, when their notices have been held to operate upon the rights of employers, who have knowledge of them; and by a variety of other cases.

The case of *Fuller* v. *Brown*, so far as it respects the point now under consideration, only decides, that a stipulation to give four weeks notice before leaving and to work four weeks afterwards and then receive his pay would not be violated if he left by reason of sickness.

It will be in season to consider whether, the latter clause of the instructions, stating that he "was entitled to recover his wages without deduction for damages," and to which exceptions were taken, can command assent, when it shall be properly presented. *Batterman* v. *Pierce*, 3 Hill. 174.

The argument for the plaintiffs insists, that the regulations of the company did not become a part of the contract between it and the female plaintiff. It is a fact agreed, that a printed paper containing the regulations of the company was delivered to her before she commenced to work. In these regulations were the following clauses. "Any person intending to leave the company's employment, must give notice to her or his overseer two weeks at least previous to leaving, and continue to work until the expiration of the notice. Those who leave contrary to this regulation, (cases of sickness excepted,) will not be settled with or paid till such notice is regularly given and worked out. The foregoing regulations will be regarded as an express contract between the corporation and all persons in its employ; and all who continue to work for the

corporation will be considered as agreeing to the terms here stated, particularly those relating to the hours of labor and notice of leaving."

The female plaintiff by continuing to work for the company after these regulations were delivered to her, must be considered as having agreed to them, and therefore as having expressly agreed, that she was not to be paid till the required notice had been regularly given and worked out. She cannot now avoid the effect of that agreement and maintain an action without proof of a compliance with its terms. It is agreed that she "did not give or work out the notice required by said paper and that she was not sick.". It is said that the regulations do not contain any clause of forfeiture. The word forfeiture is not found in them, nor was it necessary. An agreement, that payment shall not be made without a compliance, is equally effectual as a bar to the action. It is also said, that it does not appear, that she did not leave by consent of the company, or that she did not work as long as she agreed to. It is not agreed or proved, that she did leave by its consent, or that she had agreed to work for a time specified, which had expired; and the burden of proof rests upon her to shew that she left by permission, or that there was a special contract respecting the time during which she was to continue to labor.

The argument asserts, that the regulations were not binding upon her, because the contract was not mutual; that the company could discharge her without giving her any notice.

The position is quite novel, that a contract will not be valid unless each party assumes precisely the same obligations.

It is further urged, if there must be a forfeiture of wages, it can extend to no more than the wages of two weeks. The contract contained in the regulations will not admit such a construction. There is no limitation of time, during which she was not to be settled with or paid, and the Court is not at liberty to insert one. It was undoubtedly intended to operate upon all the wages earned subsequent to the last settlement, and such is its necessary effect.

It is moreover earnestly urged that the plaintiffs may re-

cover the ten cents allowed for board. It appears from the agreed statement, that she was to receive "thirteen cents per piece" for weaving, and that "said company in addition allowed said Almeda ten cents for board." The sum allowed for board appears therefore to have been allowed as payment in part for her services for weaving. *Plaintiffs nonsuit.*

TENNEY, WELLS, HOWARD and APPLETON, J. J., concurred.

SACO WATER POWER COMPANY *& al. versus* ELIZABETH GOLDTHWAITE.

The occupation of land twenty years, as a mill-yard for piling logs, timber and boards, whatever might be its effect, as against the proprietor of the land, is sufficient evidence of title as against one who subsequently without title takes the occupation of it to himself.

In a *writ of entry*, adverse possession will not establish title in the tenant, unless commenced twenty years *before the suit.*

But in a *petition for partition* a sole seizin in the respondent may be established by a possession commenced twenty years *before the trial*, though less than twenty years *before the commencement of the process.*

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

PROCESS FOR PARTITION of real estate.

PETITION by the Saco Water Power Company and Gideon Tucker, representing that they are tenants in common with others, to them unknown, of "the Bog Mill and the water and privilege used with, and to the same belonging;" lying upon the north side of the road and bounded as follows, &c. and praying that their respective parts may be set off to them in severalty.

The petition was filed at February term, 1844. The appearance of the respondent was entered at May term, 1844, and her brief statement was filed at the September term, 1852; alleging a sole seizin in herself of a specified part of the land. At the April term, 1853, she filed a further brief statement, alleging that, as to the lot described in her first brief statement, she had acquired an indefeasible title by a

grant, to be presumed from an adverse, open, notorious, and exclusive possession for more than twenty years.

At the trial, the petitioners' ownership in the mill and mill privilege was admitted by the respondent, but she denied that the lot described in her brief statement was a part of the mill privilege. And the petitioners admitted that the house built by J. K. Cole, about the year 1830, has ever since been occupied by him, or by the respondent, as his grantee.

It was then testified by a witness for the petitioners, *that* from the year 1802, the mill owners had occupied the land on the North side of the road, for piling logs, boards and other lumber, as each one had occasion, and found a space to do it in; — *that* the house, now occupied by the respondent, was built by J. K. Cole about the year 1830; — *that*, until the house frame was raised, the land where it stands had been always since 1802 occupied by the mill owners as a depository for boards and timber. The plan used at the trial shows that no part of the lot claimed by the respondent is more than 134 feet distant from the mill.

The case was then submitted to the Court upon the following stipulations: —

"If the Court shall be of opinion, that the petitioners, by such possession and improvement, as was testified to, if proved to have continued more than 20 years, could not acquire such title to the premises described in the respondent's brief statement as would enable them to maintain their petition for partition, then judgment is to be rendered for the respondent, as to the premises so described, and the petitioners are to have judgment, as prayed for, of the residue of the premises described in their said petition.

"If the Court shall be of opinion that the petitioners, by such a possession and occupancy of the premises as was testified to, could acquire such a title as would enable them to maintain their petition, but that the respondent by her disseizin, which commenced less than 20 years before the filing of this petition, but has now continued more than 20 years, has acquired a perfect title, then Edward E. Bourne, Esq. is

to hear the parties and decide as to how much she has acquired a title to by an exclusive and adverse possession for more than 20 years, and as to that, judgment is to be rendered for the respondent, and as to the residue described in the petition, for the petitioners.

"But if the Court shall be of opinion that the petitioners could upon such evidence of possession and improvement, so continued, acquire such title as would enable them to maintain their petition, and that the respondent has not acquired a title to the premises, described in her brief statement, by her disseizin commenced and continued less than 20 years before filing this petition, then the report is to be set aside and the cause to stand for trial."

Eastman, for the petitioners.

1. The title of the petitioners to a proportion of the mill, and of the mill privilege, is conceded, and their co-tenants are owners of the residue.

Was the land, claimed by the respondent, a part of the mill privilege? If it was, the petitioners *have had* a right to partition thereof.

What is a mill privilege?

In *Moore* v. *Fletcher*, 16 Maine, 65, the present Chief Justice says, "By the privilege of a mill, or its equivalent, mill privilege, is understood the land and water used with the mill, and on which it and its appendages stand."

In *Maddox* v. *Goddard*, 15 Maine, 224, the present Chief Justice says, "It is not unusual, in our early history, to find mill privileges conveyed without any exact bounds; and such deeds have been held to convey so much land, as was necessary, and customarily used with the mill." See also *Blake* v. *Clark*, 6 Greenl. 436; and *Whitney* v. *Olney*, 3 Mason, 280.

In this case the whole lot was commonly used with the mill, and therefore comes strictly within the definition of a mill privilege.

It was claimed as a part of the mill privilege, and occupied as such, down to the time when the respondent's house was

built. Logs, timber, boards, and other lumber, were piled there, by the mill owners, all, or nearly all, the time, a period of nearly thirty years.

If it embraced less than the whole, including the piece claimed by the respondent, how much less, and where were its boundaries?

Even if it had not been *necessary* for the use of the mill, the use of it by the mill owners was such, as to give them a good title as against this respondent, who makes no pretence, that she or her grantor had any title to, or possession of, the premises claimed by her, prior to 1830. Her grantor and she are both strangers to the original title, and their only claim is, by a disseizin of the mill owners, at that time, without any pretence of any previous title or claim.

In this process, then, the petitioners should not be compelled to prove a good title against all the world; but their possession, prior and long continued, should be held as sufficient evidence of title. Stearns on Real Actions, p. 213.

But the proof of occupancy, by the mill owners, was such, as would give them a good title, as disseizors, even against a prior owner.

The land was occupied in the manner that mill owners usually occupy mill privileges. These are never fenced by the mill owners. They have no occasion for fencing.

The owners of the mill occupied this land in common, as they used and occupied the mill; and for the purposes of the mill, as owners, and not otherwise, and their occupancy was constant, uninterrupted and exclusive.

The petitioners therefore, having purchased a part of the premises, and shown a right of entry, have a right to partition. R. S. c. 121, § 2.

2. Has the disseizin, by the respondent and her grantor, which commenced *less than* 20 years before this petition was filed, ripened into a right during the pendency of this process?

The respondent entered her appearance, and filed her plea in the District Court, at the May term, 1844, as appears by

the plea itself, alleging therein that she had a right to be heard. Her further plea was filed in the Supreme Judicial Court, at the Sept. term, 1852.

The well known principle of law is, that, in all actions and processes, the rights of the parties are to be determined, according to the state of the facts as they existed *at the time when the proceedings were commenced.* No limitations run during the pendency of an action. Neither party can acquire new rights by keeping an action in Court.

Is the process for partition an exception ?

Under our present law, the process for partition is an adversary proceeding, in which all persons interested are notified, and have a right to appear and be heard ; and by it are concluded the rights of all those who have, or might become parties. *Cook* v. *Allen*, 2 Mass. 462 ; *Marshall* v. *Crehore*, 13 Metc. 462.

There is nothing in the Revised Statutes from which an inference could be drawn, that a delay or a continuance of the process in Court should give either party new rights, or deprive either party of any rights existing at the time the petition was filed.

The maintenance of the process must depend upon the question, whether the petitioner had a right of entry *when the petition was filed. Baylies* v. *Bussey*, 5 Greenl. 153, (157-8.)

In petitions for partition, the rights of the parties must be determined upon the facts as they existed *when the process was instituted.* A tenant in common of a reversion, expectant upon a lease for years, cannot maintain the process, even though the lease should *expire before the adjudication. Hunnewell* v. *Taylor & als.*, 6 Cush. 472, (476.)

The fact of sole seizin, put in issue by the pleadings, "can properly apply only to sole seizin *at the time when the partition was filed.*" *Mallett* v. *Foxcroft*, 1 Story, 474, (476.)

Where, in a proceeding for partition, there is evidence of possession for 20 years *before suit*, adverse to the petitioner, it is a bar to the petition. *Clapp* v. *Bromagham*, 9 Cow. 530. (550, 561.)

We contend, therefore, that this respondent acquired no rights by the running of the statute of limitations, after the petition was filed; and as she had then been in possession less than fourteen years, she has acquired no right by possession.

J. Shepley, for the respondent.

1. If any right whatever can be acquired by such acts as are stated in the testimony, it amounts to a mere easement, and not a fee simple estate in the premises. *Stetson* v. *Veazie*, 2 Fairf. 408; *Littlefield* v. *Maxwell*, 31 Maine, 134; *Monmouth C. Co.* v. *Harford*, 1 Cromp. Meas. & Rose, (614,) 631.

But not even an easement was acquired. 2 Greenl. Cruise, p. 219, § 16; old ed. vol. 3, p. 424; 31 Maine, 134, before cited; 2 Greenl. Ev. § 539, and authorities cited; *Donnell* v. *Clarke*, 19 Maine, 175.

2. Of land, which is open, unfenced and unenclosed, no fee simple estate can be acquired merely by the occasional piling of logs and boards thereon, at certain times, and the removal of them shortly afterwards. *Bethum* v. *Turner*, 1 Greenl. 111; *Tilton* v. *Hunter*, 24 Maine, 32; *Foxcroft* v. *Barnes*, 29 Maine, 131; *Littlefield* v. *Maxwell*, 31 Maine, 134; *Gloucester* v. *Beach*, note to 2 Pick. 60; *Thomas* v. *Marshfield*, 13 Pick. 249, 2 ¶; *Slater* v. *Jepherson*, 6 Cush. 129, noticing a distinction said to exist between decisions in Mass. and Maine, and some others; *Bailey* v. *Carleton*, 12 N. H. 18.

3. The petitioners are not entitled to have partition of land to which the respondent, *at the time of the trial*, had a perfect title. The filing of the petition and the proceedings thereon thus far, did not interrupt or purge the disseizin; and sufficient time had elapsed to give title to the respondent, when the trial took place, if not at the time of filing the petition.

The filing of the petition, and even judgment thereon, makes no interruption to the claim for betterments by six years adverse possession. *Baylies* v. *Bussey*, 5 Greenl. 153; *Tilton* v. *Palmer*, 31 Maine, 487.

To obtain betterments, there must be six years adverse possession. *Treat* v. *Strickland*, 23 Maine, 237, 238.

In petitions for partition "no precept ever issues in the nature of an execution to put the petitioner into possession." *Baylies* v. *Bussey*, before cited, 5 Greenl. 159; R. S. c. 121, § 9, 11.

WELLS, J. — The parties have agreed, that "if the Court shall be of opinion, that the petitioners by such a possession and occupancy of the premises as were testified to by the witness, could acquire such a title as would enable them to maintain their petition, but that the respondent by her disseizin, which commenced less than twenty years before the filing of their petition, but has now continued more than twenty years, has acquired a perfect title, then Edward E. Bourne, Esq. is to hear the parties, and decide as to how much she has acquired a title to, by an exclusive and adverse possession for more than twenty years, and as to that judgment is to be rendered for the respondent, and as to the residue described in the petition, for the petitioners."

If the petitioners do not show any title to the premises of which partition is sought, by documents or records, except to their proportions of the mill and privilege as described in their petition, it appears by the evidence, that the mill owners had used the premises for more than twenty years before the entry by the grantor of the respondent, by piling logs, timber and boards upon them. The possession and occupancy consisted in the use of the premises as a mill-yard. And such use of the premises, excepting that part of them taken by the grantor of the respondent, was continued by the mill owners. It does not appear to be necessary to decide what effect should be given to such acts against one having a lawful and valid title. For the grantor of the respondent, when he erected his house in 1830, had no title to the land, and it is admitted that he was a disseizor of the lawful owner. He entered upon those, who were then using the premises as a mill and lumber yard. They might have had title, it does not appear, that they had not. The presumption is that they were acting lawfully until their acts are shown to be unlaw-

ful. The manner in which they occupied the land, without any exhibition of title on the part of others, would be *prima facie* evidence of title in themselves against a mere stranger to it. Stearns on Real Actions, 239.

It does not appear whether the petitioners or their grantors were in the occupation of the premises, at the time when the grantor of the respondent commenced his possession. In the absence of all proof of an outstanding title in third persons, the occupation of either would be presumptive evidence of a title in them. Whoever the occupants were at that time, they were dispossessed of that part of the premises of which the respondent or her grantor took possession. The remainder of the premises after such possession taken, would be subject to the same presumption as previously existed, and the petitioners while in the occupation, would be entitled to the benefit of it.

The respondent could have no legal ground to deny to the petitioners the dominion over such part of the premises as was not in her possession, nor to interpose any obstacle to a partition of the same.

When the petition was filed, the disseizin made by the grantor of the respondent had not continued twenty years, but at the time of the trial more than twenty years had elapsed since it first commenced. The pendency of the petition is not considered as having the effect of a writ of entry, and as putting an end to the disseizin. The object of the petition is a division of the land between those, who have lawful title. When the petition was filed and notice given, the respondent had no title, her appearance before her title accrued could not deprive her of rights subsequently acquired. *Tilton* v. *Palmer*, 31 Maine, 486. By statute, c. 121, § 9, the respondent might, on motion to the Court, at any time before judgment be allowed to appear and defend. At the time of the trial, her adverse seizin had ripened into a perfect title. There could have been no objection to her appearance then, if she had not appeared before. Her right did not depend upon the time when she entered her appearance upon

the docket, but upon the title, which she presented at the trial.

Judgment is to be rendered in favor of the respondent for that part of the premises to which the commissioner shall find she has acquired a title by disseizin, and partition is to be made of the residue according to the prayer of the petition.

SHEPLEY, C. J., and TENNEY, HOWARD and APPLETON, J. J., concurred.

COUNTY OF FRANKLIN.

SALLY WOODMAN *versus* JUSTUS SKEETUP.

The excepting party is bound to present the documents which were made a part of the case.

If a part of such documents be missing, he cannot complain that a decision should be made upon the case as presented.

Exceptions not taken at the trial, cannot be regarded in the decision.

In a writ of entry against an alleged disseizor, brought by one who had mortgaged the land, before the commencement of the suit, to secure a promissory note, the mortgagee is a competent witness for the demandant.

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

WRIT OF ENTRY.

The demandant's title to the land was under a warranty deed from Ephraim Woodman to John Robbins, and a warranty deed from Robbins to herself.

But Monroe Woodman had previously owned it. To prove that Monroe Woodman had conveyed it to Ephraim Woodman by a deed now lost by time and accident, the demandant called Ephraim Woodman as a witness, but he was objected to on the ground of interest.

The exceptions state that she then released said Ephraim Woodman, and said John Robbins "from any and all liabilities on the covenants in their aforesaid deeds; said releases be-

ing made a part of the case." Ephraim Woodman was admitted as a witness, and testified to a conveyance to him, from Monroe Woodman, by an unrecorded deed, now lost.

In the course of his examination, it appeared that the witness was holding a mortgage of the land, to secure a note due to him from the demandant. To obviate any objection to the witness, growing out of his interest under that mortgage, he executed to the demandant a release from all his claim under the mortgage and on the note secured by it. As the demandant was not present in Court, the release was delivered to her attorney.

By order of the Judge, the release was placed by the attorney upon the files of the Court for the benefit of the demandant.

The objection to the witness was then overruled, and he was received to testify for her. The verdict was against the tenant, and he excepted. [In making up the papers for exhibiting the case to the Court, the clerk certifies, that the releases to Ephraim Woodman and John Robbins, from their liabilities upon the covenants of warranty in their deeds of conveyance, are not on the files of the Court, for which reason he furnishes no copies of them.]

Cutler, for the tenant.

1. The lost releases were made a part of the case for the benefit of the demandant. She should therefore see that copies of them be duly furnished. The tenant ought not to suffer by the loss of them from the files.

2. The mortgage from the demandant to the witness gave him an interest, that she should recover the land. The release given by him was insufficient to discharge that interest. It was never delivered. For a delivery includes the assent of the releasee. And there was no subsequent ratification.

3. The witness ought not to have been allowed to testify to the contents of the lost deed; at least until its execution had been proved by the subscribing witness.

Tripp, for the demandant.

SHEPLEY, C. J. — Ephraim Woodman having conveyed a farm with covenants of warranty to John Robbins, 2d, from whom the demandant derived her title, was offered as a witness for the demandant, who had executed a release to him of all liability on his covenants. The objection was to his competency on account of interest. The release was made a part of the case. It is said, that it cannot now be found. It was the duty of the tenant to present copies of the exceptions with the documents referred to.

As the case has been presented by the tenant for decision, he cannot properly object to a decision upon the exceptions and the documents presented. There is no reason to conclude, that the release was not correctly described in the bill of exceptions, and therefore no reason to conclude, that the witness was not properly admitted to testify.

It is said, that he should not have been permitted to testify to the loss and contents of the deed before its existence and execution had been proved by other testimony. The statement in the bill of exceptions is, that he was called to prove its execution as well as loss. There does not appear to have been any objection made to his testimony, if he was a competent witness, and an objection not presented at the trial cannot now be received.

In the course of his testimony it appeared, that he was the mortgagee of the premises demanded, by virtue of a conveyance executed by the demandant to secure the payment of a note then due to him. It does not appear to have been executed since the commencement of this suit. He thereupon executed a release to the demandant of all title to the premises by virtue of that mortgage and delivered the same to the attorney of the demandant in her absence. The objection is, that the release was ineffectual, there being no proof of a legal delivery or acceptance of it, and that the witness continued to be interested. The consideration of the effect of the release is unimportant, if the witness was not interested in the event of the suit in consequence of his position as mortgagee. If the tenant obtained a judgment in his favor in

this suit, a copy of the record of it would not be admissible in evidence in a suit upon the mortgage by the witness against the tenant. If the demandant failed to establish her title, the witness in a suit upon the mortgage, made before the commencement of the suit, would not be precluded from establishing it. Nor does it appear that he would suffer loss if he did not; for the note named in the mortgage was not discharged, and the demandant might have sufficient property to pay it, if she did not recover in this suit. The witness does not therefore appear to have had any certain interest in the event of this suit, and he was not rendered incompetent by the disclosure of his position as mortgagee.

Exceptions overruled.

TENNEY, HOWARD and APPLETON, J. J., concurred.

JOHNSON *versus* KNOWLTON *& als.*

To assumpsit for services, a report rendered upon a common law submission of all demands, and awarding that nothing was due from either of the parties to the other, is a valid defence.

In such a case, testimony offered by the plaintiff to show, that the services were performed at an agreed price and upon a contract with the defendants, and also to show that an account in favor of the plaintiff and his co-partner for similar services, was not laid before the arbitrators, may be rightfully excluded by the Judge, as having no tendency to prove that the claim in suit was not embraced in the award.

The plaintiff submitted his claims, and the plaintiff and his co-partner submitted their joint claims against the defendants to arbitrators, who heard and acted upon both cases at the same session. The defendants introduced a receipt and an order against the plaintiff. *Held*, that the Judge rightfully excluded testimony, offered by the plaintiff to show, that to himself and partner there was due a large sum from the defendants, though the object of the testimony was to satisfy the jury, that the receipt and order had been applied by the arbitrators in payment of that *company* claim.

A Judge cannot be required to instruct the jury that they may, from a *selected part* of the evidence, infer any matter of fact involved in the issue.

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

ASSUMPSIT for services and expenses in driving the defendants' logs upon the Sandy river.

The plaintiff and one Ingham were co-partners. By a submission at the common law the co-partnership and the defendants, and by another like submission, Ingham and the defendants, and by another like submission, the plaintiff and the defendants referred all their demands to arbitrators, who heard and acted upon all the cases at the same session. In the last named case they awarded, that nothing was due from either party to the other.

The services and expenditures, sued for in this action were rendered before the submissions were entered into. On the trial under the submission between the plaintiff and themselves, the defendants introduced a receipt and an order signed by the plaintiff. These papers were marked B. & C. The paper E., referred to in the opinion of the Court, was signed by the plaintiff, by Ingham and by all the defendants, in which it was agreed, that they each should lay before the arbitrators their "several accounts for running, driving and marking the lumber."

At the hearing before the arbitrators, it was admitted by the defendants, that the services sued for had been performed and expenses incurred, to the amount in the whole of $1053,69, but they at the same time asserted, that the prices were too high, and that in the whole business, the plaintiff and the defendants were co-partners.

The defendants introduced and relied upon the award rendered upon the submission between the plaintiff and themselves.

The plaintiff contended, that the account now sued was not laid before the arbitrators or considered by them. To show that fact, he offered evidence, "that no claim was presented before the arbitrators *in favor of Ingham and the plaintiff* against the defendants for running or driving the lumber, and that the labor performed by the plaintiff was upon hire by the day, and that the money paid out in expenses was by contract with the defendants;" and contended, that such evidence, taken in connection with the awards, shows that the demand in suit was not adjudicated upon by the referees. The Judge however excluded the evidence.

The plaintiff offered evidence, that there was due to himself and Ingham $1400, for hauling the lumber.

This evidence was offered for the purpose of showing that the papers B and C were applied by the arbitrators to that debt. But the Judge excluded it.

The plaintiff requested the Judge to rule, "*that* the evidence shows that all matters submitted to the arbitrators were not adjudicated upon by them; *that* the award on that account was void; and *that* the fact, that so large an amount was admitted to have been due to the plaintiff from the defendants, and the fact that the referees awarded nothing to be due to the plaintiff, furnish evidence, from which the jury might infer such a degree of partiality on the part of the referees as would render the award void." This request was refused.

Whereupon it was agreed that the case should be reported for the consideration of the full Court, and if it be their opinion that the ruling of the Judge was correct, the "plaintiff is to become nonsuit; but if the Court should be of opinion that the ruling of the Judge was not correct, the action is to stand for trial."

Webster, for the plaintiff.

Cutler, for the defendants.

Shepley, C. J. — This suit appears to have been commenced to recover compensation for services performed and money expended for floating logs in Sandy river. It is stated in the report of the case to have been admitted before arbitrators, that the services had been performed and the expenditures made by the plaintiff; and that the only objections made to his account were, that the price charged for services was too high, and that he and the defendants were co-partners.

In defence it appeared, that the plaintiff and defendants executed mutual bonds on February 23, 1852, containing recitals, that differences had arisen between the parties concerning the purchase of certain timber lands, "and a lum-

bering operation upon the same, including the running the lumber and all other demands and incidental expenses growing out of the entire operation;" and by which the parties "agreed to submit and refer the said differences and all other demands between the said parties of whatsoever nature" to three persons as arbitrators, who after hearing the parties, made their award in writing on April 10, 1852, by which they determined, "that neither of said parties is indebted to the other."

It appeared, that other arbitration bonds were executed on the same day between the plaintiff and David Ingham of the one part and the defendants of the other part, and between David Ingham of the one part and the defendants of the other part; and that their respective claims were submitted to the decision of the same arbitrators; and that they were all heard during the same session of the arbitrators, who at that time made an award in each of the three cases.

The plaintiff's counsel at the trial of this case insisted, "that the awards were all to be taken together and might explain each other;" and testimony was "offered to prove, that no claim at said hearing was presented in favor of David Ingham and said plaintiff for running or driving the lumber in the Sandy river, and that the labor performed by plaintiff was upon hire by the day, and money paid out and expenses incurred in driving said lumber was by contract with defendants," "which evidence was ruled out by the Court."

It does not appear, that the presiding Judge expressed any opinion upon the positions asserted by the counsel further than to exclude the testimony offered; and the decision according to the conclusion of the report must be made upon the correctness of the rulings at the trial,

The testimony, offered to prove that the plaintiff and Ingham did not present to the arbitrators any claim for running lumber, could have no tendency to prove, that the plaintiff's claim for such services was not fully and fairly considered and decided by the arbitrators. Nor would the testimony offered to prove, that the plaintiff performed his labor "upon hire by

the day," and that "the money paid out and expenses incurred was by contract with the defendants," have any such tendency. This might all be true and yet upon a full and impartial hearing he might not be entitled to recover any thing from the defendants. For it appears, that they contended, that he was a partner with them in the business; and the report states, that "other accounts were presented as partnership accounts."

The paper E, subscribed by all the parties concerned in the three awards and bearing date on February 22, 1852, also admits that they all had accounts "for running, driving and marking the lumber." It does not therefore follow, that any injustice was done to the plaintiff or that his claims were not fully considered and decided, because the defendants were not found to be indebted to him, although no claim was presented by him and Ingham jointly for like services.

The plaintiff also "offered evidence to prove, that there was due plaintiff and Ingham for hauling the timber, for driving which this action is brought, the amount of $1400, for the purpose of showing, that the papers marked B and C were applicable to that debt, which evidence was rejected by the Court." The papers referred to were of no importance to the defence, which rested upon the conclusiveness of the award.

Testimony to prove, that they ought not to be allowed in this suit in set-off could have no influence to relieve the plaintiff's claim from the effect of the award upon it.

The testimony offered and not received, having no tendency to prove, that the plaintiff's claim was not considered and decided by the arbitrators without partiality or fraud was properly excluded.

The presiding Judge was requested "to rule that the evidence introduced shew, that all matters submitted to arbitrators were not adjudicated upon by them, and that the award on that account was void." Without objecting that this required the Court to decide a matter of fact, it may be ob-

served, that no testimony has been noticed or pointed out authorizing the Court to come to such a conclusion.

The Judge was further requested to rule, "that the fact of so large an account being admitted to be due to the plaintiff from the defendants, as aforesaid, and the referees awarding, that nothing was due the plaintiff from defendants, furnish evidence, from which the jury might infer such a degree of partiality on the part of the referees as would render the award void," which ruling the Court refused.

A fatal objection to a compliance with this request is, that it would authorize the jury to decide the case upon a part and not upon the whole of the testimony introduced.

It is quite apparent also, that the arbitrators might have conducted with perfect fairness and impartiality, without finding any thing due to the plaintiff on an account for services admitted to have been performed, by finding that he was a partner with the defendants, and that upon a fair adjustment of all the partnership concerns the defendants were not indebted to him. *Plaintiff nonsuit.*

TENNEY, HOWARD and APPLETON, J. J., concurred.

COUNTY OF OXFORD.

MURDOCK *versus* RIPLEY.

The force which an officer may apply, to enable him to serve a legal precept, must be no greater than is necessary for the accomplishment of that purpose.

In a suit against an officer for inflicting violence in the service of a precept, it is for the jury to decide, whether the degree of force used was unnecessary.

His own judgment, though honestly formed, and though he had no purpose to transcend his authority, is not conclusive as to the degree of force which was necessary; and for any excess he is responsible, in damages in a suit at law.

Though the resistance made by the plaintiff contributed to the injury which he received, that is no defence in such a suit, if in fact the officer used more violence than was necessary.

Murdock *v.* Ripley.

One aiding the officer, and acting in his presence, on such an occasion, is entitled to the same protection as the officer.

On Exceptions from *Nisi Prius*, Howard, J., presiding. Assault and Battery.

An officer held a warrant for service against one Bridgham, and employed the defendant to aid in serving it.

In attempting to arrest Bridgham, the officer was resisted by this plaintiff. To repel that resistance, this defendant inflicted the violence for which this suit is brought.

The plaintiff, admitting the right of the defendant, as an aid to the officer, to repel and overcome the resistance made by the plaintiff, contended that the force used by the defendant was greater than the occasion justified. Evidence upon that point was laid before the jury.

The Judge instructed them, that if the defendant used more force and inflicted upon the plaintiff greater injury than was necessary to overcome the resistance, he would be responsible in this suit. The Judge, at the defendant's request, also instructed the jury that, if the plaintiff, by his continued resistance, *contributed* to the injury which he received, while the defendant, as aid, was in the lawful performance of his duty, the plaintiff would not be entitled to recover for such injury. In answer to an inquiry from a juror, the Judge gave the further instruction *that* the officer was bound to serve the warrant, and to use as much force as was necessary to enable him to execute it; *that* the burden of proof, as to the excess of power used, was upon the plaintiff; *that* it was incumbent on him to prove that the defendant had conducted unlawfully; *that* the defendant, as aid to the officer, had a right to use the same force as the officer would be authorized to use under the circumstances; *that* officers were entitled to liberal treatment; *that* their acts should be liberally construed; *that* they had a right, if resisted, to perform their duty with a strong hand; *that* Ripley, as aid to the officer, under the circumstances, had a right to judge what force was necessary to repel the resistance; *that*, unless he acted *wantonly* or was guilty of gross negligence in the use of force, he

would be justified; and *that*, if the acts complained of were performed in good faith, and were not in violation of law, he was not responsible, whatever may have been the consequences.

The verdict was for the defendant. The plaintiff excepted.

Clifford, for the plaintiff.

Walton, for the defendant.

The highest interests of every citizen require a prompt and efficient execution of the laws, especially in criminal process, and that resistance to officers should be speedily and effectively suppressed. To secure such a suppression, liberal encouragement and liberal dealing should be extended to all good citizens, and especially to officers of the law.

In their honest efforts in that behalf, the force they employ is not to be measured by close mathematical exactness. Except for the plaintiff's own illegal acts, he would have suffered no injury. In suppressing mobs, riots and in overcoming resistance to officers, all that can be required, is good faith and honest purpose. One thus acting, is to judge what measure of force is requisite. If not in violation of law, and if performed without wantonness, or evil intention, such acts will be protected. No responsibility attends them. The man who willfully throws himself as an obstruction before the wheels of justice, and gets run over and injured, must suffer the consequences.

Resistance to an officer is prohibited by statute. Can a party recover for an injury arising from a violation of the law? The maxim *in pari delicto* applies. Lewis' U. S. Crim. Law, 102, 103; R. S. c. 158, § 26; 10 Metc. 365.

Wells J. — The defendant, acting as the aid of the officer in making the arrest of Bridgham, was justified in using such force as was necessary to overcome the resistance of the plaintiff. If he used more force than was necessary to accomplish that purpose, he became a trespasser. 1 Chit. Plead. 164. *Cockroft* v. *Smith*, 2 Salk. 641.

The plaintiff, by his resistance, may be considered as contributing to the injury, which, it is alleged, he received, but

that resistance could not justify unnecessary violence. The fault of the plaintiff in the first instance would afford no justification for the defendant in transcending the line of his duty.

It fell within the province of the jury to determine whether the defendant exercised a proper judgment in repelling the resistance of the plaintiff, and if his own judgment led him astray, he must be responsible for the consequences.

Exceptions sustained, verdict set aside and a new trial granted.

SHEPLEY, C. J., and TENNEY and APPLETON, J. J., concurred.

COUNTY OF CUMBERLAND.

ANDREWS *versus* CITY OF PORTLAND.

There can be no recovery for labor under a contract, when not rendered in conformity to it, unless there has been some acceptance of it, or unless an exact performance has been waived, or unless the non-conformity was occasioned by the contractee.

A payment made by one of the parties to a contract in part of the contract price for having done a job of work, does not waive an exact performance of the contract, if, when making such payment, he did not know that there was an insufficiency in the work.

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

The City Council of Portland ordered, "that the Committee on the Fire Department be authorized to contract for the construction of a suitable number of stone reservoirs, in or near Commercial street, not exceeding five in number."

Pursuant to that authority, the committee contracted with the plaintiff to build five reservoirs, in conformity to a plan and specifications, and to pay him $387,50 for each of them.

The plaintiff procured materials for the reservoirs, and built one of them. There was evidence tending, (as the plaintiff insisted,) to show that some of the committee superintended the construction of the reservoir and accepted it, having assented to some alterations from the prescribed plan. The work, however, was unsatisfactory to the committee. They paid the plaintiff $350, and forbade him to proceed any further under the contract.

There also was evidence tending to show that the Committee on the Fire Department always had charge of erecting reservoirs.

This action is *assumpsit*, brought to recover $37,50, the balance for building the one reservoir and $800 for injury by the committee's rescission of the contract as to the other four.

Among other requests to the Judge for instruction to the jury, were the following :—

"2. That if the plaintiff substantially completed the contract for the reservoir at Titcomb's wharf, and built it of as good materials, and to the acceptance of the Committee on the Fire Department, the city would be bound to pay what it was worth, which instruction the Judge declined to give.

"3. That if the jury find the city, after the reservoir was constructed, paid the plaintiff $350, on account of it, such payment was an acceptance of it by the city, and that if not in strict accordance with the terms of the contract, the plaintiff might recover the value of the reservoirs, or else the contract price, less such a sum as it would cost to make it equal to the kind specified in the contract, which instruction the Court declined to give."

The verdict was for the defendants, and the plaintiff excepted to the Judge's refusal to give the second and third requested instructions.

Fox, for the plaintiff.

The order of the City Council authorizing the committee to contract for the building of five reservoirs, together with the fact of the committee superintending the construction, assenting to the alterations and change of materials, and afterwards accepting the same, bound the city to pay for the reser-

voir what it was worth, more especially since it was shown that the Committee on the Fire Department always have had charge of building reservoirs. *Damon* v. *Granby*, 2 Pick. 345; *Simons* v. *Heard*, 23 Pick. 124; *Snow* v. *Ware*, 13 Met. 43.

The second requested instruction should, therefore, have been given.

The third requested instruction should also have been given. *Hayden* v. *Madison*, 7 Greenl. 76, is almost precisely like the present case, and the requested instruction was based on that authority. 7 Greenl. 118; *Abbott* v. *Hermon*, 13 Met. 43, before cited.

Barnes, City Solicitor, for the defendants.

SHEPLEY, C. J. — The only error insisted upon is the omission to instruct the jury as stated in the second and third requests. The written contract appears to have been made by virtue of an order, passed on August 8, 1850, authorizing the committee on Fire Department "to contract for a suitable number of stone reservoirs, in or near Commercial street, not exceeding five in number." The order did not authorize the committee to superintend their construction, or to dispense with the performance of the contract, or to determine, that it had been performed. If they had been authorized to build the reservoirs, or to superintend their construction, an authority might have been implied to determine whether the contract had been performed. Their authority extended only to the single act of making the contract. The city would not be bound by any other act of theirs without proof, that it had been ratified, and no vote or act, from which this could be inferred, has been introduced. The second request for instructions was therefore properly refused.

The third request rests upon the position, that a partial payment made on account of it by the city, after a reservoir had been constructed, amounted to an acceptance of it. The case of *Hayden* v. *Madison*, 7 Greenl. 76, is relied upon as sustaining it. It appears from that case, that a payment was

made by the town, "knowing that eighty-six rods of the road had not been completed, and making no objection on that account." It does not appear in this case, that payment was made by the city with a knowledge, that it had not been so far completed, that one reservoir had been constructed according to its provisions. It does appear, that the committee or some of its members had such knowledge, and that objections were made on that account, and that a certain sum was reserved from the amount agreed to be paid, because there had not been such a performance of the contract.

If the city could be bound by these acts of the committee, a payment made under such circumstances would not amount to a waiver of performance of the contract. It not appearing that the city had waived performance, or had accepted and used the reservoir alleged to have been completed, the instructions and refusals to instruct were fully authorized.

Exceptions overruled.

TENNEY, WELLS and APPLETON, J. J., concurred.

CUMMINGS *versus* BUCKFIELD BRANCH RAIL ROAD.

Misdescriptions in contracts or judgments in suit, are amendable, at the discretion of the Judge as to terms.

To the rulings of the Judge in matters within his discretion exceptions cannot lie.

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

DEBT on judgment for $1896,86, damage, and $5,33, cost, recovered March term, 1851, alleging that it was unsatisfied for $100.

After issue and joinder upon the plea of *nul tiel record*, the plaintiff read the record, and moved for leave to amend his declaration so as to read $1896,80, instead of $1896,86.

It appeared by the record, that the plaintiff, at the same March term, 1851, had recovered against the defendants a judgment for $1896,80, and also a judgment for $2443,96, with $5,53 cost in each suit.

The amendment, though objected to, was allowed and made. Upon that evidence, the Judge instructed the jury, that the action was maintainable, and the verdict was for the plaintiff.

To those rulings and instructions, the defendants excepted.

Geo. F. Emery, for the defendants.

1. The amendment substituted one cause of action for another, and was therefore unauthorized.

The change was in a material particular, viz. the amount to be recovered, the very gist of the action. *Note to Bristow* v. *Wright*, 1 Smith's Leading Cases, 453; *Eichelberger* v. *Smyser*, 8 Watts, 181.

The issue in this case was purely one of *identity*. Two judgments had been rendered in favor of the plaintiff *v.* the defendants at the same term. Would it have been competent for the Court to have allowed an amendment, substituting the larger judgment for the one declared on, or had the other judgment been less in amount than this, could that have been substituted? Certainly not, because it would have substituted a different cause of action. Equally did the amendment allowed, substitute a new cause of action. It was not the judgment which the defendants had notice to defend against. The amendment took from him a verdict to which on the proper plea he was entitled, and would have had, and therefore should not have been allowed.

2. This action is not maintainable, because when it was commenced, the plaintiff could have taken out his alias execution for the balance due, if any.

For, although in *Clarke* v. *Goodwin*, 14 Mass. 239, the Court decided differently, the reasons for the opinion in that case do not now exist. Consequently the reasons failing, the law itself falls. *Cessat ratio, cessat lex.* That the plaintiff should be estopped from maintaining an action under such circumstances, appears from the fact that he may thus get two executions for the same cause of action. Public policy also requires, that there should be an end of lawsuits.

3. No evidence was introduced to show any thing due, and

hence the action is not maintainable. The allegation that the judgment remains unsatisfied for the sum of $100, is a material one, and should be proved. The plaintiff alone has power to prove it, having the exclusive control of the execution.

4. Should the exceptions be overruled, no costs can be recovered. R. S. c. 115, § 96.

E. L. Cummings, for the plaintiff.

APPLETON, J. — If any error arises in misdescribing a contract or judgment in suit, it is a matter of discretion on the part of the presiding Judge, when and on what terms to permit its correction. When the mistake is corrected, it is not to be viewed as a new cause of action but as the correction of an error in the statement of the one declared upon. The exercise of this discretion in matters legally amendable, is not the subject of exceptions. If it were, still the amendment was properly allowed in this case. *Stanwood* v. *Scovil*, 4 Pick. 422; *Greene* v. *Jackson*, 15 Maine, 136; *Smith* v. *Palmer*, 6 Cush. 513.

The judgment in suit was recovered at the March term, 1851, of the late District Court, and the execution issued thereon has in part been satisfied. By R. S. c. 115, § 105, "an *alias* or *pluries* execution may be issued within three years next after the day in which the last preceding execution was returnable, and not afterwards. As the plaintiff might have renewed his execution, it is insisted that he cannot maintain this action. But such is not the common law, and that is not changed by any statutory provisions. By § 96, of the chapter before referred to, costs are not allowed when an action is commenced upon a judgment on which at the time of its commencement an execution might have issued, except in the case of trustee process, but the suit is not prohibited. The plaintiff is therefore entitled to judgment for the amount due.

Exceptions overruled.

Judgment on the verdict.

SHEPLEY, C. J., and TENNEY, WELLS and HOWARD, J. J., concurred.

GRAY *versus* CARLETON.

The lien given by the R. S. c. 125, § 37, for securing labor and materials, employed in the erection of buildings, gives no protection to one who builds for himself, under an arrangement, though merely a verbal one, that he should purchase the land, at an agreed price.

The amendatory Act of 1850, extended to suits pending at the time of its enactment.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J., presiding.

WRIT OF ENTRY.

In 1848, Thomas Warren owned a lot of land, and agreed verbally with one Rowe, to sell it to him for $500, and to make some advances of materials and money to help Rowe to build a house upon it. Warren was to own the land and house, until paid the purchase money and advances, and then convey it to Rowe.

Rowe proceeded to build the house, receiving from Warren the promised advances.

This demandant did the plastering, by the yard, under a contract with Rowe, finishing it on July 8, 1848, and on Oct. 7, 1848, in order to secure the lien allowed by the statute, he sued Rowe and attached the house and the "lot of land on which it stood." In that suit he obtained judgment against Rowe, and within thirty days afterwards, viz., on *November* 15, 1850, by virtue of the execution which was issued thereon, levied and set off to himself a part of the land, but not including any portion of the house.

The tenant holds under a warranty deed from Warren, made in *September*, 1850.

The case was withdrawn from the jury, and submitted to the Court for a legal decision.

Rand, for the demandant.

Warren owned the land. The house was built for him under his contract with Rowe, and Warren then owned both house and land. The demandant rendered his personal services, and furnished materials in building the house. This he did by a contract with Rowe, who had contracted with

Warren to build it. To one standing in this relation, a lien upon the land is expressly given by the statute of 1841. Its language is; "by virtue of any contract with the owner, *or other person who had contracted with such owner.*"

True, the Act of June 28, 1850, c. 159, has stricken out the words, "*or other person who had contracted with such owner.*" But that Act cannot be permitted to defeat liens which existed before its passage; and especially those in which attachments had been previously made. Such a retroactive effect is not to be allowed.

Fessenden & Deblois, for the defendant.

SHEPLEY, C. J. — The demandant appears to have labored during the year 1848 upon a house built by Henry Rowe, on land then owned by Thomas Warren, who had, as Rowe states, agreed to provide certain materials and to assist him with money to enable him to build the house, and had agreed to convey the land, on which it was to be built, upon payment of an agreed price, and of the money advanced, and of the value of the materials furnished.

The demandant caused the estate to be attached to secure a lien for payment of his services; recovered judgment against Rowe, in October, 1850, and caused an execution issued thereon to be levied on part of the lot of land, on Nov. 15, 1850.

This suit has been commenced to recover possession of the land thus levied upon. Rowe does not appear to have performed his contract with Warren, or to have become at any time the owner of the land. It is only by virtue of the lien created by statute, c. 125, § 37, and the proceedings before stated, that the demandant claims to have acquired title.

There are insuperable obstacles to a recovery. The labor does not appear to have been performed by virtue of any contract with the owner, or by virtue of any contract made with another person "who had contracted with such owner."

There does not appear to have been any contract between Rowe and Warren, that Rowe should build the house for Warren. He appears to have been building it for him-

self, for his own use or gain, or loss, and to have obtained credit from Warren to enable him to do it; and for security the house and land were to remain the property of Warren until he should be paid. The demandant does not therefore present a case, in which a lien was created by the statute.

If the Court could consider that he had, the statute was amended by the Act approved on June 28, 1850, by striking out the words, "or other person who had contracted with such owner," and this repeal of that clause was in force before the levy in this case was made; and there remained no legal authority for making such a levy upon the land of another, than the judgment debtor. *Bangor* v. *Goding*, 35 Maine, 73. *Demandant nonsuit.*

TENNEY, WELLS, HOWARD, and APPLETON, J. J., concurred.

DANIEL CASH *versus* NATHANIEL D. FREEMAN.

A receipt in full of all demands, though purporting to be for a sum merely nominal, will, if unexplained, discharge all debts *then* existing even such as are not payable until a subsequent day.

ASSUMPSIT, upon an unnegotiable note for $12, dated Jan. 11, 1851, and payable in July then next with interest. The plaintiff read the note. The defendant then introduced a paper signed by the plaintiff, as follows: — "Bridgton, May 30, 1851. Received of Nathaniel D. Freeman, one dollar and fifty cents in full of all demands to this date.

"The case was submitted for such a conclusion as a jury should come to according to the legal rights of the parties."

Strout, for the plaintiff.

Written agreements are to be construed according to the intention of the parties, to be collected from the whole instrument. The same principle of law applies to receipts. From the recital and consideration in this receipt, it does not appear to have been the intention of the parties to release a note, *not due at the date of the receipt*, and which was allowed by the maker to remain in the possession of the payee after the

receipt was given. True, the rule of law is that a receipt embraces all demands embraced by its terms. It is, however, admissible to show what was intended to be released. 15 Pick. 225. That intention may be ascertained from the paper itself. True, the note in this case was a subsisting debt, at the date of the receipt. But it was not payable till a subsequent day.

The cause of action did not arise till two months after the date of the receipt. To allow the receipt to bar the note, is to give it a prospective operation.

A release will not operate prospectively, to defeat an action, the cause of which may arise subsequent to the release. *Cocke* v. *Stuart*, Peck. 137; 3 U. S. Digest, 330, § 66.

Littlefield, for the defendant.

SHEPLEY, C. J. — In the case of *Cunningham* v. *Batchelder*, 32 Maine, 315, it was decided, that a receipt in full of all demands, if unexplained, would operate as a discharge from the payment of an existing promissory note. This case is presented for decision without any explanation of the occasion of making the receipt. The only proof of any transactions or dealings between the parties is found in the making of the note and receipt. The note had not then become payable, but a receipt may operate upon existing claims and demands, although a present right of action upon them may not have accrued; while it would not operate as a bar to claims or demands not then existing.

The note was not surrendered to the defendant, but the occasion of making the receipt may have been an adjustment of the note at a place, where the plaintiff did not have the note.

The case may lead one to suspect, that the note has not been paid, but that is not sufficient, without any explanation or proof of other dealings between the parties, to relieve the plaintiff from the effect, it may be, of his own imprudent conduct. *Plaintiff nonsuit.*

TENNEY, WELLS, HOWARD and APPLETON, J. J., concurred.

Baker *versus* Freeman *& al.*

An authorization to an agent to affix the seal of his principal must itself be under seal.

If an agent have affixed to an instrument the name and seal of his principal, when authorized to affix the name only, the seal cannot be treated as surplusage, even though the instrument would have been effectual by the signing without the sealing.

In an assignment of a debtor's property *in trust*, for the benefit of creditors, the trustees covenanted under seal that they would pay proportionate dividends to such creditors as should *sign* the instrument of assignment, assenting thereto and stipulating that they would release certain claims; —

Held, that a creditor whose name had been signed thereto, under proper authority, by an agent who at the same time, *without authority* annexed a seal to the signature, was not so a party to the instrument as to maintain covenant broken against the assignees for his proportion of the dividends.

On Report from *Nisi Prius.*

Covenant Broken.

In 1833, by an *indenture* of three parts, one Edward Rowse, of the first part, assigned his property to the defendants, of the second part, for the benefit of M. N., I. J., and such others, being creditors of said Rowse, as have *signed* the instrument, of the third part. The defendants on their part assented to the trust, and covenanted for its faithful performance.

The instrument contained a clause, attesting that the parties of the third part assented to the assignment, and stipulating that they would release and discharge all their claims against one Bean, the co-partner of Rowse.

The instrument contained the signatures and seals of some of the creditors, and shows among them the name and seal of the plaintiff, "by Joseph Adams." The defendants deny that Adams had authority to affix the seal of the plaintiff, who thereupon introduced the deposition of Adams. His testimony was, that he affixed the name and seal of the plaintiff, and that he had authority from the plaintiff, and thinks it was either verbal or written, but not under seal.

The case was submitted to the Court upon a stipulation that "if in their opinion, the execution of the assignment is

not proved, the plaintiff is to become nonsuit;" if otherwise, a default is to be entered.

Lancaster & Baker, for the plaintiff.

The only question is, whether the plaintiff so became a party to this instrument, that he can maintain this action?

His name and seal were affixed to the assignment by Jos. Adams, and by the *authority* of the plaintiff, as he deposes.

By what kind of authority?

I. We contend that the Court is authorized to infer that it was by power of attorney. This assignment was made twenty years ago; the property passed into the hands of the defendants, and was long since converted by them, and all parties have treated this as a valid instrument for the whole time. It is not therefore to be expected that this authority can be so well proved as in a recent transaction. It is not a matter of record, but is of a transitory kind, so that witnesses might be almost expected to forget the transaction. The fact of authorization being proved, the law will step in, after such lapse of time, and presume that it was the legal kind of authorization, until the contrary appears.

II. Parole authority was sufficient.

If a person is present, parole authority is good. But, if the authority was given, it can be of no importance that the principal should be present.

So one co-partner may affix a seal for the others. 4 Maine, 206; 11 Pick. 400; 21 Maine, 280; 4 Mason, 206.

There is no necessity for such a rule as to assignments, but great inconvenience in it. Preserve the rule as to deeds of conveyance, if you please, but in commercial transactions, so often done through agency of others, it is worse than useless.

This rule applied to commercial matters is inconsistent with the spirit of the age, and must ultimately fall.

Why not let it go now?

III. It was not necessary that the plaintiff's signature should be affixed *with seal*, it is good without, and entitles him to maintain this action. Adams was authorized to *sign*,

if not to affix the seal, and by the very terms of the instrument, this is all that is required.

The covenant is made by the defendants with the several parties of the third party. Who are the third party? The instrument defines them to be such creditors as shall "*sign*" it, not become parties to it, not execute, not sign and seal and deliver. These three things are included in the word *execute.* To require a seal, is to make a new contract for the parties.

Deane, for the defendants.

APPLETON, J. — This is an action of covenant broken, in which the plaintiff seeks to recover whatever may be due him as party to an assignment under seal, made to the defendants by one Rowse, of whom he was a creditor. To entitle him to recover, he must show that he became legally a party thereto. He did not sign the indenture himself, but his name was affixed by Joseph Adams, who purported to act as his attorney. As the contract declared on was a sealed instrument, and as the plaintiff's rights depend on his having become a party to the same, it is obvious that unless Mr. Adams had authority under seal, to bind his principal, his signature would be ineffectual for that purpose. The only testimony on this subject is from Mr. Adams, who says he had authority from Mr. Baker to execute the assignment, and thinks it was either verbal or written, and that it was not under seal, because he could find no power under seal, and has no recollection of having had such a power from him. By his testimony it is left uncertain whether the authority was verbal or written, while the idea that it was under seal is distinctly negatived. As the attorney was not authorized to bind his principal, the latter is to be regarded as a stranger to the assignment and not entitled to any benefits arising under it. *Plaintiff nonsuit.*

SHEPLEY, C. J., and TENNEY, WELLS and HOWARD, J. J., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1853.

COUNTY OF LINCOLN.

WHITMORE *versus* LEBALLISTIER.

Of the powers of referees to decide both law and fact.

TENNEY, J. — This is the ordinary case of an award of referees, where they have undertaken to decide the whole case, without reporting the facts found, and submitting to the Court the law applicable thereto.

This Court have the discretionary power to accept, reject or recommit, according to the equity of the case, which was possessed by the late District Court, at the time it accepted the report. Statutes of 1845, c. 168. The parties selected their tribunal, which had authority to decide the law and the fact involved. No suggestion of any improper bias upon the minds of the referees is suggested. *Exceptions overruled.*

Judgment on the award.

SHEPLEY, C. J., and HOWARD and APPLETON, J. J., concurred.

Lowell & Foster, in support of the award.

F. Allen, contra.

STATE *versus* REED.

To a *complaint* for crime, it is not a fatal objection, that it employs Arabic numerals, or long used and well understood abbreviations, to express the time when the offence was committed, or when the complaint was made and sworn to.

To a complaint for selling, without authority, *one glass* of spirituous liquor, there is no ground for the objection that there was no definite description of the quantity in which the liquor was sold.

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

COMPLAINT, made and sworn to on the "16*th day of December, A. D.* 1850," charging that the defendant on the "14*th day of December, A. D.* 1850," without authority sold to N. T. a quantity of spirituous liquor, viz: "*one glass* of rum, one glass of gin, one glass of brandy and one glass of wine."

After verdict against the defendant, he moved in arrest of judgment, for the reasons: —

1st. That the day of the month and year in which said selling is alleged, to wit, the 14th day of December, A. D. 1850, is expressed in figures and not in writing as they should be.

2d. That no year is sufficiently and properly expressed in which said selling is alleged.

3d. That said selling is alleged to have taken place on "the 14th day of December, A. D. 1850," and not on the fourteenth day of December in the year of our Lord eighteen hundred and fifty, or in the year eighteen hundred and fifty, as it should have been.

4th. That the selling alleged in said complaint is of one glass of rum, one glass of gin, one glass of brandy and one glass of wine, which said term "*one glass*" does not express any quantity known to the law.

The motion was overruled, and the defendant excepted.

Merrill, for the defendant.

The day of the month and the year should have been written out in words in the complaint, and not in figures, and

instead of the abbreviations, A. D. the words, "*in the year*," or, "*in the year of our Lord*," should have been written out at length, and the omission to do this is fatal to the complaint. 1 Chitty's Crim. Law, 176; 7 Dane's Abr. 269 & 70; 5 U. S. Dig. 147.

Tallman, Att'y General, for the State.

TENNEY, J. — The exceptions are attempted to be sustained on the ground, that the time, when the complaint was made is stated therein to be "on the 16th day of December, A. D. 1850," and that it is alleged in the complaint, that the defendant, "on the 14th day of December, A. D. 1850," was guilty of the acts complained of; and it is contended, that the use of figures and abbreviations in the complaint renders it invalid.

In all criminal prosecutions, the accused shall have a right to demand the nature and cause of the accusation; and he shall not be deprived of his life, liberty, property or privileges but by the law of the land. Constitution of Maine, Article 1, § 6.

The use of Arabic numeral characters has been long adopted in contracts and other documents, and no want of certainty is perceived to be the result. And the nature and cause of a criminal complaint is not rendered obscure in any degree, by reason of dates being in those characters. Such abbreviations as occur in the complaint, which we are considering, have been for a long time used, and their meaning is as well understood as if the words which they represent, were written at length.

It has not been satisfactorily shown, that a complaint containing dates in numeral characters, and the abbreviations of "A. D." for "the year of our Lord," fails to be according to the law of the land. The statutes of England, which have been cited for the purpose of showing the complaint defective, are not such as are binding authority here. The Act of the 4th year of George 2, c. 14, and 6 Geo. 2, c. 26, we are not satisfied has ever been adopted as a part of the common law of this country.

In several States of the Union, dates like those in question have been held sufficient. *State* v. *Hodgdon*, 3 Ver. 481; *State* v. *Kaiford*, 7 Porter, 101; *Barnes* v. *State*, 5 Yerger, 186; *State* v. *Haddock*, 2 Hawk. 416. In other cases they have been regarded as insufficient at common law, though they have sometimes been held valid under statutory provisions. *State* v. *Deckins*, 1 Hayw. 406; *State* v. *Lane*, 4 Iredell, 114; *Finch* v. *State*, 6 Blackf. 533.

The practice which has prevailed in this respect, it is believed has not been uniform even in this State, and authority is not so clear as to warrant the decision, that a complaint for such a cause is essentially defective, though we think it would be better for criminal pleaders to adhere to the ancient practice which has generally been adopted, to frame complaints exclusively in the English language. *Exceptions overruled.*

SHEPLEY, C. J., and WELLS and HOWARD, J. J., concurred.

COUNTY OF KENNEBEC.

AUGUSTA BANK *& al. versus* HAMBLET.

An authority, given by the vote of a corporation to sell and convey its real estate, may be reasonably construed to include a right to make a binding contract to convey at a future day.

A seal affixed to a contract sufficiently imports a consideration.

In a sealed obligation to pay the purchase money of land, a recital that the obligee had by a "bond bound himself" to convey, estops the purchaser to deny the authority of the agent by whom the seller's bond purports to have been executed, if the seller have not disavowed it.

Bonds given between the parties, both being a part of the same transaction, the one to sell and the other to purchase land at a stipulated price, are not dependent, if they fix the time and place at which the purchaser is to make the payment.

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

DEBT on bond dated July 22d, 1848, in the penal sum of

$1000, on condition, that " whereas the said Banking Company and said Smith have this day agreed with the undersigned, and by their bond bound themselves to sell and convey unto the undersigned the following tract of land [described] for the sum of one dollar per acre, payable, one third the first of November, 1849, one third the first of November, 1850, and the other third the first of November, 1851, with interest thereon annually, from the first of November next, in consideration whereof the undersigned has agreed and doth hereby agree with said Banking Company and said Smith, within thirty days from this date, to take and receive a conveyance of said land, and to pay or secure to be paid the sums aforesaid, at the times and in the manner aforesaid; which said security for the payment of said sums shall be to the satisfaction and acceptance of said Smith. Now if the undersigned shall and will within the said thirty days, at said Augusta, pay or offer to pay the aforesaid sums as aforesaid, then the aforesaid bond shall be null and void; otherwise to be and remain in full force and virtue."

The bond given by the plaintiffs and referred to in the condition of the defendant's bond, was given at the same time, in the penal sum of $1000, conditioned; —

" That whereas the said President, Directors and Company and the said Smith have agreed to sell and convey unto the said Hamblet a certain lot of land, [here follows description as above,] and the said Hamblet, in consideration thereof, hath agreed to the said President, Directors and Company and the said Smith, that he will, within thirty days from the date of this, give them satisfactory security to pay for the above described land, one dollar per acre, payable, one third Nov. 11, 1849, one third Nov. 1, 1850, and the balance the first day of Nov. 1851, with interest annually from the first day of Nov. 1848. Now, therefore, if after the performance of the said conditions, and at the request of the said Hamblet, his heirs and assigns, the said President, Directors and Company and the said Smith shall make, execute and deliver to the said Hamblet, his heirs and assigns, a good and sufficient deed of

conveyance of the said premises, and therein warrant and assure the same to him and them free from all incumbrances, then this obligation to be void; otherwise to remain in full force and virtue."

This bond was signed,—

"The President, Directors & Co. of the Augusta Bank,

"by Tho's W. Smith, *Pres't.* [L. S.]

"Tho's W. Smith. [L. S.]"

To show the authority of the president of the bank to execute the bond, the plaintiffs introduced the copy of a vote of the directors, of the same date of the bonds, authorizing him to "sell and convey" the land.

Upon this evidence, the Court is to enter a legal judgment by nonsuit or default. If by default the damages, if not adjudged liquidated, are to be settled on a hearing before the Court or some Justice thereof.

J. W. Bradbury, for the plaintiffs.

J. S. Abbott, for the defendant.

1. The bond given by the plaintiffs was evidently the consideration for the bond given by the defendant. But Thos. W. Smith had no authority to execute the bond on the part of the bank.

The directors' vote gave authority "to sell and convey," but no authority to bind the bank by a bond. Hence the bank was not bound, and it would be contrary to established principles that one party should be bound when the other is not.

2. The agreements in the bonds are dependent, conditions were to be performed by the *plaintiffs*, either preceding any thing to be done by the defendant or simultaneously.

But they did nothing, offered to do nothing. They have not even to this day ascertained the number of acres which the land contained. Hence the defendant is released. His stipulation was within thirty days to "take and receive" a conveyance and pay or secure, &c.

No payment whatever would be due within the thirty days. The thirty days would expire on *August* 21, 1847. No pay-

ment was to be due, *nor interest to be taxed* until *November* 1, 1849. Hence it is apparent that the phrase, "pay or offer to pay the aforesaid sums as aforesaid," means simply to perform the conditions of the bond on his part, as he would be legally required to do.

What then, upon a view of all the conditions in the defendant's bond, were the parties to do? The plaintiffs were "to convey" to him, the defendant was "to take and receive the deed," "and pay or secure the sums". The defendant was not required *to demand* a deed. The acts were to be simultaneous, neither party did any thing, and consequently, neither has any right of action against the other. *Brown* v. *Gammon*, 14 Maine, 276; *Howe* v. *Huntington*, 15 Maine, 350; *Low* v. *Marshall*, 17 Maine, 232; *Drummond* v. *Churchill*, 17 Maine, 327; *Dana* v. *King*, 2 Pick. 155; *Hunt* v. *Livermore*, 5 Pick. 395; *Johnson* v. *Reed & al.* 9 Mass. 78; *Gardiner* v. *Corson*, and cases cited in the note, Rand's edition, 15 Mass. 499; *Swan* v. *Drury & al.* 22 Pick. 485.

TENNEY, J. — The first objection made to the maintenance of the action arises from the supposed want of authority in the president of the bank to execute the bond, referred to in that of the defendant, now in suit, in behalf of the corporation, and it is urged therefore that there is no validity in the bond given by the bank to the defendant; and hence that of the defendant is destitute of consideration, and one cannot be enforced, while the other may be avoided.

The votes of the stockholders and directors of the bank, introduced for the purpose of showing the power of the president to execute certain instruments, does not embrace bonds for the future conveyance of real estate, *in terms*. But by the vote of the stockholders on Feb. 22, 1814, he is authorized to execute instruments, which the directors may order for the convenient managing and disposing of any estate of the bank, and to affix thereto, the seal of the corporation.

On July 22, 1848, the directors empowered the president

by vote, to *sell* and *convey* the land described in the bond for the prices and in the manner therein mentioned. It is not necessary, that each instrument appropriate for the convenient managing and disposing of the estate of the bank, should be specified in a vote of the directors, provided the general power to perform acts, which may embrace the execution of such instruments, is conferred. The authority to *sell* as well as to convey real estate, implies a power to negotiate and make a bargain with a purchaser, prior to the conveyance; and if the latter for any reason cannot follow, the negotiation and bargain, immediately, the attempt to make a conveyance might be fruitless unless the bargain is made obligatory upon the parties. It is not an unreasonable construction of the vote, that the president should be authorized not only to convey real estate, but if necessary, under the power *to sell*, to make a *binding contract*, to convey at a future time.

But this action is upon a sealed instrument. Its character imports a consideration. It recites all the material parts of the condition of the bond given to the defendant. The whole contract is fully disclosed therein. Among other recitals, it states that the plaintiffs and Thomas W. Smith, on the day of its date agreed with the undersigned, and by their bond bound themselves, &c. The bond here referred to, the bank have not repudiated, as not being their deed, or done any thing indicative of a design to avoid its obligations, on account of any want of authority in the president to execute it. The defendant is estopped to escape liability on this ground.

2. It is contended that the conditions in the defendant's bond are dependent, and that certain conditions were to be performed by the plaintiffs, either preceding any thing required of the defendant, or simultaneously. If such was the character of the transaction, this action cannot be maintained. It is well settled, when acts are to be performed by each party at the same time, neither party can maintain an action against the other without performance or an offer of performance on his part. But if it is the design of the parties, that one party alone is to do the first act, after the execution of

the contract, and by failure, to commit a breach thereof, the other party may be excused from tendering a performance of the acts to be done by him. Such was the case of *Warren* v. *Wheeler*, 21 Maine, 484, upon a contract not under seal, in which it was agreed by the latter, that he would deliver to the former, or his assignee, a good warranty deed, within twenty days from the date of the contract. And then the other party, or assignee, should deliver to him, the notes mentioned, &c. The Court say there can be no doubt, that it was the intention of the parties, as expressed in the agreement, that the deed should be delivered, and payment made by money or notes at the same time. And neither party would be obliged to perform unless the other did. In such case the general rule is, that the party who would claim performance from the other, must show a readiness and offer to perform his own part. But this rule does not prevail, when the contract itself determines, which party shall first prepare and offer to perform. When the parties have agreed upon this matter, neither the law nor the tribunals break in upon or disregard such agreement.

The bonds of the respective parties were executed on the same day, and are part of the same transaction. It was the intention of the plaintiffs to convey the land, and of the defendant to take the conveyance on the terms described in the bonds. It was not required by the contract, that the former should pass the title without the payment of the consideration, or the security therefor; or that the latter should give the security without receiving the title. It is manifest they were to be simultaneous acts. But it was the contract, that the defendant on a day and place certain, should pay or offer to pay the sums, stipulated as the consideration of the conveyance as specified in the bond. On failure to do this, the bond was to be effectual against him; and by doing this, the condition was to be saved. Not having performed his agreement, the condition of the bond has been broken, and the defendant is liable.

It was not the design of the parties as disclosed by the

bond, that on failure of the defendant to perform the condition and receive the conveyance, the plaintiffs should retain the title and receive the sum of one thousand dollars. The sum named in the formal part of the bond was not intended as the damages estimated by the parties for the breach of the condition. According to the agreement of the parties, the defendant is to be defaulted, judgment to be entered for the penal sum in the bond, and execution to issue for such sum as shall be determined by the Court, or a Justice thereof.

SHEPLEY, C. J., and HOWARD and APPLETON, J. J., concurred.

TREASURER OF INSANE HOSPITAL *versus* INHABITANTS OF BELGRADE.

The statute of 1847, c. 33, for the government of the insane hospital, gives authority to two justices of the peace, *quorum unus*, to decide upon questions of insanity when the selectmen shall have, upon a written complaint, refused or neglected to do so.

The jurisdiction of the justices is, therefore, dependent upon such refusal or neglect.

That jurisdiction is to be settled, *before* the justices have power to proceed, and it is to be settled by them alone, so far as relates to the person alleged to be insane.

In a suit by the hospital to recover the expenses of a person, committed as insane by such justices, their jurisdiction is established, by showing their adjudication that the selectmen had neglected to make examination after "a complaint" or after "an application" made to them "in writing."

To the maintenance of such a suit, it is not necessary to show that the defendants had notice of the proceedings before the justices.

A complaint in writing, made to the selectmen, by the wife of the person alleged to be insane, is a sufficient basis for their action; she being a *relative* within the intendment of the statute.

ASSUMPSIT.

The plaintiff introduced an attested copy of the record of two justices of the peace and quorum. The record set forth an attested copy of a complaint made to them in 1850, on oath, by the father and the wife of Richmond H. Gould, of

Belgrade, representing that he was insane and dangerous, and that his comfort and that of others required him to be sent to the hospital; that an application had been previously made by said wife, to the selectmen of Belgrade, requesting them to examine into the matter of said Richmond's insanity, and that they had neglected to do so.

Also a copy of the warrant issued on said complaint by said justices, to the sheriff or his deputy, requiring him to bring said Richmond before them, that the matter of his insanity may be inquired of according to law; also the return indorsed thereon by the deputy sheriff, that he had arrested said Richmond and brought him before said justices.

Also the adjudication of said justices as follows: —

"Richmond H. Gould, of Belgrade, upon complaint of Nancy Gould, his wife, and Elihu Gould, his father, made to us 'that said Richmond H. Gould is an insane person and dangerous, and that his comfort and that of others requires that he should be sent to the insane hospital; and that application was made several months since by the said Nancy, to the selectmen of Belgrade, aforesaid, requesting them to examine into the matter of said Richmond's insanity, but that they have unreasonably neglected so to do,' was brought before us, and examination was had by us into the subject matter of said complaint; and it satisfactorily appearing to us the said justices, upon proof from the several witnesses, and from such testimony as was by us deemed proper, that said Richmond H. Gould is, and for some months past has been an insane and dangerous person; and that due application in writing had been previously made by the said Nancy to the selectmen of Belgrade, aforesaid, requesting them to examine into the matter of said Richmond H. Gould's insanity, and that they have unreasonably neglected so to do.

"It is therefore considered by us the said justices, that the said Richmond H. Gould is an insane and dangerous person. And we do further adjudge that in our opinion the said Richmond would be rendered more comfortable and safe to himself and others, by a residence in the insane hospital. And

that an order be issued under our hands, to send said insane person to the insane hospital, as provided in the statute relative to the same.

"Given under our hands the day and year aforesaid.

"Benja. A. G. Fuller, } *Justices of the*
"B. F. Chandler, } *Peace and Quorum.*

"A true copy of judgment:

"*Attest:* B. A. G. Fuller, *Jus. Peace and quorum.*"

Also an attested copy of the warrant, under the hands of said justices addressed to the superintendent of the hospital, as follows: —

"You are hereby notified, that at an examination this day had before us, the subscribers, two justices of the peace and quorum, in and for said county, on complaint of Nancy Gould and Elihu Gould, that one Richmond H. Gould *is* an insane person, and would be more comfortable and safe to himself and others, by a residence in the insane hospital.

"We have decided that said Richmond H. Gould *is* an insane person, and that he would be rendered more comfortable and safe to himself and others by a residence in the hospital.

"We have, therefore, ordered the said Richmond H. Gould, committed to said hospital, and direct his detention in the same until he become of sound mind, or be otherwise legally discharged.

"And we do certify, that said Gould is a resident of Belgrade, in said county, and was there arrested."

It was admitted that the residence of Richmond was in Belgrade, and that he was received into the hospital in virtue of said warrant, and that the hospital incurred expenses for his board and clothing there. It is to recover for those expenses that this suit is brought.

Upon this evidence, the Judge directed a nonsuit, to which the plaintiff excepted.

Fuller & Edwards, for the plaintiff.

I. The right to maintain this action is found in the statute of 1847, relating to the insane hospital.

This statute was evidently framed, and intended by the

Legislature to relieve the hospital of all questions as to the formality of proceedings, and as to the settlement of the insane person, and to render the judgment of the magistrates final. This appears from the following considerations: —

1. The justices are in certain cases made the *appellate* court, who shall "hear and *determine all matters* brought before them" and give their "order," &c. Stat. 1847, c. 33, § 9.

2. No appeal from their decision is any where allowed, and the peculiar necessities of the case require that such decision should be final.

3. Upon the refusal or neglect of the selectmen to examine, the two justices (quorum unus) shall inquire into, and *determine*, *both* as to the insanity as well as to *all other* matters touching the case. Ib. § 10.

4. The certificate (or order) of said justices "*shall be deemed sufficient evidence* to render such city or town liable for the expense of committing to and supporting in the insane hospital such insane person." Ib. § 11. It is therefore contended: —

II. The certificate of the justices is conclusive and settles the only question which defendants here deny, the legal liability to the plaintiff. The statute points out what the certificate shall contain, to which this certificate conforms, and is therefore final.

III. The defendants cannot in this action object to irregularity in the proceedings. This defence is not now open. If any such irregularity exists, the only remedy is by *certiorari*. They cannot be permitted, after the support has been furnished, to object to the payment upon such technical ground.

The justices are made the judges in "*all matters* touching the case." This includes the sufficiency of the complaint, and their decision must stand till set aside upon *certiorari*. This is the only remedy in cases where no appeal lies. 12 Maine, 271, 235 and 210; 19 Maine, 46; 25 Maine, 69; 23 Maine, 9.

IV. The commitment was strictly legal.

1. No form of complaint is specified, and evidently no technicality is required. The statute was enacted to simplify proceedings.

2. It would be sufficient to allege in the words of the statute, (§ 10,) that "the selectmen had refused (or neglected) to examine," &c. The application would be matter of proof, *one* of the "matters" to be examined into by the justices.

The essential matter is the neglect or refusal. If the record finds this it is sufficient.

The record need *not* show that there had been application to selectmen in writing. This however does so show. 12 Maine, 271.

V. The case finds, *that* the person committed was insane; *that* he had his residence in Belgrade; and *that* the plaintiff furnished the items charged; and the whole record shows that the selectmen had for a long time neglected to examine into the case, or to provide for his comfort and safety by sending him to the hospital, after application to them made in writing. This gives perfect right to a recovery.

Morrell, for the defendants.

The justices had no jurisdiction, and no authority to act.

Chap. 33, § 8, Laws 1847, makes selectmen of towns a board of examiners in their several towns. To that board of examiners a complaint must be made *in writing*.

If they neglect or refuse to examine and decide, upon *such* a complaint, application may then be made to two justices of the peace, &c. § 10.

The application said to have been made to the selectmen is not alleged to have been in writing, and it did not appear from the complaint made to the justices, that it was in writing. The justices, therefore, had no power to issue a warrant and to act in the premises.

It was the right of the town to have the complaint examined by the selectmen. The power of the justices was only appellate, and no appeal could lie till the selectmen had had an opportunity to investigate the matter. Such opportunity

they never had, because they could act only upon a written complaint, which of itself was to be the basis of all subsequent proceedings.

The complaint referred to in the justices' adjudication, was not made by any relative of the person said to be insane. It was by his wife only, and she is not a *relative.*

The statute requires the examination, when made by justices, to be in the town to be charged or in an adjoining town. That it was so done, should appear of record. But it does not appear. No jurisdiction therefore was shown.

The case fully shows that though the power of the justices was only appellate, they assumed and exercised a jurisdiction original and exclusive.

TENNEY, J. — The trustees of the insane hospital are authorized in the name of the treasurer to bring actions for the recovery of all debts due to the institution. Statutes of 1847, c. 33, § 2.

By the provisions of the 10th § of the same chapter of the statutes, "If the mayor and aldermen of any city, or the selectmen of any town shall refuse or neglect to examine and decide on any case of insanity, as required by § 8, two justices of the peace, one of whom shall be of the quorum, upon complaint made in writing by any relative of an insane person, or other individuals named, shall sit, and hear and decide on the case. And they are authorized and required, to call before them such testimony as they shall deem proper, and they shall inquire into, and determine, both as to the insanity, as well as to all other matters, touching the case, and upon being satisfied of the insanity of the person of whom examination is made, they shall so decide; and they have the power, if they deem the exercise of it expedient, by an order under their hands, to send said insane person to the hospital, and to certify the fact of the insanity, and also the city or town in which the insane person resided, was commorant, or found at the time of the arrest or examination; and shall direct the detention of such person, till restored, or otherwise legally discharged.

The jurisdiction of these two justices of the peace is dependent upon the refusal or neglect of the officers of cities or towns required to make the examination and decision of any case of insanity, referred to in the written complaint, as required by the 8th §. This question of jurisdiction must be settled before the two justices of the peace have power to proceed to examine the case of insanity presented. Their adjudication after they have assumed jurisdiction is made final against the person, supposed to be insane, even to the restraint of personal liberty, there being no provision for an appeal. It follows that the jurisdiction, of those who make this final decision upon the question of insanity, and other questions embraced, is finally settled before they enter upon the merits of the complaint. No other tribunal, excepting the justices of the peace, to whom the complaint is presented, having any authority by the statute to settle the point of jurisdiction, either originally or by appeal, it follows of necessity, that if they entertain jurisdiction, they decide that question conclusively, so far as it regards the person, who is the subject of the examination. And the power to do so, is likewise expressly given to them, in the language of the statute, which is, "they shall inquire into and determine both as to the insanity, as well as to all other matters touching the case."

Such being the power of the justices of the peace, under the 10th §, the documents and other evidence before them upon the question of jurisdiction, need not be specified. The provision of the statute, which we are considering, being based upon the refusal or neglect of a tribunal authorized in the first instance to make an examination, no record, as in the case of an adjudication, exists, and no copies can be certified. There is supposed to be no document of any description, excepting the complaint; and this may not be accessible; and the refusal or neglect must be shown ordinarily by parole. It is sufficient if the justices of the peace certify that a complaint had been made in writing to the selectmen of Belgrade, requesting them to examine the matter of the person supposed to be insane, and that they have neglected so to do. In this case, the justices of the peace have stated in

their certificate, among other things, "that due *application* in writing had been previously made by said Nancy [wife of the insane person] to the selectmen of Belgrade aforesaid, requesting them to examine into the matter of said Richmond H. Gould's insanity, and that they have unreasonably neglected so to do." And when it is considered, that the justices of the peace took jurisdiction, and made a final decision of the matter, having certified that due application in writing had been proviously made," &c., it cannot be doubted that they intended to use the term "due application" as synonymous with the word "complaint" as used in the statute.

It is objected that the complaint originally presented to the selectmen of Belgrade, was not signed in the manner required by the statute, it being signed by the wife of the person, supposed to be insane. If the term "relative" of a man, does not in its literal signification embrace the wife, it would be difficult to believe, that the Legislature intended that selectmen should be prohibited from giving heed to the complaint of the wife, when designed to promote the good of the husband, his family and the community at large. But it cannot be doubted that the wife sustains a *relation* to the husband, and by the strictest rules of literal construction, she is his relative, although for many purposes the rules of law make them identical. On this point also, the decision of the justices must be treated as conclusive.

The certificate given by the two justices of the peace in this case, is made equally binding upon the insane person, and the city or town, in which he resided, was commorant or found at the time of the original arrest and examination. Same chapter, 11th section.

It is insisted, that the defendants are not liable because they had no notice of the pendency of the complaint, upon which the final decision was made. The statute requires no such notice, and it was obviously the design of the legislature to dispense with it. The principal municipal officers of cities and towns, in all cases, are made the board of examiners upon questions of insanity, presented under the statute, c. 33, § 8,

of 1852. Upon their decision an appeal lies to a tribunal consisting of two justices of the peace and the quorum. One of these justices, such officers have the privilege of appointing. Having once refused or neglected to enter upon the examination, no provision for a notice to appear before those whose authority arises from their own refusal or neglect could be useful. *Exceptions sustained, new trial granted.*

SHEPLEY, C. J., and HOWARD and APPLETON, J. J., concurred.

COUNTY OF SOMERSET.

DUTTON *versus* COLBY.

A tenancy at will may be terminated by the landlord's giving to the tenant a notice in writing as prescribed in R. S. c. 95, § 19.

If the tenant held over, the thirty days notice to quit, upon which to found a process of detainer cannot be given until the tenancy had been fully terminated.

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

FORCIBLE ENTRY AND DETAINER of a farm.

The general issue alone was pleaded.

On March 9, 1851, the respondent paid the complainant one year's rent of the farm in advance. No lease was given, and nothing was said about quitting at the end of the year.

On May 18, 1852, the complainant gave to the respondent written notice to quit the farm and surrender peaceable possession of it to the complainant. This process was instituted on June 18, 1852.

The case was submitted to the Court.

J. S. Abbott, for the complainant, cited R. S. c. 128; *Wheeler* v. *Cowan*, 25 Maine, 283; *Davis* v. *Thompson*, 13 Maine, 209; *Smith* v. *Rowe*, 31 Maine, 212.

The respondent has pleaded merely the general issue. Under that plea, nothing of tenancy at will can be set up.

Webster, for the respondent, as conclusive of the case, cited *Smith* v. *Rowe*, 31 Maine, 212.

WELLS, J. — The respondent became the tenant of the complainant on the ninth day of March, 1851, and gave his note for the amount of the rent for one year. There was no written lease, but a verbal agreement, that the respondent should occupy the premises for that period. After the expiration of the year, a notice in writing was given to him to quit.

By statute, c. 91, § 30, "no estate or interest in lands, unless created by some writing, and signed by the grantor or his attorney, shall have any greater force or effect, than an estate or lease at will."

The respondent was therefore tenant at will, and the notice given would terminate the tenancy. But the complainant could not have the aid of this process until he had complied with the statute, c. 128, § 5, and given a further notice after an end had been put to the tenancy, as was decided in *Smith* v. *Rowe*, 31 Maine, 212.

There does not appear to be any just ground of objection to the defence, made in this case, under the plea of the general issue.

According to the agreement of the parties, a nonsuit is to be entered.

SHEPLEY, C. J., and HOWARD, RICE and HATHAWAY, J. J., concurred.

STEWART *versus* HANSON.

A mortgage of chattels transfers to the mortgagee the legal title, subject to be defeated upon a redemption within the stipulated time.

A mortgagee of chattels has the right to immediate possession, unless he have otherwise agreed.

Declarations of a third person accompanying an act, and exhibiting the reason or purpose of the act, become a part of the act, and *as such*, may be introduced in evidence.

Of this class are declarations, accompanying an act, which specify a past transaction as the reason of the present act.

Thus a person, when delivering an article to the defendant, declared the reason to be that by a previous bargain, the article was to remain the defendant's property, unless paid for, which had not been done; —

Held, the declaration was a part of the delivery, and therefore admissible in evidence.

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

Trespass *de bonis.*

Two persons named Christie mortgaged to the plaintiff the chattels in controversy, among which was a large red horse. The mortgage was dated Nov. 30, 1848. Its condition was that the mortagers should pay and indemnify the mortgagee against his suretyship upon their note payable May 30, 1849. It stipulated that the articles should remain with them till called for by the mortgagee. The note was paid by the mortgagee Aug. 18, 1849.

The plaintiff introduced evidence tending to prove that some of the articles were taken by the defendants from the possession of the mortgagers on July 16, 1849, and afterwards sold by him.

The defendant objected that the action is unmaintainable, because the plaintiff, not having paid the note on said 16th of July, and not having called for possession, had no right to possession, and therefore no right to bring trespass. The objection was overruled, and the defendant excepted.

The defendant offered to prove, that before the mortgage was made, one of the mortgagers came to the defendant with the horse and surrendered it to the defendant, declaring at the same time, that there was a previous bargain, that the horse was to remain the defendant's property, unless he paid the defendant for it, which he had not done. The Judge admitted the proof of the surrender of the horse, but excluded the declarations of the previous bargain and the defendant excepted.

The Judge instructed the jury that, if they believed the tes-

timony upon that point, they would be authorized to find that the horse was transferred to the defendant by that surrender, it not appearing, that the surrenderer then owed any debts.

The verdict was for the plaintiff for $538.

Hutchinson, for the defendant.

Stewart, pro se.

Declarations which are merely *narrative of a past transaction*, are not admissible as evidence. 1 Greenl. on Ev. § 110; S. P. in 1 Greenl. on Ev. § 99.

The defendant should have established by other proof that he let Christie have the horse in question, otherwise his declarations are not admissible for any purpose. *Pool* v. *Bridges*, 4 Pick. 379.

Here the defendant relied upon the acts and declarations of Christie to prove not only that he surrendered the horse to the defendant, but that he received it from him at some time previous.

He also relied upon these declarations to show *what* the bargain was at the time Christie received the horse. Nothing can be clearer upon legal principles than that these declarations were wholly inadmissible. The Court allowed the proof of the surrender to be put in by the defendant, allowed all his statements to be proved in relation to the *surrender itself*, and that he had not paid defendant for the horse. All this was allowed to be proved by the Court. But the declarations as to the previous bargain were excluded and properly so.

The declarations of a person not a party who is living and a competent witness, though against his interest at the time they were made, are inadmissible. *Fitch* v. *Chapman*, 10 Conn. 8; *S. P. Baker* v. *Briggs*, 8 Pick. 122.

Wells, J. — A mortgagee of personal chattels has a right to the possession of them, unless it is agreed that they shall remain with the mortgager. *Libby* v. *Cushman*, 29 Maine, 429; *Holmes* v. *Sproul*, 31 Maine, 73. By a conveyance of goods in mortgage, the whole legal title passes conditionally

to the mortgagee, and if not redeemed at the time stipulated, the title becomes absolute at law. Story on Bail. § 287; *Flanders* v. *Barstow*, 18 Maine, 357.

In the present case, the mortgagers agree to keep the property mortgaged, "till called for, free of expense to said Stewart." The plaintiff had a right to the possession at any time, and the act of taking and selling the property was a violation of that right, for which trespass would lie. The mortgagers had no right to retain it against the will of the plaintiff. *Woodruff* v. *Halsey*, 8 Pick. 333; 1 Chit. Plead. 167. The plaintiff, like any other general owner, could take the actual custody of the property whenever it might suit his convenience. The defendant offered to prove, "that before the execution of the plaintiff's mortgage, one of the Christies, being one of the mortgagers, came with the large red horse, which was included in the mortgage, to the defendant and surrendered said horse to the defendant, at the same time declaring there was a previous bargain, that the horse was to be the property of the defendant, unless he paid the defendant for him, and this he had not done. The Judge admitted the proof of the surrender of the horse, but excluded the declarations of the previous bargain. And the jury were instructed, that they would be authorized to find, if they believed the testimony upon that point, that the large red horse was transferred to the defendant by his surrender, it not appearing that the mortgagers were owing at that time any debts."

It may be difficult to determine, at all times, when declarations shall be received as a part of the *res gesta*. But when they explain and illustrate it, they are clearly admissible. Mere narratives of past events, having no necessary connection with the act done, would not tend to explain it. But the declaration may properly refer to a past event as the true reason of the present conduct. If one should hand to another a sum of money, and should say that it is in payment of money borrowed at a former period, there could be no doubt, that the declaration would be explanatory of the act, although it referred to the past. So too if one should deliver a horse to an-

other with an accompanying declaration, that he had returned the horse, which he had previously hired of him; the act and declaration would be admissible upon a question subsequently arising in relation to the title of the horse, between the person to whom it was delivered and one claiming the horse under the person, who made the declaration. But when the narrative departs from a just explanation of the act, it affords no elucidation of it. Because the declaration regards the past, it is not therefore to be rejected.

The declaration, in the present case, made at the time of the surrender, was before the plaintiff had acquired any interest in the horse. It implied, that the horse, at that time, was the property of the defendant. And although it referred to a previous bargain, that bargain was still existing. It was in substance a recognition of a present state of things, as much so as if it had then been agreed, that the horse was the property of the defendant, and was to remain as such until payment was made for him. The mortgager had at that time a perfect right to admit that the defendant owned the horse, or to recognize a prior agreement producing the same effect. The declaration does appear to be explanatory of the surrender.

But it is said, that the jury did not believe the fact of the surrender, and therefore the declaration was immaterial. But their disbelief may have arisen from the exclusion of the explanation. The proof of the surrender merely, without any information as to the reasons for it, might create doubts of the existence of the fact. If the evidence was admissible the party offering it should have had the benefit of it. The jury might have taken a more favorable view of the alleged fact, if the declaration had been admitted. The exceptions must be sustained. *Verdict set aside and a new trial granted.*

Shepley, C. J., and Howard, Rice and Hathaway, J. J., concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1853.

COUNTY OF WALDO.

ERSKINE *versus* BOYD.

A certificate in the caption of a deposition that "the deponent was first sworn according to law to the aforesaid deposition by him subscribed," does not sufficiently show that the oath was taken before the deponent had been examined as a witness.

Such a caption, therefore does not authorize the deposition to be received.

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

CASE.

The plaintiff offered four depositions. They were objected to and were excluded. To that exclusion he excepted.

The only one of the depositions, as to which the exception was insisted upon, was that of Merrill Savage.

N. Abbott, for the plaintiff.

Libbey, for the defendant.

APPLETON, J. — The R. S. c. 133, § 15, require that "the deponent shall be first sworn to testify the truth, the whole truth and nothing but the truth relating to the cause or matter

for which the deposition is to be taken; and he shall then be examined," &c. By § 17, of the same statute it is required that it should appear in the certificate of the magistrate annexed to the deposition "that the deponent was sworn according to law and when."

The magistrate in the caption to the deposition of Merrill Savage certifies that "the aforesaid deponent was first sworn according to law on this third day of January, A. D. 1853, to the aforesaid deposition by him subscribed this day," &c. From this it does not distinctly appear that the requisite oath was administered before the deponent was examined as a witness by the respective parties to the cause. But the statute provides that the deponent should be sworn previously to his examination, so that all interrogatories shall be answered under the sanction of an oath. The certificate of the magistrate does not clearly show this to have been the case and the deposition was properly excluded. *Atkinson* v. *St. Croix Man. Co.* 24 Maine, 171; *Batchelder* v. *Merriam*, 34 Maine, 71.

It is unnecessary to consider the exceptions as to the other depositions, as they were not relied upon by the counsel for the plaintiff in argument.

Exceptions overruled. Nonsuit confirmed.

SHEPLEY, C. J., and TENNEY and HATHAWAY, J. J., concurred.

COUNTY OF PISCATAQUIS.

GOULD *versus* SMITH.

Hearsay is never admissible, if from the nature of the case it is apparent that better evidence is attainable.

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

DOWER.

In order to show that the husband was dead, the demandant offered evidence that "the news of his death at *Niagara falls*, was received in the fall of 1849, by his family, in a newspaper published at Lawrence, Massachusetts, called the Lawrence Courier." This was objected to, but was admitted as "*inducement* to evidence of reputation of the death in his family."

The demandant then offered what purported to be the said newspaper, which was objected to, but admitted as *inducement*. It was dated Sept. 15, 1849, and contained the following paragraph: — "James Gould, a millwright by trade, belonging in Brownville, Maine, and lately residing in Dover, N. H., and, we believe, also for a short time in this town, was killed by the falling of a block of timber on his head at Niagara falls, on the 27th day of August. We give this information at the instance of a gentleman in this town, who was at the falls at the time of the accident, and to apprise the friends of the deceased of his melancholy end."

The demandant also offered the testimony of Mr. Jenks, postmaster of Brownville, that, by request of the family, he wrote to the postmaster at Niagara falls, inquiring about the death of the said James Gould, and received a letter purporting to be from the postmaster last named, stating the facts and circumstances of his death very much as related in said newspaper. The letter was not offered.

This evidence of Mr. Jenks was objected to, but was admitted. There was further evidence in the case.

The verdict was for the demandant. To the admission of the evidence, the tenant excepted.

Sanborn, for the tenant.

The newspaper paragraph was but hearsay. Nothing shows that it was inserted by any one having knowledge of the death. 1 Greenl. on Ev. § 128, 136, 137.

The testimony of Jenks was inadmissible, because it was mere hearsay, and because it was a mere verbal detail of the contents of a written paper, which was not offered; and which, if offered, should have been excluded, because there was no testimony to prove its genuineness. Greenl. Ev. § 142. For the same reason the newspaper should have been excluded. *Wentworth* v. *Keizer*, 33 Maine, 367; *Morton* v. *Barrett*, 19 Maine, 109.

If the record of a Court is not *prima facie* evidence of its genuineness, then surely the letter and newspaper could not be.

If Gould was dead, better evidence of the fact must have been attainable. *Crouch* v. *Eveleth*, 15 Mass. 305.

S. A. Blake, for the demandant.

It is apparent that the evidence objected to was admitted merely as inducement to the other testimony, which of itself showed that the family considered the husband dead. The admission then was within the discretion of the Judge. *Cochrane* v. *Libbey*, 18 Maine, 41; *Morton* v. *Barrett*, 19 Maine, 109.

The death of a person may be presumed from his absence for a period less than seven years, if intelligence has been received from him of a kind calculated to lead the mind to such a conclusion. 1 Greenl. Ev. (3d ed.) note to p. 107; 2 B. & Ald. 385.

So, where there has been no intelligence, the death may be inferred from the lapse of less than seven years, if other circumstances concur. 1 Greenl. Ev. § 41.

At the trial no question was made of the *genuineness* of the newspaper, or of the *truthfulness* of the postmaster's correspondence.

And why were not the newspaper announcement and cor-

respondence properly admissible, as facts calculated, in connection with his long absence and the dangerous business of building a bridge across the St. Lawrence, to illustrate and explain his absence, and to give a character to that absence, more or less tending to satisfy the mind, whether he was dead or alive?

RICE, J. — Hearsay, as a general rule, is not evidence. To this rule, however, there are exceptions, under which to prevent an entire failure of justice ; and when no better evidence can be supposed to exist, it is admitted. *Crouch* v. *Eveleth*, 15 Mass. 305. But when, from the nature of the testimony offered, it is manifest that better evidence exists and is accessible, it is not admissible. *Jackson* v. *Esty*, 5 Cow. 319. It was held by this Court, in *Morton* v. *Barrett*, 19 Maine, 109, that the certificate of a consul of the death of an individual abroad, is not evidence of that fact. The letter of the postmaster at Niagara falls, if it had been introduced, would have shown the existence of better accessible evidence of the death of Gould, and was, even if proved genuine, not more satisfactory than a consular certificate. But the letter itself was not introduced. Proof of its contents was still more remote, uncertain and inconclusive.

The newspaper paragraph was *hearsay* upon *hearsay*, and although both were introduced as *inducement*, they were calculated to influence the jury upon a point, to prove which they were not admissible. *Exceptions sustained and new trial granted.*

WARD *versus* CHASE.

In a suit between the vendee of a chattel and an attaching officer, upon the question whether the sale was fraudulent as against the creditors of the vendor, the interest of the vendor is to be viewed as a balanced interest, and he is therefore competent as a witness for either party.

In a suit by the vendee of a chattel against an officer, by whom it had been attached in an action against the vendor and his co-partner, such co-partner

is competent as a witness for the officer, although, *should the officer recover*, the avails of the property would *probably* go to reduce the witness' liability upon the partnership debt.

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

Trespass, against the sheriff for the act of his deputy in attaching a mare, alleged to be the plaintiff's property.

At the trial, it appeared, *that* the mare had belonged to Frye and Bemis, co-partners; *that* the partnership had been dissolved, Frye taking the property of the company and undertaking to pay its debts; *that* he afterwards sold the mare to the plaintiff, and *that* the deputy afterwards attached her with other property upon a writ against Frye & Bemis jointly, for one of the partnership debts. Upon that debt the creditor claimed $303. The attached property was sold on the writ for $474,64, which yet remains in the hands of the deputy, and the suit is now pending in Court.

In defence of this action of trespass, the officer contended, that the sale to the plaintiff was fraudulent and void, as against the attaching creditors.

The *plaintiff* called Frye, as a witness, who was objected to on the ground of interest, he being liable as vendor to the plaintiff upon the implied warranty of title. But he was admitted, and to that admission, the defendant excepted.

The *defendant* called Bemis as a witness. He was objected to upon the ground of interest, because if the defendant should recover, the avails of the mare would be applied to the partnership debt and thus reduce the indebtedness of Bemis. Bemis was rejected as a witness, and to that rejection, the defendant excepted. The verdict was for the plaintiff for $78,50, damage. There were other points and other rulings in the case.

The arguments of counsel were chiefly upon points, which the Court did not find it necessary to discuss or decide. Upon the competency of the witnesses, however, the following views were urged by —

Stewart, for the defendant.

1. Frye was the plaintiff's vendor, and therefore inadmissible. *Thompson* v. *Towle*, 32 Maine, 87.

His interest was not balanced. He was bound *at all events* to make the *plaintiff's* title good. But the suit, upon which the mare was attached, *may be defeated.* The attaching creditors *may fail* to establish their claim. This question has been directly decided in this Court, and the witness held incompetent. *Gage* v. *Wilson*, 17 Maine, 378, 381; S. P. in *Brewer* v. *Curtis*, 3 Fairf. 51, 53; S. P. in *Thompson* v. *Towle*, 32 Maine, 87, 89.

For another reason his interest was not balanced. The mare was attached as the property of Frye and *Bemis*. She was sold to the plaintiff by *Frye alone.* But should the attaching creditors recover judgment against Frye and Bemis, Frye would be liable for only *one moiety* of such judgment, as between himself and Bemis. If he paid the whole judgment, he would have a remedy over upon Bemis for contribution. But he would have no such remedy if the plaintiff failed in this suit. His interest, therefore, was not balanced.

2. Bemis was a competent witness for the defendant. He had no *direct* and *certain* interest in the *result* of *the suit.* If it was defeated by his testimony, the verdict could not be used as evidence for any purpose in the suit brought by the attaching plaintiffs against himself and Frye, or for any other purpose beneficial to him. He had therefore no interest in the verdict as a matter of evidence. And the attaching plaintiffs may never recover judgment against him in their suits, and, in that event, the property attached must be returned to the defendants in that suit. He had, therefore, no *pecuniary* interest in this suit. At all events, the interest was too remote, uncertain and contingent to exclude him. *Commercial Bank* v. *Wilkins*, 9 Greenl. 40; *Philbrook* v. *Handley*, 27 Maine, 56.

Hutchinson, for the plaintiff, upon the same point, urged that Bemis was incompetent as a witness for the defendant, being directly interested in the event of the suit and in its subject matter. 2 Stark. Ev. 750.

APPLETON, J. — In the month of March, 1851, James E. Frye sold out half of his stock in trade to Jacob Bemis and entered into co-partnership with him, which continued till Aug. 28, of the same year, when it was dissolved. Bemis then sold out his interest in the goods and profits of the firm to Frye, and received a contract to indemnify and save him harmless from all their outstanding debts. After the dissolution Frye sold the horse in dispute to the plaintiff, which, while remaining in the possession of the vendor, was attached by a deputy of the defendant on writs against the firm of Frye & Bemis, and against Frye alone, the attachment on the firm debt having precedence. The plaintiff thereupon commenced the present suit, which is defended on the ground that the sale to him was fraudulent as against creditors. To prove that it was made in good faith, the plaintiff called Frye, his vendor, whose testimony was received, subject to all legal objections. The defendant, to show the sale fraudulent, offered Bemis as a witness, who was excluded on the ground of interest. To both these rulings exceptions have been duly taken.

The evidence of Frye, though a vendor of the plaintiff, was properly admitted, his interest being regarded as balanced. *Nichols* v. *Patten*, 18 Maine, 231.

Bemis had no *legal* interest in the result of the suit, and should have been permitted to testify. The rule of law is clearly stated by GIBSON, C. J., in *Bennett* v. *Hithington*, 6 Serg. & Rawle, 195. "Although the case of the witness be in every point and particular, the case of the party by whom he is called to testify, although he expect a benefit from the event, and in short, although he be subjected to as strong bias as can influence the understanding and actions of man, yet if he be not implicated in the legal consequences of the judgment, he is competent. By legal consequences, are meant those which are fixed, certain and actual, and by which an advantage, not depending on a contingency, is to be gained or lost; such for instance, as being able to give the verdict in evidence on the one hand, or being subjected to an incumbrance or duty on

the other." A similar rule is adopted in *VanNess* v. *Terhune*, 3 Johns. Cases, 82. The witness had no direct and absolute interest in the record. He could not make use of the judgment in any suit by the creditors of the firm against him, and though the defence should be established, he would not be discharged. The creditors of the firm may not recover judgment, or if they do the execution may not be seasonably placed in the hands of an officer, in either which events he would derive no benefit from the attachments, though the defendant should succeed in his defence. The general interest a creditor may have, that his debtor should prosecute his suit to a successful issue, by which he will be the better able to meet his engagements, will not suffice for the exclusion of his testimony. *Noyes* v. *Sturtevant*, 18 Maine, 104. A trespasser is a witness for the plaintiff against a co-trespasser, though if a judgment be recovered against him and paid, he will be discharged, the payment being considered a matter of uncertainty. So the debtor, in a suit by a creditor against the fraudulent vendee of property under the provisions of R. S. c. 148, § 49, is permitted to testify, though the judgment recovered, if paid, will go in reduction of his debt; his interest not being considered certain, because it cannot be foreknown that it will be satisfied. *Philbrook* v. *Handley*, 27 Maine, 55. The witness Bemis has no control over the funds derived from the sale of the property attached. He cannot order or direct the plaintiff in his suit against the firm under which the officer justifies, in the application he may make of the funds. He has no such specific lien on them as will render him legally interested, however confident he may be that they will eventually be applied to the discharge of his liabilities.

The debt against the firm, on which the horse in dispute and other property was attached, amounted only to $303. The proceeds of sales, as is admitted, were $476,64. The value of the horse as found by the jury was $78,38. It would seem, therefore, that the funds arising from the sale of the horse will not be needed for the payment of the debt

against the firm, in the discharge of which alone, the witness has any interest. If the creditor of the firm should direct such an appropriation of the proceeds as would not require the funds arising from the sale of the horse to be applied to the discharge of the firm debts, then the witness would have derived no benefit from and would have no interest in its attachment.

If the interest of a witness is doubtful or contingent he should be admitted. "Objections on the score of interest, say the Court, in *Shipton* v. *Thornton*, 9 A. & E. 327, are not to be favored, and the safe rule is to admit the witness when there is doubt of the fact." The exclusion of testimony on the ground of interest, can never be justified, except when its existence is ascertained with absolute certainty, and then it must rest rather upon the authoritative force of precedents than upon the logical deductions of enlightened reason.

Exceptions sustained. New trial granted.

SHEPLEY, C. J., and TENNEY and RICE, J. J., concurred.

HOUSTON *versus* JORDAN.

The interest which an obligee or his assignee has in a conditional bond for the conveyance of real estate, is attachable by his creditors.

Prior to the Act of 1847, chap. 21, that interest was to be made available to creditors by a sale of it on execution.

If, after an attachment made in a suit against the obligee or his assignee, the defendant therein shall have obtained a conveyance pursuant to the bond, the title by the Act of 1847 may be transferred by a levy, to which the previous attachment shall impart its usual validity.

Such an *attachment*, however, can give no validity to a levy, if the conveyance have been made, not to the execution debtor, but to some other person.

Whatever rights, under such an attachment, are acquired by an *auction purchase*, can be vindicated only by process in equity.

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

WRIT OF ENTRY, upon the demandant's own seizin.

At the trial, it appeared that one Packard held a bond for the conveyance to him of a lot of land upon conditions to be by him performed.

In 1850, all Packard's right to any real estate in the county was attached on a writ in favor of this demandant and also on a writ in favor of P. H. Rice & al. In 1851, judgments were rendered against Packard in these suits, and within thirty days afterwards, this demandant *levied the land* upon his execution, and Rice & al. caused Packard's right under the bond to be sold at auction, and this demandant was the purchaser. Both under that levy and that purchase, the demandant makes title in this suit.

After the making of said attachments, Packard, the obligee, assigned his rights in the bond to this tenant, to whom the obligor, in conformity to the bond, had conveyed the land, before the said levy or sale.

The demandant offered to prove fraud in the assignment of the bond from Packard to this tenant.

The tenant resists the demandant's claim ;—

1st. On the ground that the attachments, being made in general terms of all Packard's right, title and interest in real estate, do not hold his interest in the conditional bond, the same being a personalty, or mere right in action.

2d. If the attachments were good to hold Packard's interest in the bond, the obligor having made the conveyance of the premises to the tenant, before the demandant's levy, that levy would give him no fee in the land, to enable him to maintain this action upon his own seizin.

3d. The sale upon the execution, Rice & al. against Packard, to the demandant would convey no right to maintain this action.

If the Court shall be of opinion that this action is maintainable upon the evidence, a default is to be entered. But if the Court should be of the opinion that the action is not maintainable *upon the questions of law raised in the case*, the demandant is to become nonsuit ; unless it should be the opinion of the Court, that upon proof of the fraud, as offered to be proved, the action can be maintained, in which event the cause is to stand for trial.

Rice, for the demandant.

The bond to Packard gave him a legal interest in the land. That interest was attachable by his creditors. R. S. c. 114, § 73.

We do not pretend that the levy is sustainable under the laws as they existed prior to 1847. Our reliance is upon an enactment of that year, c. 21, § 1. [NOTE. — That enactment is recited in the opinion of the Court.] That enactment was intended to enlarge the rights of attaching creditors, and to give them an adequate remedy to obtain the land in cases like this, upon fulfilling the conditions upon which the obligee's right depended. The case is strictly analogous to rights of redemption in mortgages, taken by levy or sale on execution. To the tenant's objection that we never had the fee, we ask, why not? The statute directed the levy of execution "as in other cases." And it was so done.

Under the previous statutes, a bill in equity was the appropriate remedy, because, under them, the purchaser obtained only a *right to a conveyance.* By the statute of 1847, the levy perfected the conveyance, and gave us a seizin.

The counsel also presented other points, but they were not discussed in the opinion of the Court.

Bell, for the tenant.

APPLETON, J. — This is a writ of entry, in which the demandant claims upon his own seizin to recover a certain parcel of land in the town of Monson, the boundaries of which are duly set forth. It is in proof, that Daniel Rice, on Oct. 4, 1849, gave one Cyrus Packard a bond to convey to him the demanded premises upon certain conditions therein specified; that on Feb. 6, 1850, all the right, title and interest of said Packard to any and all real estate in the county of Piscataquis was attached on a writ in favor of the plaintiff against him; that on March 11, 1850, a similar attachment was made in favor of P. H. Rice & Co.; that these suits were entered and judgment thereon rendered, March term, 1851; that executions issued; that within thirty days after the rendition of

judgment the plaintiff in this action caused his execution to be extended upon the premises demanded; that Rice & Co. on their execution seized and sold the plaintiff said Packard's right in equity of redeeming said premises and also all his right to a conveyance thereof by virtue of said bond; and that the levy and the sales before mentioned were all in due form of law. After the attachments of Packard's interest, he assigned, on June 3, 1850, his bond from Daniel Rice to the defendant, to whom said Rice, on Jan. 4, 1851, conveyed the premises therein described. At the time of the levy the conditions of the bond had been performed, and the fee of the estate levied upon was in the defendant, the assignee of Packard. It is conceded that the plaintiff acquired nothing by his levy, unless in consequence of the provisions of the statute of 1847, c. 21.

To determine the true construction of that Act, it becomes necessary to advert to the preceding legislation in reference to the attachment, and sales of the interest of debtors in bonds for the conveyance of real estate, and to the decisions upon such legislation, so far as they bear upon the questions here presented for our determination. The right to attach and sell on execution the interest of a debtor, by virtue of a bond for the conveyance of real estate, was first given by the statute of 1829, c. 431. In *Aiken* v. *Medex*, 15 Maine, 157, the course to be pursued to perfect the lien acquired by attachment, first received the consideration of the Court. In that case, after the attachment, and before judgment, the debtor paid the money due on the bond and took a conveyance to himself and instantly conveyed to a third person. The judgment creditor, instead of selling the right acquired by attachment, according to the provisions of the statute of 1829, c. 431, proceeded to extend his execution upon the land. The Court there held, that the creditor not having followed the requirements of the statute, by selling the interest attached on the execution, had lost the lien created by his attachment, and acquired nothing by his levy. The fee of the land was not in the debtor, either in that case or in this, at the time of the

levy. In that case, it had been conveyed to the obligee, and from him the title had passed before the levy, but in this, the fee passed directly from the obligor to the defendant, the assignee of the bond, so that the debtor was never seized of the premises upon which the levy was had.

The law thus having been settled, that the judgment creditor, if he wishes to perfect the lien acquired by the attachment, must sell on the execution the interest of his debtor as attached, and if, instead of a sale, he chooses to resort to a levy, when a conveyance has been made, that his rights will date from the levy and not from the attachment, the statute of 1847, c. 21 was passed. By § 1, of this Act, it is provided, that whenever under the provisions of R. S. c. 114, § 73, "the right, title and interest, which *any person* has by virtue of a bond or contract to a deed of conveyance of real estate on specified conditions, shall have been attached, and during the existence of the attachment and before the same shall have been perfected by proceedings on execution, the obligor or his assigns shall have executed a deed of conveyance to the *obligee* or his *assigns*, pursuant to such bond or contract, *the said attachment shall hold the premises so conveyed, as effectually as if the attachment had been originally made after such conveyance;* and execution may be levied thereon as in other cases of real estate taken on execution." It is insisted, that this Act authorizes the attaching creditor in all cases when there has been a conveyance from the obligor, after the attachment, whether to the debtor, as whose it was attached, or to any one else upon the debtor's assignment of the bond, to extend the execution upon the land conveyed, and that such levy would pass the estate, whether the fee was or had been in the debtor or not. We think such is not the law. The Act was manifestly passed to meet cases like *Aiken* v. *Medex*, and to enable the creditor when the title had, after the attachment, vested *in the debtor* before execution, to perfect his title in the premises by levy, "as effectually as if the attachment had been originally made upon them after such conveyance. The debtor whose interest is attached,

may be the obligee in the bond or his assignee. When the person, (*any person*, in the language of the statute) whose right, title and interest is attached, and to whom the conveyance is made, is the obligee or assignee of the obligee, the statute applies and not otherwise. The person whose interest is attached, and to whom the conveyance is made, must be one and the same. The attachment is to hold the premises as effectually as if it had been made upon them after the conveyance. If this statute had been in force at the time of the decision of *Aiken* v. *Medex*, the levy would have held the estate. But in this case, had the attachment been originally made after the conveyance to the defendant and that lien been perfected by a levy, it would not have touched the fee. Whether the assignment of the bond, and the subsequent conveyance to the defendant, was in good faith or fraudulent, and for the avowed purpose of defrauding creditors, in either event the plaintiff would not have acquired any such legal title as would enable him to maintain this suit. The levy would only give him the interest of the debtor, but as the legal title was in the defendant, the plaintiff could not upon known or recognized principles of law divest him of it by a levy upon it as the estate of Packard. *Blood* v. *Wood*, 1 Metc. 528; *Howe* v. *Bishop*, 3 Metc. 27; *Hascall* v. *Hilton*, 30 Maine, 419. By the express provisions of the statute, the levy is to give no greater rights than if the attachment had been made before the conveyance, and what would be his rights in such case is to be determined by the common law.

The object of the statute was, in case of a conveyance to the debtor of the premises of which he had a bond, to enable the attaching creditor to levy and to provide that by such levy his title should reach back to the date of his attachment, and thus defeat any conveyances the debtor might have made and override any attachment made after the conveyance to him from the obligor, and this is effectually accomplished by the statute.

If the plaintiff has acquired rights by virtue of his levy or

of the sale to him of Packard's interest in the bond for a deed, his remedy is in equity, where the good or bad faith of the defendant can be investigated, and the rights of both parties definitively settled. But at law the plaintiff is without remedy. *Shaw* v. *Wise*, 1 Fairf. 113; *Aiken* v. *Medex*, 15 Maine, 157.

In this view of the case it becomes unnecessary to consider the other questions presented by the counsel for the plaintiff in his argument. *Plaintiff nonsuit.*

SHEPLEY, C. J., and TENNEY, RICE and HATHAWAY, J. J., concurred.

COUNTY OF HANCOCK.

BUCK *versus* SPOFFORD.

Neither a written submission or an award can be explained or varied by parol testimony.

But a party may show, by parol, what controverted matters were laid before the referees and acted upon by them.

The referees are competent witnesses upon those points.

In *assumpsit* between tenants in common of real estate, under a submission by rule of Court, the referees have authority, if the question be presented by the parties, to award that one of them shall convey to the other real estate, the ownership of which had been in dispute between them.

An acceptance by the Court of such an award constitutes a valid judgment.

After such an award, and judgment in favor of the plaintiff, both parties continued to claim the land. It was then sold, and its avails lodged with a depositary, and the parties agreed, *in writing*, that the title should be litigated in an assumpsit suit between themselves; the defendant consenting to have the money considered as if in his hands: —

Held, that this agreement did not preclude the defendant from relying upon the former judgment: —

Held, also, that a decision giving effect to that judgment, as a bar to the suit, is a decision upon the "merits" of the case.

Buck *v.* Spofford.

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

Assumpsit.

At the trial, it appeared that a mortgage of a township of land had been made to the defendant, to secure debts due partly to himself, and partly to others, and that he foreclosed the mortgage. The plaintiff claimed an equitable interest in the land, to the extent of three sixteenths of it, and required a conveyance of that proportion.

But the defendants contended that the plaintiff's interest was only three twentieths; the difference being three eightieths. Afterwards, in a suit between the parties, brought by the plaintiff, they, by a rule of Court, submitted that suit and all demands, to the determination of referees, who, as required by the submission, made two distinct awards on separate matters. Among other things, they awarded, that the defendants should convey by quitclaim deed to the plaintiff, *three twentieths* of the land, and the awards were accepted at October term of the Court, 1848.

In 1849, an opportunity occurred for selling the township. The plaintiff still insisted that his ownership was three sixteenths, and declined to join in the sale, unless allowed that proportion of the avails.

In order, however, that the chance of selling should not be lost, it was arranged that all should join in a conveyance, leaving the dispute as to the three eightieths, to be subsequently adjusted, upon stipulations contained in a written contract, marked D, between these parties. The conveyance of the township was accordingly made by a joint deed of all the owners, the plaintiff therein warranting three sixteenths.

The said contract between these parties was substantially as follows: —

"Whereas three eightieth parts of said township are in dispute between the said Spofford and Buck, each claiming a legal or equitable title to the same; and whereas, in the sale of said township, the consideration for said three eightieths amounted to the sum of five hundred sixty-two dollars and fifty cents: —

"Now, therefore, said Spofford on his part agrees, that the said sum of five hundred sixty-two dollars and fifty cents, when paid, shall be lodged in the hands of Bliss Blodgett, to be held by him and appropriated as hereinafter expressed.

"And the said Buck, on his part, agrees that within one year he will commence an action for money had and received against said Spofford in our Supreme Judicial Court, and as speedily as possible prosecute the same to final judgment.

"And said Spofford further agrees that, on the trial of said action, he will admit the said sum of five hundred and sixty-two dollars and fifty cents to be in his hands, and justly and equitably due to said Buck, provided he, said Buck, on said trial shall prove that he, at the time of his and others' conveyance aforesaid, was legally or equitably entitled to the said three eightieth parts of said township, and shall establish his claim thereto by a judgment of said Court, and that he, said Spofford, will not object to the form of said action, nor to said Buck offering therein, evidence to substantiate his legal or equitable claim as aforesaid.

"And said Buck further agrees, that provided he shall recover said sum of five hundred and sixty-two dollars and fifty cents debt, of said Spofford, in the action aforesaid, he will not enforce the judgment or execution therefor, against him, but discharge the same on payment of costs in said execution taxed, and look to said Blodgett for the debt, as deposited as aforesaid in his hands, who shall be authorized to pay the same over to said Buck, and said Buck also agrees, that on said trial, said Spofford may offer any evidence in reduction of said sum, and if reduced, the said reduction shall be paid over to said Spofford by said Blodgett; and if he, said Buck, shall fail to commence his suit as aforesaid, or having commenced the same shall fail to maintain it, then said Blodgett shall be authorized to pay over said amount in his hands to said Spofford.

"And it is further agreed, if for cause, the Court should dispose of said action without an opportunity to try the merits, then in such event, said Buck may at any time thereafter

within six weeks commence another action, and said funds shall remain as aforesaid to wait the event of such suit.

This action is assumpsit for money had and received.

After introducing said contract D, the plaintiff was proceeding to show that when the joint deed was made, he had a legal or equitable title to the three eightieths of the township.

The counsel for the defendant, for the sake of saving time, stated his defence; it was thereupon agreed that the case should be reported upon the plaintiff's evidence already introduced, and such as the defendant should offer.

The defendant then introduced the record of the former suit including the said submission, awards and judgment thereon; and also, subject to objection, the depositions of two of the referees. These depositions show that, before the referees, the plaintiff insisted upon a right to three sixteenths of the township, but that they decided him to be entitled, not to three sixteenths, but to three twentieths. The plaintiff admits that whatever title he has to any part of the township, accrued before the commencement of the former suit.

If this defence is a bar to the plaintiff's action, a nonsuit is to be entered; otherwise the case is to stand for trial.

Herbert, for the plaintiff.

The agreement admits the sum of $562,50 in hands of defendant, and that it belongs to the plaintiff justly and equitably on a certain contingency; viz., provided the plaintiff shall on the trial of this action prove that he, at the time of the execution of the said agreement, was legally or equitably entitled to three eightieths of said township, and shall establish his claim thereto by judgment of this Court.

The plaintiff was proceeding to introduce evidence of his legal and equitable title, as provided for in said agreement D, when the defendant substantially interposed the objection that the matter was *res adjudicata*. This course is in direct conflict with the letter and spirit of the contract.

The plaintiff's depositions were inadmissible, as tending to vary or explain the supposed award. *Lufkin* v. *Field*, 6

Met. 287, 289; *Barlow* v. *Todd*, 3 Johns. 367; *Delery* v. *Stanton*, 9 Johns. 38; *Efner* v. *Shaw*, 2 Wend. 567; 2 Greenl. Ev. § 74.

But the defendant introduced what purports, as he contends, to be the copy of a judgment.

If the copy be a copy of a valid judgment, then the award and other papers are inadmissible, being merged in the judgment.

Is there a valid judgment?

What are its forms and requisites?

They are interlocutory or final. An interlocutory judgment is not evidence of any fact, except of the progress of the suit, and cannot operate beyond that point.

The final judgment operates as evidence, and is binding on the parties, if duly entered up, recorded and proved.

In order to its admission as evidence, it must be —

1st. Final.

2d. On assessment of damages, if for plaintiff.

3d. It should appear that the Court, upon some assessment, duly entered the judgment in words following, "it is therefore considered by the Court that the plaintiff recover the sum of ——," according to the usual form. *Jarvis* v. *Blanchard*, 6 Mass. 4—5.

The copy is not of a valid judgment, finally disposing of the case, awarding damages and costs.

It is but an interlocutory order or judgment, spread upon the record, and its introduction bars the assumption that any *final* judgment was ever entered up. Howe's Practice, 265.

If there be no final judgment, the preliminary papers are not evidence and certainly are not conclusive as an estoppel. 1 Greenl. Ev. § 529; *Holt* v. *Miers*, 9 C. & P. 191.

And why does no judgment appear in this case? The answer is apparent. There is no power in this Court on the award, either to render judgment or to order execution, or to decree specific performance. The Court has no jurisdiction of the awards, and that being apparent by an inspection of the record, it will be treated as a nullity, even if in other re-

spects in due form and final. *Granger* v. *Clark*, 22 Maine, 128, 130.

The Court appears to have exhausted its jurisdiction in accepting the report.

The action was assumpsit. The Court had no power to accept an award, fixing the title to real estate. The error or mistake appears to be in the improvident acceptance of a report, where there was no jurisdiction, and where no judgment could be rendered.

Had the fact come to the knowledge of the Court, that the report required the execution of a deed, the report would have been accepted *pro tanto*, for the Court would not have attempted what it could not enforce.

But even admitting that there be a valid award and even a valid judgment, or both; what then is the aspect of the case?

Does not the party place himself by his counsel before this Court, doing violence to his own contract?

Has he not agreed not to do the very act which he is now substantially doing?

Does he not object to the introduction of testimony to support the legal and equitable claims of the plaintiff under the agreement?

Was not the trial of the merits the object of the parties, and was it not the very gist of the agreement?

The parties in the agreement went so far that, if a trial was not had on the merits in this suit, a new suit is to be instituted.

By this agreement even if there be an award and judgment in every respect valid, the defendant has on good consideration bargained them away as a bar to the merits on this suit.

The judgment or award is an estoppel available to the *plaintiff*, if to any one, and if a man may waive his right to an estoppel as a bar to the merits, by implication, how much more by special agreement. *Howard* v. *Mitchell*, 14 Mass. 243; *Adams* v. *Barnes*, 17 Mass. 365; 1 Saunders, 325, note 4, note d, Philad. ed., 1846.

The plea being the general issue, the case should go to the jury. *Doe* v. *Haddock*, 26 Cr. M. & R. 316; *Voglet* v. *Unch*, 2 B. & A. 668; *Stafford* v. *Clark*, 2 Bing. 377.

A man can bargain off his whole title; why may he not on good consideration bargain off an estoppel, which is but evidence of title, and "evidence of questionable character?"

The circumstances of the case show an agreement of the parties to open the whole merits of the case.

If a party may lose the benefit of an estoppel by the form of his plea, how much more by his contract.

J. A. Peters, for the defendant.

SHEPLEY, C. J. — The plaintiff claimed a legal or equitable interest in lands in township numbered 5, in the eighth range west of the east line of the State. It is admitted, that whatever claim he had, accrued before the commencement of a former suit between the parties. While that suit was pending, the parties agreed upon a reference of it and of "all demands between them," and an entry thereof was made upon the docket of this Court during its session in July, 1847. The specification of his demands contained a claim for his share of all moneys received by the defendant and for lumber taken from the township; and for the plaintiff's interest in a contract made with Perley, and that defendant should release to him any supposed title to any portion of the township, which might in equity belong to the plaintiff.

It appears from a copy of the submission, awards, judgment and testimony of two referees, that the whole of the subject matter of this suit was embraced in the submission and awards made in that suit, and that the referees considered and decided upon it, and that judgment was entered upon those awards.

It is insisted that the testimony of the two referees is not legally admissible to identify the matters submitted, and to prove that they acted upon them. The objection cannot prevail. *Woodbury* v. *Northy*, 3 Greenl. 85; *Bixby* v. *Whitney*, 5 Greenl. 192; 2 Greenl. Ev. § 78. The authorities

cited do not decide otherwise. They do decide, that a written submission or award cannot be explained or varied by parole testimony.

The judgment in the former suit will be conclusive upon the rights of the parties, unless its effect has been impaired or waived by their contract made on October 3, 1849. The plaintiff, subsequent to that judgment, appears to have continued to claim a greater interest in that township than was awarded to him, and the agreement was made to secure to him, whatever rights he might have, as an inducement to join in a conveyance. It recites, that "three eightieth parts of said township are in dispute between the said Spofford and Buck, each claiming a legal or equitable title to the same." They agree that a certain sum was received for the part in dispute; and that an action might be commenced to obtain a decision upon the rights of the parties.

The defendant agrees, that the sum so received, shall be considered as justly and equitably due to the plaintiff, provided he shall on trial "prove that he at the time of his and others' conveyance aforesaid, was legally or equitably entitled to the said three eightieth parts of said township." Here is no consent, that the plaintiff should be entitled to maintain this suit by proof that he had such a title at some former time. It requires the title to be established as existing at the time of the conveyance. There is no language from which a waiver of any existing right can be inferred. The clause securing to the plaintiff the right to "offer any evidence in reduction of said sum," could only have the effect to preserve to him such right in case he should fail to establish a complete and full defence.

The clause providing, that a new action may be commenced, if this should be disposed of "without an opportunity to try the merits," cannot deprive the defendant of the right to present the former judgment as a bar. When an action is defeated by proof, that the subject matter of it has been already decided by a valid judgment existing between the parties, the decision is made upon the merits.

The contract did not provide, that an action should be maintained to carry into effect so much of an award in the former action as required the defendant to release to the plaintiff all right to three twentieth parts of the title derived from the foreclosure of a mortgage. Respecting that right, there does not appear to have been at any time any dispute. The claim of the plaintiff to the three eightieth parts, appears to have been in addition to the claim of the three twentieth parts. *Plaintiff nonsuit.*

TENNEY, RICE and HATHAWAY, J. J., concurred.

WHITE *& al. versus* CURTIS.

To maintain assumpsit against one who, after the loss of a vessel at sea, has received the insurance money upon her freight, all the part owners must join, as co-plaintiffs.

Advantage of a non-joinder may be taken on the general issue.

Amendments in a writ may be made by striking out or inserting the names of *defendants*.

That rule has not been applied to *plaintiffs*.

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

The plaintiffs were part owners of the schooner Abby Hammond. One Martin was also a part owner, but he does not join in this suit, not being one of the plaintiffs.

The defendant in Boston procured insurance, in his own name for whom it might concern, upon the freight on a voyage from Boston to Aux Cayes and back, on which voyage the schooner was lost.

This action of *assumpsit* is brought to recover the plaintiffs' part of the insurance money, alleged to have been received by the defendant.

Plea, general issue.

Herbert, for the plaintiffs.

Robinson, for the defendant.

RICE, J. — If the plaintiffs are entitled to any portion of

the money which the defendant received from the insurance company, it is upon an implied contract with the owners of the Abby Hammond, jointly. The facts reported disclose no severance of the joint interest of the owners, or any of them. This case falls under the general principle, that where part owners sue, *ex contractu*, all the persons who are part owners must join; for all who are parties to a contract, must sue for a breach of it. The case of *Williams* v. *Williams*, relied on by the counsel for plaintiff, does not militate with this principle, but is entirely consistent with it.

The law does not permit a defendant to be harassed with a multiplicity of suits when the whole matter in controversy can be more appropriately and equitably settled in one.

Sections 11 & 12, c. 115, R. S. authorize amendments by striking out or inserting names of *defendants*, only. That rule, in this State, has not been applied to plaintiffs.

According to the agreement a nonsuit is to be entered.

SHEPLEY, C. J., and TENNEY, HATHAWAY and APPLETON, J. J., concurred.

DODGE *versus* SWAZEY *& al.*

Of items which constitute *payments*, in distinction from *set-offs*.

RICE, J. — In this suit cost alone is in controversy. The plaintiff brought his action, claiming to recover an account of $47,31, for personal services. The account is admitted to be correct.

It is admitted that plaintiff subsequently received from the defendants $10, in cash, and it was proved that one of the defendants paid an order drawn by the plaintiff on one White for $26,06, in favor of Isaac Partridge, which order White had refused to accept. The plaintiff afterwards asked Partridge if Swazey had paid the order, and on being answered in the affirmative, he replied "that it was all right."

The defendants contend that these several sums amount-

ing to $36,06, should be applied in part *payment* of the plaintiff's claim. This the plaintiff controverts, and contends that they are properly evidence in *set-off* and not in payment.

As to the mode of payment it may be by any lawful method agreed upon between the parties, and fully executed. The meaning and intention of the parties, when it can be distinctly known, is to have effect, unless that intention contravene some well established principle of law. This intention is to be ascertained, in ordinary cases, by the jury. 2 Greenl. Ev. § 519.

We think the legitimate inference to be drawn from the situation of the parties and the facts stated, is, that those several sums were intended by them as payment of the plaintiff's claim *pro tanto*. He is therefore to be restricted to quarter costs under the provisions of § 13, c. 151, R. S.

SHEPLEY, C. J., and TENNEY, HATHAWAY, and APPLETON, J. J., concurred.

C. Lowell, for the plaintiff.

Woodman, for the defendants.

DODGE *versus* HOOPER.

Until a settlement or adjustment has been made among the several part owners of a vessel, relative to *her earnings and disbursements*, no action can be maintained by one of them against another for his share of the net avails.

The same rule applies, even after the defendant had sold his part of the vessel.

The same rule applies, though the defendant, while part owner, had had control of the vessel, sailing her on shares.

ON FACTS AGREED.

ASSUMPSIT.

The defendant was part owner of the schooner Mary Ann, and sailed her as master. The plaintiff owned part of her, and there were three other part owners. About the time when this suit was commenced, the defendant sold his share to one of the other part owners. The plaintiff, however, attached

that share in this suit. His claim is for his part of the schooner's earnings, while sailed by the defendant as master.

The defendant filed an account in set-off for disbursements on account of the vessel, and for wages and for money paid the owners, as a part of the earnings. There has been no settlement of the affairs of the vessel.

If this action is not maintainable, a nonsuit is to be entered, otherwise it is to stand for trial.

Hinckley, for the plaintiff.

If the case proceed to trial, a principal question will be as to the terms on which the vessel was sailed. The plaintiff contends that the defendant sailed her on shares, while, as it is understood, the defendant insists that he was on wages by the month. This is a question for the jury, distinct from any that can arise between the parties as part owners.

The question sought to be settled in this stage of the case, is whether the fact of the master's being a part owner, affects his liability to a suit in this form in his capacity as master.

Every thing between the parties stands as it would have done, provided the defendant had sold out previous to the commencement of the plaintiff's claim, or if he had never had an interest in the vessel as owner. The whole matter is between owner and master, and distinct from questions that arise between owners. It is apparent that the rule laid down in *Maguire* v. *Pingree*, 30 Maine, 508, and other similar cases cannot be applicable here, unless the Court intended to say that a partner, in one kind of business, shall not maintain an action against his co-partner about a matter not relating to the partnership.

Robinson, for the defendant.

Rice, J. — The defendant was part owner as well as master. Whether he sailed the vessel on shares, or otherwise, is not material. Before it can be determined whether there is any thing due the plaintiff, arising out of the use of the vessel, by the defendant, a settlement between them as part owners must be had. To permit the plaintiff to recover of

the defendant, as master, money which he would be liable to refund for disbursements, made by him as part owner, on account of the vessel, would be to complicate, rather than adjust, disputed and conflicting claims. The law does not authorize this mode of procedure in such cases. *Sturtevant* v. *Smith*, 29 Maine, 387; *Maguire* v. *Pingree*, 30 Maine, 508; *Hardy* v. *Sprowl*, 33 Maine, 508.

Plaintiff nonsuit.

SHEPLEY, C. J., and TENNEY, HATHAWAY and APPLETON, J. J., concurred.

JONES *& al. versus* LOWELL.

In trespass for injury to personal property, owned by the plaintiffs jointly with other co-tenants, damages may be recovered in proportion to the plaintiffs' ownership.

In trespass for injury to personal property, the person who committed the act complained of, is competent, as a witness for the plaintiff, to prove that the act was done by direction of the defendant.

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

TRESPASS.

The plaintiffs owned some sticks of old timber upon the ship-yard shore. Two men cut into firewood one of the sticks and also an old mast which lay near it.

For that cutting, this action was brought.

To show that the cutting was ordered by the defendant, the plaintiffs offered as witnesses the two men by whom the wood had been cut. They were objected to because of their interest, to get discharged from their liability, by enabling the plaintiffs to recover and obtain pay from the defendant.

They were however admitted, and testified that the defendant had employed them to cut some sticks of his timber, and sent his clerk to point out the sticks, who accordingly pointed out the mast and the other stick, which they cut, supposing them to be the defendant's property. There was

testimony that the mast belonged to several co-tenants, the plaintiffs owning one half of it.

The Judge instructed the jury that, if they found for the plaintiffs in relation to the mast, they should allow them the amount of one half the injury done to it.

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

C. Lowell, for the defendant.

It is not pretended that the defendant designed, or in person committed any trespass upon the property of the plaintiffs, but that a clerk, as his agent, by mistake, directed two Irishmen to cut the plaintiffs' spars instead of the defendant's, both lying in contiguous localities.

And these two Irishmen, the actual trespassers, are introduced to sustain the plaintiffs' claim against the defendant, under a pretence that they were the sub-agents, appointed and directed by the defendant's clerk, as principal agent, to do the wrong.

We contend that until the testimony of the supposed clerk, or some other legal evidence is introduced to prove his authority and the directions he gave, the actual trespassers, the pretended sub-agents, are incompetent to prove their own innocence, and the guilt of the defendant, by swearing to this double agency.

They were engaged in a palpable wrong, a legal tort, and no prior authority from the defendant, or a subsequent ratification by him, could excuse the trespassers from their legal liability to the injured plaintiffs. This we apprehend is well settled, sound law.

In one and the same breath, the plaintiffs seek by these blundering Irishmen to prove — 1st, that the defendant had a clerk; — 2d, that he directed that clerk to show them his spars; — 3d, that the clerk did show and point out the spars claimed by the plaintiffs; — and 4th, that they, the Irishmen, cut the very spars, thus pointed out by the clerk.

This, we think, is a little too much evidence to get from *such* a source.

By swearing the case against the defendant, through the absent, speechless clerk, they swear themselves clear of both parties. Their interest, then, is scarcely less than that of either of the parties of record.

Are they then competent witnesses in any view of the matter, especially without a release, and will the highest Court in Maine sanction the use of such interested witnesses? We think not. If admissible at all, it is only so after a release, and the necessary antecedent testimony of the clerk. The *onus probandi* is upon the plaintiffs.

We think this view of the matter is sustained by the general principles of law, and recognized in the following cases. *Paine* v. *Tucker*, 21 Maine, 138; *Clark* v. *Peabody*, 22 ib. 500; *Crooker* v. *Appleton*, 25 ib. 131; *Atkinson* v. *Snow*, 30 ib. 364.

In *Everton* v. *Andrews*, 4 Mass. 653, it is said, "if the testimony of the witness, produced by the plaintiff, would discharge him from the plaintiff's demand, by establishing it against the defendant, this testimony will not be received."

We contend, then, that this testimony was improperly admitted, and that our exceptions are well sustained.

J. A. Peters, for the plaintiffs.

Appleton, J. — In assumpsit, if a party, who ought to join as plaintiff, be omitted, the defendant may take advantage of such omission under the general issue. In trespass the exception is only available by plea in abatement. In this case, the general issue having been pleaded, the plaintiffs, though co-tenants with others in whole or in part of the property upon which the trespass was committed, are entitled to recover to the extent of the injury by them sustained. *Cabell* v. *Vaughan*, 1 Saund. 291, f.

The servant of the defendant, by whom the act complained of was done, was called as a witness to establish the case on the part of the plaintiffs and exceptions have been alleged to the reception of his testimony on the ground of interest. When and in what cases a witness should be rejected for this

cause is a question more involved in uncertainty than any other in the endless variety of topics submitted for judicial investigation. The presumption of law is in all cases in favor of admission. Every witness, who is offered, should be received to testify unless he is clearly and incontrovertibly brought within some of those legal principles which, whether wisely or not, have been deemed sufficient to justify exclusion.

In trespass, all who engage in the act, as well those who commit the trespass as those who, without being present, advise or direct its commission, are principals as between themselves and have ordinarily no contributory rights. Where there are many trespassers a suit may be brought against each severally, and a recovery of judgment against one is no bar to the prosecution of suits by the same plaintiff against each of the others for compensation for the same injury. *Livingston* v. *Bishop*, 1 Johns. 290. The plaintiff may have several actions against each trespasser and elect *de melioribus damnis*, but he can have but one satisfaction. Metc. Yelv. 68, a.

The recovery here being no bar to a suit against the witness for the trespass to which his testimony related, he has no interest in the judgment as a judgment. It could not be received in a suit against him to show the fact of the trespass or the amount of the injury. As against him the plaintiffs may recover more or less as the jury may determine. It is true the plaintiffs may collect the judgment they may recover against the defendant, but that contingency is one affecting the credibility rather than the competency of the witness. If the judgment should be paid, it is the payment, which will defeat the plaintiffs' right to recover, but the payment of the damage sustained would equally have that effect, whether there was a judgment or not. It would be a consequence resulting from a satisfaction of the plaintiffs' claim and wholly irrespective of the fact, that the same had been converted into a judgment. The judgment, as such, is of no more service to the witness, and can no more avail than would the fact, that the witness is a co-trespasser, serve the defendant

as a bar to the plaintiffs' suit. *Snow* v. *Chandler*, 10 N. H. 92. While the witness thus receives no protection by reason of the judgment against the defendant, his statements in this case may be received against him and form the basis upon which the verdict is rendered. According to the entire weight of authority the testimony objected to was properly received. *Marsh* v. *Berry*, 7 Cow. 346; *Collins* v. *Ellis*, 21 Wend. 402; *Dudley* v. *Bolles*, 24 Wend. 465; 2 Smith's Leading Cases, 72; *Morris* v. *Daubigny*, 5 J. B. Moore, 331; *Blackel* v. *Weir*, 5 B. & C. 385; 1 Phil. Ev. 68.

This reasoning may be technical. But as an estoppel against an estoppel setteth the matter at large, so resort may well be had to technicality when the effect is to free the administration of the land from the sinister effect of those rules by which such large masses of material evidence have been excluded.

Exceptions overruled.

Judgment on the verdict.

SHEPLEY, C. J., and TENNEY and RICE, J. J., concurred.

SAWYER *versus* FREEMAN.

An award is void, if it have allowed a claim which was not submitted, and if the amount so allowed cannot be ascertained and separated from the residue of the award.

A submission between co-tenants of a vessel, "concerning her earnings and expenses," does not authorize the referees to allow moneys paid or received for insurance.

One who charters a vessel is not thereby authorized to insure for the owner.

Neither has one part owner, *as such*, a right to insure for another.

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

DEBT on award.

The submission was contained in the condition of an arbitration bond. The condition was that "whereas differences have arisen and are now depending between Reuben Freeman, 2d, the defendant, on the one part, and Wills Carver, Benjamin Sawyer and Lewis Freeman on the other part, con-

cerning the earnings and expenses of the schooner Orizaba, from the commencement of her first voyage to the present time, of which schooner the said parties were part owners in proportions as follows, viz: — Reuben Freeman, 2d, three eighths, Wills Carver, one eighth, Benjamin Sawyer, one eighth and Lewis Freeman, one fourth; which differences, and all demands concerning the same and all action, causes of action, judgments, executions, controversies and demands whatsoever, at any time hereafter commenced, prosecuted or depending by or between the said parties, for or by reason of the matters above mentioned; the said parties have agreed and by these presents do agree to refer to the award and determination of A. Cummings Milliken of Seaville, in said county, and Jacob Sawyer of Tremont aforesaid, granting to them the power of calling to their aid, in making up their award, William Heath of Tremont aforesaid, who are arbitrators indifferently chosen and selected by and between the said parties.

"Now if the said parties, their executors, administrators and assigns, shall in all things well and truly observe, perform and keep the award and determination which the said arbitrators or any two of them shall make and publish of or in the premises in writing under their hands, on or before the twentieth day of March instant, then this obligation is to be void, otherwise to remain in full force."

The referees, after reciting the submission, made an award under their hands and seals, March 17, 1851, as follows: — "Now know ye, that we the said A. C. Milliken and Jacob Sawyer, arbitrators as aforesaid, taking upon us the charge of said award and arbitrament and having deliberately heard and considered the allegations of the parties concerning the premises, do thereupon make this our award in writing between the said parties of and concerning the premises, in manner and form following, that is to say —

First, we do award, arbitrate and determine by these presents, that the said Reuben Freeman, 2d, his heirs, executors or administrators do and shall pay or cause to be paid unto the

said Wills Carver, Benjamin Sawyer and Lewis Freeman as follows, viz, —

To Wills Carver, thirty-six dollars and sixty cts.	$36, 60
To Benj. Sawyer, thirty-six dollars and sixty cts.	36, 60
To Lewis Freeman, seventy-three dollars and twenty-one cents,	73, 21
	$146, 41

being a sum total of one hundred and forty- six dollars forty-one one hundredths.

"And that upon the payment thereof the said Reuben Freeman, 2d, shall seal and subscribe, and as his free act and deed deliver unto the said Wills Carver, Benjamin Sawyer and Lewis Freeman a general release in writing of all manner of actions, suits, cause and causes of action, bonds, bills, covenants, controversies and demands whatsoever which he hath against them, or either of them, by reason of the matter aforesaid, and that the said Wills Carver, Benjamin Sawyer and Lewis Freeman shall severally seal, subscribe and deliver a like general release to the said Reuben Freeman, 2d."

The defendant was notified of the award on the day of its date.

It was admitted, that the defendant sailed the schooner on shares, victualing, manning, managing and controlling her for one half the net earnings on the usual contract.

It was shown before the referees, that the defendant, after putting one McKenzie in his place for a voyage, did, after the time for the vessel's return had arrived, insure upon the freight $650, or $550, being about the supposed amount of his interest in it. It did not appear, that he undertook, or had any orders, to insure for the owners. The vessel was lost and the insurance money was paid to the defendant. At the trial in this suit, at *Nisi Prius*, it appeared, that the referees took this insurance money into account, and decided, that each part owner of the vessel was entitled to a proportion of the insurance money, and in making up the award charged the same, "about $300," against the defendant and against his remonstrance.

The case was submitted to the Court.

Wiswell, for the plaintiff.

Herbert, for the defendant.

SHEPLEY, C. J. — The suit is upon an award made by virtue of a submission contained in the condition of a bond, which recites, that "differences have arisen and are now depending" "concerning the earnings and expenses of the schooner Orizaba" "from the commencement of her first voyage to the present time;" "which differences and all demands concerning the same, and all actions, causes of action, judgments, executions, controversies, and demands, whatsoever, at any time heretofore commenced, prosecuted or depending, for or between the said parties, for or by reason of the matters above mentioned, the said parties have agreed and by these presents do agree to refer."

There are many comprehensive words used, but they are all restricted by other language to the differences "concerning the earnings and expenses." When the words all demands are used, they are limited to all concerning the same; and the word same has relation to the word differences and not to the vessel. So all actions, causes of action, controversies and demands whatsoever, are limited to those arising for or by reason of the matters above mentioned.

It appears from testimony introduced by the plaintiff, that "the referees took into account a certain insurance of the freight of the schooner Orizaba, charging the defendant about $300 therefor, in making up their award."

The plaintiff and other persons parties, to the submission, were part owners of that vessel. The defendant had agreed to navigate her for one half of her net earnings. He does not appear to have been authorized by the contract or otherwise to make any insurance for the other owners. By virtue of his being a part owner, or the charterer of the vessel, he had no authority to cause insurance to be made. *Finney* v. *Fairhaven Ins. Co.* 5 Met. 192.

Neither the premium paid, nor the amount received for in-

surance of freight, could properly be considered as comprehended by the terms earnings and expenses.

In the case of *White* v. *Mann*, 26 Maine, 361, the amount received for insurance was held to be included in "all net earnings and profits," as those terms were used in that contract only, because the contract provided for the payment of them "after deducting insurance and charges of every name and kind," thereby showing, that it was the intention of the parties to the contract, that insurance should be made on account of all interested and carried into the account.

The decision of arbitrators, that a matter does come within the terms of the submission, cannot be conclusive of the fact. If it could, all matters would be included, which they pleased to consider to be so, however at variance with the terms of the submission and contrary to the intention of the parties to it.

When the amount, included in an award by excess of authority, cannot be ascertained and separated so as to leave the rest part unaffected thereby, the whole award is void. *Boynton* v. *Frye*, 33 Maine, 216.

The arbitrators having exceeded their authority by deciding upon the claims of the other part owners to share the amount received for insurance upon freight, and having included the same in their award, and there being no means by which the amount so awarded can be separated from the remainder, the whole must be considered as void.

Plaintiff nonsuit.

TENNEY, RICE, APPLETON and HATHAWAY, J. J., concurred.

COUNTY OF PENOBSCOT.

WILLIAMS *versus* HILTON.

A writ upon mortgage to obtain a foreclosure may be brought and maintained by the surviving mortgagee.

A promissory note, agreeing in many respects with one described in a mortgage deed, though variant therefrom in some of its particulars, may be proved *by parol* to be the note intended to be described in the mortgage.

Taxes legally assessed upon land, create a lien, which may become paramount to all other titles.

In the conditional judgment in favor of a mortgagee, there may be included sums paid by him for taxes, though assessed while out of his possession.

The mortgagee may presume the taxes to have been assessed legally, and may therefore pay them, without inquiring into their validity, unless notified by the mortgagee of their invalidity, and indemnified against hazard of losing the estate by omitting to pay them.

While the mortgager is in possession of the land, it is his duty to pay the taxes upon it.

If in addition to the mortgaged land, he also be in possession of adjoining land, it is his duty to cause the tax upon the mortgaged part to be separately assessed.

If he omit that duty, and the tax be assessed upon both lots collectively, without showing how much of it was upon the mortgaged part, the mortgagee, in order to prevent a forfeiture, may pay the whole tax, and have its amount included in his conditional judgment upon the mortgage.

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

WRIT OF ENTRY, on a mortgage made by James Purinton to Thomas L. Winthrop and Reuel Williams. Winthrop having deceased, the action is brought by Williams as survivor. The condition of the mortgage was "that if the said James Purinton, his heirs, executors or administrators, pay to the said Winthrop and Williams, their heirs, executors, administrators or assigns, the sum of four hundred dollars, in one, two, three, four, five and six years according to his six notes therefor, then this deed, as also said six notes, bearing even date with these presents, given by the said Purinton to the said

Winthrop and Williams, promising to pay the same sum and interest at the times aforesaid, shall be void, otherwise shall remain in full force."

The demandant read one of the notes described in the mortgage. He also offered to read a note signed by Purinton in the following form, which was attached to the deposition of one D. Williams: —

"$66. Augusta, 15th day of June, 1829.

"For value received I promise Thomas L. Winthrop to pay him or order, sixty-six dollars, in five years from date with interest. "James Purinton.

"Attest: D. Williams."

This note was objected to because made payable, not to Winthrop and Williams, but to Winthrop only, and therefore not one of the notes secured by the mortgage.

The demandant then proposed to read the deposition of D. Williams, who wrote the mortgage deed and the notes, and who deposed that this note was one of the six notes made at the time of the mortgage and intended to be secured by it. The deposition was objected to, because contradicting the deed. It was admitted, however, subject to the objection.

The mortgage embraces only the East half of lot No. 17, and the West half of the adjoining lot No. 16. The tenant owns the East half of No. 16, and his buildings are upon that half. The taxes of the town, for 1846, 1847, 1848 and 1849 were assessed upon the mortgaged land and the other part of lot No. 16, in one sum, there being nothing to show what portion of it was upon the mortgaged land.

The whole of those taxes, amounting to $160,35, were paid by the demandant, who claims, that the amount should be included in the conditional judgment in this suit.

A default was entered, which is to be taken off, if the demandant is not entitled to recover.

Stewart, for the tenant.

According to the description in the mortgage deed, the notes secured thereby were all made payable to Winthrop and Williams. But the demandant claims to introduce, as secured

by the mortgage, a note payable to Winthrop alone, and relies upon deposition proof that the same was *intended* to be embraced in the mortgage. Such proof is not allowable.

"Oral testimony is not to be received to contradict, vary or materially affect by way of explanation any written contract, provided the contract is perfect in itself and capable of a clear and intelligible exposition from the terms of which it is composed." Per PARKER, C. J. in *Stackpole* v. *Arnold*, 11 Mass. 31; 1 Greenl. Ev. § 275, 276, 277, 281.

An error or mistake in a deed cannot even in a suit in equity be rectified upon *parol* testimony. *Elder* v. *Elder*, 1 Fairf. 80; *Dwight* v. *Pomroy*, 17 Mass. 303.

If the notes produced to sustain a mortgage differ materially from those described in it, the mortgage cannot be upheld. *Jewett* v. *Preston*, 27 Maine, 400.

It is not sufficient for plaintiff to prove that the *mortgagee* intended to secure the payment of the note in dispute, by the mortgage. He must show *affirmatively* that the *mortgager* also so intended. *Dwight* v. *Pomroy*, 17 Mass. 329.

But the plaintiff's counsel will probably contend that this evidence is admissible for the purpose of identifying the note as one of those *intended* to be secured by the mortgage, and of showing that there was a mistake on the part of the scrivener in not drawing the note to Winthrop and Williams; and that this may be shown by parol testimony, and that the plaintiff, upon that testimony, although it contradicts the mortgage, is entitled to have this note allowed in the conditional judgment.

But does this really alter the matter? Does not the mortgage on its face describe certain notes to Winthrop and Williams? Is not the note offered, payable to *Thomas L. Winthrop alone*, a very different note from any described in the mortgage? Does the demandant propose any thing less than, by his parol testimony, either to expressly contradict the mortgage or to add a material fact to it, viz., that it was intended also to secure a note to Thomas L. Winthrop *alone*, or to show that the *note* should have been made running to Win-

throp and Williams, like the first one offered, and their claim to have this note allowed *on parol proof* that it should have so been made?

Could parol proof be received, in a suit by Winthrop and Williams on this note, that it was *intended* to make it running to them *jointly* instead of to *one* of them? Could they recover upon such proof?

Even the plaintiff's counsel will not contend that such proof could be received. Neither will he contend that parol testimony is competent to prove that it *was intended* to secure a note in the mortgage payable to *Winthrop alone* in *addition* to those running to *Winthrop* and *Williams*. The demandant then may assume the position that this note, given to Thomas L. Winthrop alone, was *intended* to have been made to *Winthrop* and *Williams;* that it was one of the *six* notes described, or intended to be described, in the mortgage; that *this note* was actually described in the mortgage as given to *Winthrop* and *Williams*, when in *point of fact* it was made by mistake of the scrivener running to *Winthrop alone*. And he will probably rely on the case of *Bourne* v. *Littlefield*, 29 Maine, 302, as an authority, in support of his position.

That case, so far as it goes, manifestly seems to support such a view. But it is not a case identical with this. In that case, the diversity was merely in the pay-day; here it is in the party to whom the note was given. But the tenant respectfully submits that the doctrines advanced in that case well deserve the serious re-consideration of this Court, before they are to be regarded as the established law of the land, because they appear to be in conflict with many prior decisions of this Court, especially the case of *Jewett* v. *Preston*, 27 Maine, 400, and with the decisions of all other common law courts.

But even if that case is to stand, it still remains, that upon *this* note, the demandant cannot recover.

The mortgage to Winthrop and himself being joint, he is entitled to recover (if at all) the amount due upon joint security, *as survivor*. The legal remedy *survives to him.*

But he can have the conditional judgment, upon a joint mortgage, for nothing but the *joint debt secured* by that mortgage. The legal remedy survives to him only upon the *joint debt*, and as well as the mortgage. The two go together. There is no pretence that *Williams* can maintain an action in his own name upon this note to Winthrop, nor that he ever could. No remedy therefore *survives* to him upon this note. No person but Winthrop or his administrator can maintain an action upon this note, or upon the mortgage given to secure it. The two remedies concur. Williams has no legal interest in the note, and can maintain no action on the mortgage to collect it. This precise question has been already settled in Massachusetts and is decisive against the plaintiff. *Burnett* v. *Pratt & al.* 22 Pick. 556.

The counsel then at much length commented upon the town assessment, attempting to show that for all the years, of which the demandant paid the taxes, there was no legality or validity pertaining to them, and contending that the demandant could be under no obligation to pay such taxes, and therefore had no claim to have them embraced in the conditional judgment.

Cutting, for the demandant.

Rice, J. — The tenant has submitted to a default. The demandant now claims, to be entitled to an unconditional judgment for possession of the demanded premises. At the trial, as the case finds, the demandant introduced a deed of mortgage from Purinton to Winthrop and Williams, and also a tax title covering the premises described in the mortgage, with other territory not included therein.

Subsequently, the plaintiff abandoned his tax title, withdrew all records and proceedings tending to establish the same, except the treasurer's receipts, and elected to rely upon his mortgage and the notes alone, and claimed that the taxes paid should be included in the conditional judgment.

It is quite apparent, that when this report was drawn, the parties understood, that the demandant should have a condi-

tional judgment only, if entitled to recover. By the provisions of c. 104, of stat. of 1844, the judgment must be conditional. The only questions, therefore, open for the consideration of the Court are, whether the plaintiff is entitled to maintain his action, and if so, for what amount shall the conditional judgment be entered.

That Thomas L. Winthrop has deceased and that the plaintiff Williams is surviving mortgagee, sufficiently appears from the evidence in the case. The action is therefore properly in Court.

The demandant claims that the conditional judgment shall include the amount of the two notes produced at the trial, and the further sum of one hundred and sixty dollars and thirty-five cents, paid by him for taxes on the demanded premises, with interest thereon. The tenant contends that judgment should go for the amount of the last note described in the mortgage and no more, excluding the note for sixty-six dollars, payable to Thomas L. Winthrop, and the amount paid by the demandant for taxes.

The mortgage was made by James Purinton, running to Thomas L. Winthrop and Reuel Williams, and provides "that if the said James Purinton, his heirs, executors or administrators pay to the said Winthrop and Williams, their heirs, executors, administrators or assigns, the sum of four hundred dollars in one, two, three, four, five and six years, according to his six notes therefor, then this deed, as also said six notes bearing even date with these presents, given by the said Purinton to the said Winthrop and Williams, promising to pay the same sum and interest, at the times aforesaid, shall be void, otherwise shall remain in full force."

The note to which objection is made corresponds in all respects with the notes admitted to be secured by the mortgage, excepting that it is payable to "Thomas L. Winthrop," instead of "Thomas L. Winthrop and Reuel Williams." To prove that this was one of the notes given by Purinton to Winthrop and Williams, and constituted a part of the four hundred dollars secured by the mortgage, the deposition of

Daniel Williams, the attorney who drew and witnessed both the mortgage and the notes, was introduced.

From that testimony, if legally admissible, taken in connection with the papers presented, it satisfactorily appears that the note was given at the time the mortgage was executed, and constitutes a part of the four hundred dollars secured therein.

The objection to the introduction of this parol testimony is that it contradicts the deed.

The material part of the deed is the provision securing the payment of four hundred dollars. This is the substance of the contract. The production and proof of the deed, in the absence of all other evidence, would have entitled the plaintiff to judgment. *Thompson* v. *Watson*, 14 Maine, 316 ; 2 Greenl. Ev. § 329 ; 4 Phil. Ev. 309. The mortgage contains no stipulation for the payment of the notes, but does provide that on the payment of the four hundred dollars, the notes described, which were *given* to Winthrop and Williams, as well as the deed, shall be void.

Whether the plaintiff, after having proved his deed, was under the necessity of proceeding further, may admit of doubt. The most he could be required to do, if indeed that burden was on him, was to prove the amount that then remained due. The note objected to was introduced as evidence, to show in part that amount. Is it one of the notes "given by the said Purinton to the said Winthrop and Williams," which is to become void on the payment of the four hundred dollars secured by the mortgage ? Its date and amount correspond precisely with the description in the mortgage, and unless the word "given" is construed to mean "payable," there is no variance whatever. To give, ordinarily means to deliver, to transfer, to put into one's possession, to make over to another. If such be the legitimate meaning of the word as used in the deed, then, under the common and universally recognized rules of evidence, parol testimony is admissible to identify the note and apply it to the mortgage.

But if the other construction be adopted, and the word *given*

be deemed tantamount to *payable*, then the case falls clearly within the principle adopted by this Court, in *Bourne* v. *Littlefield*, 29 Maine, 302, and affirmed in *Sweetser* v. *Lowell*, 33 Maine, 446, wherein it is held that parol evidence is admissible to show a note produced in evidence, to be the one secured by a mortgage, when it does not correspond in all respects, with that described in the condition in the mortgage.

The amount of this note must therefore be included in the conditional judgment.

Against including in the judgment the amount the demandant has paid for taxes, the defendant has produced numerous objections, each and all of which he deems fatal.

In the view we have taken of this branch of the case, it will not be necessary to consider those specific objections in detail.

The mortgage, under which the demandant claims, covers the east half of No. 17, and the west half of No. 16, in the first range of lots, according to Weston's plan, of the town of Newport. The taxes paid by the demandant, and which he now claims to have included in his judgment, were assessed upon the premises covered by the mortgage and upon the east half of No. 16, and the buildings thereon, to wit, a house, two barns and a shed. The east half of No. 16, on which the buildings stand, is not covered by the mortgage. What portion of the taxes paid were assessed upon said east half of No. 16, and the buildings thereon, does not appear.

Taxes legally assessed upon an estate create a lien thereon, and lay the foundation for a title paramount to that derived by deed or mortgage. They constitute a legal charge upon the estate, not upon the mortgagee. *Faure* v. *Winans*, Hopkins, 283. It was the duty of the mortgager, and those holding under him, to discharge all taxes thus assessed upon the demanded premises, while they withheld the possession from the mortgagee, and in case taxes were assessed in a manner which they deemed illegal, notice of this fact should have been given to the mortgagee, and in case payment was to be resisted he should be indemnified against loss, because it would be un-

reasonable to subject the mortgagee to the hazard of contesting the legality of a tax title by a suit at law, in which, if the final result should be in favor of the validity of that title, all his rights under his mortgage would be forever lost.

But it is further contended that the taxes cannot be included in the conditional judgment, because only a part of the amount paid was assessed upon the estate included in the mortgage, and that under the provision of § 51 of c. 14, R. S. the demandant should have tendered the amount assessed upon the mortgaged premises, only, and thus discharged the tax lien by a much smaller sum than was actually paid.

The answer to this position is, that the whole estate of those claiming under the mortgager was assessed together, no distinction being made between that which was, and that which was not, included in the mortgage. There was therefore no data furnished by which the amount assessed upon the mortgaged premises could be determined, and the amount to be tendered ascertained. This was the fault of the mortgager. To entitle himself to the benefit he now claims, he should have rendered to the assessors a distinct description of that part of the estate covered by the mortgage, and thus have furnished a basis upon which a tender could have been made. This he has not done.

This form of action, as now regulated by statute, approximates very closely to a process in equity, for the redemption of mortgaged property, and the rights of the parties in ascertaining the amount for which a conditional judgment shall be rendered, must be determined upon the same principles that would control were the mortgager to bring his bill in equity to redeem the premises from the mortgagee. In that case the mortgager would be required to pay not only the sums directly secured by the mortgage, but also such additional sums as the mortgagee had been compelled to pay to protect the estate from forfeiture in consequence of the laches of the mortgager.

According to the agreement of the parties, the default is to stand and a conditional judgment is to be entered for the amount of the two notes produced in evidence at the trial,

and which are attached to the deposition of the witness Williams, and also for the amount paid for taxes, with interest thereon from the time of payment, with costs for the demandant.

SHEPLEY, C. J., and WELLS, HATHAWAY and APPLETON, J. J., concurred.

BLETHEN *versus* DWINAL.

Possession of land for twenty years, by a *mortgagee*, without any payment of principal or interest by the mortgager or any dealings between him and the mortgagee in relation to the land, is presumptive evidence of a foreclosure.

Possession of land for twenty years, by the *mortgager*, is presumptive evidence that the mortgage debt has been paid.

No *conditional* judgment can be rendered in behalf of a mortgagee or his assignee, unless he prove both an indebtment and its amount.

By R. S. c. 91, § 26, the notice, by force of which a prior unregistered deed may prevail against a subsequent conveyance, must be not merely constructive, but *actual*.

Prior to R. S. a notice merely constructive or implied, might have that effect.

Of the evidence from which the Court, acting with jury powers, would *infer* such notice, in a transaction prior to the R. S.

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

WRIT OF ENTRY.

Each party introduced very many deeds of conveyance under which they respectively claimed the land in controversy. The tenant then offered a deposition of much length. It was objected to on the ground of interest in the deponent. A release by the tenant to the deponent is among the papers in the case. The deposition was allowed to be read, subject to all legal objections. The tenant also introduced several witnesses upon the stand, whose testimony is reported at length.

The parties thereupon agreed, first, to constitute the Court a tribunal to settle the facts, upon the deeds, and upon so much of the evidence given by the deponent and by the witnesses upon the stand, as should be admissible; having au-

thority to draw inferences as a jury might; and secondly, upon the facts so settled, to enter judgment by nonsuit or default, as the principles of law applicable to the facts should require.

The material facts, deemed by the Court to have been established by the evidence, and the law applicable to the same, are presented in the opinion of the Court, drawn up by

APPLETON, J. — The plaintiff seeks to recover in this suit an undivided third part of lot No. 13, in Oldtown, being the same premises conveyed by Daniel Webster to James Webster, from whom he derives title. The question to be determined, is whether on the facts, as proved or admitted, James Webster or those claiming title under him can maintain this action.

It is in proof that William Dall, the original owner of the whole lot, on Oct. 30, 1802, conveyed the same to Daniel Webster, who, on the 30th of Nov. following, conveyed by deed, not recorded till Nov. 15, 1809, one undivided third to Joseph Treat, and on the 25th of July, 1804, by deed recorded Aug. 13, 1804, conveyed another third of the same lot to Eben Webster, taking from him a mortgage of the same date, to secure the purchase money. On May 3, 1806, Daniel Webster and Joseph Treat joined in a mortgage of their two thirds to William Dall. This was the state of the title, when on March 25, 1809, Daniel Webster, owning, in fact, only an equity to redeem the third incumbered by the mortgage to Dall, and holding the mortgage of Eben Webster on another third, conveyed by deed of quitclaim one undivided third of lot No. 13 to his brother James Webster. The tenant, being in possession under the title derived from Dall and Eben Webster, insists, that he should not be divested of this possession, except by some one having prior right. The demandant does not choose to determine which of the thirds, in which the lot was conveyed, his title embraces, but manifests a preference for the third conveyed to Treat by a deed not recorded at the time of the conveyance to James Webster.

It will be necessary therefore, for the purpose of exhausting the possible rights of the plaintiff, to examine his title to each of these thirds.

It appears that in 1802, and immediately after the conveyance from Daniel Webster to Joseph Treat, that a co-partnership was formed composed of Daniel Webster, Joseph Treat and Richard Webster; that this firm erected a house, barn and saw-mill on this lot in the fall of 1803; that they continued business till 1804, when one third was conveyed to Eben Webster, who then succeeded to the interest of Richard Webster and took his place in the firm, after which the new firm, thus composed, carried on the mills till 1806. In 1807, and the two following years, Treat leased his interest in the mills to Daniel and Eben Webster, by whom the same was carried on jointly. In 1810, Treat leased his third to James Webster, who that year carried on the mills in company with his brothers. In 1811 and 1812, Treat leased his share to Richard and Daniel Webster. Under this state of facts, does the deed from Daniel to James Webster, apply to the Treat third, or is he to be deemed as purchasing with actual or constructive notice of Treat's unrecorded deed?

James Webster was the brother of his grantor as well as of the other co-tenant of Treat, and a resident at Orono at the time the mills were built, until some years after the date of his deed. The year next succeeding that in which he acquired his title, he leased of Treat his third and carried on the mill with his brothers. If he considered himself as a *bona fide* owner of the Treat third, he would be little likely to lease it of one, who was not merely not an owner, but whose claim was antagonistic to his own, and thus place his title in subservience to that of one, whose rights the law postponed to his own. If, as between Treat and himself, he claimed the third of which Treat had an unrecorded deed, as having the record title, would he place in jeopardy this title, by at once yielding to that of Treat? There is no evidence whatever, that he denied or interfered with, or acted adversely to Treat, from the time his title accrued till his

death in 1822, while the proof is abundant, that Treat controlled his third without let or hindrance, receiving rents and profits from it up to the time of his release to Dall, in March, 1813. Without considering the evidence tending to show the deed to James Webster fraudulent, the conclusion is irresistible, that he purchased with notice of the prior and elder title of Treat.

The title of James Webster passed to his daughter, on his death in July, 1823, but her rights are in no respect superior to those of her father. She took the estate affected by the notice, which her father had of the conveyance to Treat.

It is to be observed that the conveyance from Daniel Webster to James Webster and from Susan White, the sole heir of James, to the plaintiff, was by deed of release. In *Oliver* v. *Pratt*, 3 How. U. S. 333, it was held that a purchaser by a deed of quitclaim without any covenants of warranty, is not entitled in equity to protection as a purchaser for a valuable consideration without notice, he only taking what the vendor could lawfully convey. The application of this principle would bar all claim on the part of the plaintiff to this third.

But whether James Webster had or had not notice, or whether taking a quitclaim is constructive notice or not, is immaterial, as the third of Daniel Webster and the third of Treat are alike subject to the Dall mortgage. As has already been seen, on the 3d of May, 1806, Joseph Treat, owning one third by deed not recorded, and Daniel Webster, owning in reality only one third, but with a record title of two thirds of lot No. 13, joined in a mortgage of two thirds to William Dall. By this mortgage, these grantors were bound to make good the title to the amount thus conveyed. The application of the principles invoked by the plaintiff to defeat the title of Treat, apply with equal force in favor of Dall, who if he relied on the record would then find two thirds in Daniel Webster and thus might well take a mortgage to that extent from him. Whether the two thirds mortgaged were in one or in both of his mortgagers in any imaginable proportions, the title would equally pass to him. The plaintiff is not in

a situation to defeat the Dall mortgage. If he purchased upon an examination of the records, they would disclose the record title to two thirds in Daniel Webster and a mortgage by him to Dall, by which the same two thirds were conveyed to him for purposes of security. If investigating facts beyond what was apparent on the record, he would find that Daniel Webster owned less than appeared of record, and that Treat owned what would thus be deducted from Daniel's interest; and that those two thirds by whichsoever of the two they were owned, or whether owned by them both, were nevertheless legally, as well as equitably, subject to the prior claim of Dall. The plaintiff then took his conveyance with record notice of a mortgage conveying two thirds to Dall, and as those same records would show that he could only acquire the interest mortgaged from Daniel Webster, his title must be postponed to the Dall mortgage, whether he purchased with or without notice of the Treat deed.

The Dall mortgage having precedence, the plaintiff next claims, that the quitclaim deed of Daniel Webster and Joseph Treat of March 13, 1813, is a payment and extinguishes the mortgage debt, and that consequently he is entitled to hold the third belonging to Daniel Webster discharged from all incumbrances. The mortgage notes were not canceled, nor was the mortgage debt extinguished, except so far as the release given was effectual to pass what was intended to be conveyed. By the release, the title of the mortgager and mortgagee would, at common law, have become merged, had not the deed of March 25, 1809, from Daniel to James Webster, intercepted the title to half of the equity of redemption, and thus prevented its passing from Daniel Webster to Dall. The claim of the plaintiff in this aspect is most unequitable. He insists that by some legal legerdemain, the release to Dall instead of enlarging shall destroy, as to one third, his estate. But such is not the law. If the plaintiff claims, that as to half of the equity of redemption the title was in him, then as to that half the release was inoperative. This release, then, of the equity is to be deemed an extinguishment of the

mortgage *pro tanto*. *Jams* v. *Mony*, 2 Cow. 246. Upon no principle can the debt be viewed as paid and the mortgage discharged, so as thereby to defeat the title of the mortgagee, when his only payment is by the release. *Catlin* v. *Washburn*, 3 Verm. 25. Half of the mortgage debt was extinguished by this release, and as to so much, the title of Dall became perfected; as to the residue he held as mortgagee as before.

It appears that from the time of the release, in 1813, to the institution of this suit, Dall and those claiming title under him have controlled the mortgaged interest without any interference on the part of James Webster, or any person claiming under him. The possession of a mortgagee for the period of twenty years, without any payment of interest by the mortgager, or any dealings between him and the mortgagee in relation to the premises mortgaged, is presumptive evidence of foreclosure. This principle, so necessary for the protection of rights and to prevent estates being unsettled after a long lapse of time by the revival of stale and antiquated claims, has received the concurrent approbation of the highest judicial tribunals in England and in this country, both in equity and at common law. In *Ashton* v. *Milne*, 6 Sim. 369, "it is a settled rule," says the Vice Chancellor, "that a court of equity regards more the antiquity of possession by the defendant, than the novel accruer of title to the plaintiff; and that it will not interfere against a person who, claiming by a mortgage title, has been in a possession for more than twenty years, without having recognized the title to redeem." In *Cholmendely* v. *Clinton*, 2 Jac. & Wal. 186, the whole doctrine is fully unfolded, in a very eloquent and elaborate opinion, in the course of which the Court remark that "the actual possession of the mortgagee, continued for twenty years without any payment of interest by the mortgager, or any thing done or said during that period to recognize the existence of the mortgage, or to acknowledge it on the part of the mortgagee, would clearly operate as a bar to a redemption by the mortgager." The

same doctrine is affirmed in this country. *Dexter* v. *Arnold*, 1 Sum. 109; *Demarest* v. *Wynkoop*, 3 Johns. Ch. 135.

Whether the mortgage is foreclosed or not, as to the half which is not merged by the release to Dall, is of no importance in the present aspect of the case, as if not foreclosed, the defendant represents the mortgagee, and nothing is better settled than that the mortgager cannot maintain ejectment against the mortgagee.

In case of a failure elsewhere, as matter of last resort, the plaintiff falls back upon the mortgage given by Eben Webster to Daniel Webster, in 1804, and claims to recover as the assignee of that mortgage. But Eben Webster, and those claiming under him, have been in the undisturbed possession of the mortgaged premises for more than twenty years, and in such case, the presumption of law is, that the notes have been paid. *Giles* v. *Buremen*, 5 Johns. Ch. 545; *Howland* v. *Shurtleff*, 2 Met. 26; *Christopher* v. *Sparke*, 2 Jac. & Wal. 223.

Further, as assignee of an existing mortgage, the plaintiff, before he would be entitled to a conditional judgment, must show some sum for which it should be rendered. The plaintiff produces no notes of Eben Webster, and offers no evidence that any such are outstanding. He therefore cannot be permitted to disturb the possession of the tenant. *Gray* v. *Jenks*, 3 Mass. 523; *Vose* v. *Handy*, 2 Greenl. 322; *Edgell* v. *Stamford*, 3 Verm. 202.

In no view of the case can the plaintiff maintain this action. *Plaintiff nonsuit.*

Shepley, C. J., and Tenney, Rice and Hathaway, J. J., concurred.

Fessenden, for the demandant.

Rowe and *Bartlett*, for the tenant.

CONSTITUTIONAL LAW.

By the House of Representatives, on January 18, 1854, it was: —

Ordered, That the following statement of facts be submitted to the Justices of the Supreme Judicial Court, and they be required to give their opinions on the questions appended thereto, viz.: —

On the first Wednesday of January inst., the members elect of the House of Representatives assembled in the Representatives' Hall, and, a quorum being present, the members were qualified, and the House was duly organized by the choice of a Speaker and Clerk, of which organization the Governor and Council and Senate were, by order, to be informed by message, according to the usual custom.

From an examination by the Governor and Council of the lists of votes returned to the office of the Secretary of State, but thirteen Senators appeared to be elected, leaving vacancies in the 2d, 3d, 4th, 5th, 6th, 11th and 13th districts — all which appeared by a report accepted by the Governor and Council.

The thirteen Senators thus appearing to be elected assembled in the Senate chamber on the first Wednesday of January current, and proceeded to organize by the election of a President and Secretary pro tempore, after being duly qualified, of which the House of Representatives was notified by message.

The Secretary of State then laid upon the table of the Senate the lists of votes for Senators, which were referred to a committee for examination.

That committee on a subsequent day reported the election of the thirteen members who had been declared elected and summoned to appear by the Governor and Council, and further reported that vacancies existed in the second and fifth Senatorial districts, and also the names of the constitutional candidates to fill those vacancies — which report was accepted. But no report was then, or has since been, made, or vote passed, with reference to the other districts.

After the acceptance of the above named report, a message was sent to the House of Representatives, informing the House that vacancies existed in the second and fifth Senatorial districts, giving the names of the constitutional candidates to fill the same, and proposing a convention to fill said vacancies — with which proposition the House refused to concur.

It has been the uniform usage in this State, since the formation of the government, to determine and declare all vacancies, existing in the Senate on the day appointed for the meeting of the Legislature in each year, before the members of the House of Representatives, and such Senators as shall have been elected, proceed to elect, by joint ballot, the number of Senators required, and then to appoint a convention for that purpose.

In the year 1847 but eleven Senators appeared to be elected. The Senators elect met on the day appointed, elected a President and Secretary pro tempore, and the votes for Senators were laid on the table, and committed. The committee subsequently reported who were elected, and also the whole number of vacancies existing in the Senate, and the names of the constitutional candidates to fill said vacancies. This report was accepted, and a message was subsequently sent to the House, informing that body that vacancies existed as reported by the committee, and stating the names of the constitutional candidates to fill the same, and proposing a convention for the purpose of filling the same, with which proposition the House concurred, and the same were filled accordingly.

In the year 1851, but fifteen Senators appeared to be elected, and the same course was taken.

QUESTIONS.

1st. Whether, if a majority of the whole number of Senators required by law are elected, and the Senate duly organized, the provisions of section 5, article 4, part 2d, of the constitution require, or contemplate, that the Senate shall determine who are elected to be Senators in all the Senatorial districts, before the members of the House of Representatives, and such Senators as shall have been elected, proceed to elect, by joint ballot, the number of Senators required? If the constitution does so require, does it necessarily result that all existing vacancies should be ascertained and declared before proceeding to such election?

2d. Whether the provisions of that section contemplate, or authorize, a convention, in the first instance, for the purpose of filling a part only of the vacancies existing in the Senate on the first Wednesday of January?

3d. Whether a Senator, elected by "the members of the House of Representatives, and such Senators as shall have been elected," to fill a vacancy existing on the first Wednesday of January, is entitled to vote in a convention held for the purpose of filling other vacancies in the Senate, existing on said first Wednesday of January?

4th. When less than a majority of the whole number of Senators required by law appear, by the lists returned to the office of the Secretary of State, to be elected, can such Senators, less than a majority, constitute "the Senate," in the sense in which that term is used in the constitution? Can such Senators, less than a majority, exercise the powers, or perform all, or any part of, the duties devolved upon "the Senate" by sec. 5, art. 4, part 2d, of the constitution? If so, what part? Can such Senators, less than a majority, decide on the legality of election returns as shown by the lists returned to the Secretary's office, receive evidence of election other than is contained in such lists, and determine election upon such evidence? Can they declare vacancies in the Senate, and determine who are constitutional candidates? If so, upon what evidence?

5th. When the House of Representatives has been duly organized, and a minority only of the whole number of Senators required by law appear to be elected, can the members of the House and a minority of such senators as appear to be elected legally form a convention for filling vacancies in the Senate, all of such Senators being duly notified, but a majority refusing to act?

Ordered, — That a copy hereof, signed by the Speaker and attested by the Clerk of this House, be communicated forthwith, and by the most expeditious mode, to each of the Justices of the Supreme Judicial Court, and an answer to the foregoing questions requested at the earliest possible moment.

Pursuant to the order, the opinion was received and read by the Speaker to the House of Representatives, January 27, 1854, as follows: —

The undersigned, Justices of the Supreme Judicial Court, present the following observations and answers, to communicate their opinions and some of the reasons therefor, in obedience to an order of the House of Representatives, passed on January 18, 1854: —

The constitution provides that "the legislative power shall be vested in two distinct branches, a House of Representatives and a Senate, each to have a negative on the other."

In several sections the words "each House" are used to designate the respective branches. In others the word "Senate" is used to designate the branch so denominated. No term is found to be used in the constitution, other than Senate, or House, or House of Representatives, to describe or designate those branches when less than a quorum of members is present. When so composed, the Senate is designated by the word "House" in article four, part third, and sections three, four, five and six; and is authorized to exercise certain of the powers conferred upon the Senate by those sections. By the third section it may, when so composed, adjourn from day to day, compel the attendance of absent members, provide the manner in which their attendance shall be procured,

and prescribe the penalties under which they shall be required to attend.

By the fourth section it may, when so composed, punish its members for disorderly behavior. If such were not the true construction, it could not protect itself, or be in a condition to perform duties required of it when so composed.

By the fifth section it is required, when so composed, as well as at other times, to keep a journal of its proceedings.

By the sixth section it may, when so composed, punish a person not a member, for obstructing its proceedings, or assaulting or abusing any of its members for any thing said or done in the Senate. This construction is also necessary for its protection, and to enable it to perform duties enjoined upon it when so composed. Other powers named in those sections it may not be authorized to exercise when so composed.

The Governor and Council are required to "issue a summons to such persons as shall appear to be elected by a majority of the votes in each district, to attend that day (the day appointed by the constitution) and take their seats." They must take their seats as Senators, and can act only in their official capacity, and in that capacity they must act as a branch of the Legislature for certain purposes. It is only as representing that branch that they can be authorized to organize in any manner as a Senate, or to notify the other branches of the government of their organization or presence in the chamber appointed for them, or can receive from the Governor and Council the copies of the "lists," or can adjourn or keep a journal. These are acts essentially necessary to be performed, whether a majority of the Senators be or be not elected and present. Unless this be the true construction, this branch of the Legislature may, under certain circumstances, fail to be organized according to its provisions.

The words "Senate" and "House" appear to be used in the constitution to designate that branch, whether composed of a greater or less number of Senators, when it is in a condition to keep a journal or record of its proceedings, or to perform acts required of it or authorized by the provisions of the constitution.

In the year 1830, when a quorum of both branches of the Legislature were present, the Justices of this Court gave their opinions that no other body than the Senate could, under the constitution, designate the constitutional candidates to supply deficiencies of Senators occasioned by omissions to elect by the qualified voters. When less than a quorum of Senators is present, no express provision is found in the constitution to authorize such a designation. It is not perceived how any such power can be implied without depriving the Senate of the power of being the judge of the election and qualification of its own members.

By the fifth section of article four and part second, it is provided, "The Senate shall on said first Wednesday of January annually determine who are elected by a majority of votes to be Senators in each district."

If the word "Senate" or "House" be used in this section and in all other parts of the constitution, as it appears to be, to designate that branch, whether composed of a quorum or a less number, the power to perform that duty is expressly conferred upon a Senate so composed, unless its power to do it is restricted by some other constitutional provision. No such provision is found, unless it be in the phrase "and a majority shall constitute a quorum to do business." That phrase or provision should not receive such a construction, without the most urgent necessity for it, as would under any conceivable circumstances prevent the organization of the Legislature according to the provisions of the constitution, and leave the State without a constitutional government, to be governed by one existing, and organized only as a necessity; or such construction as would prevent the performance by the Senate of duties expressly required of it, and which cannot be performed by any other body or branch of the government, according to the provisions of the constitution.

If the only acts to be performed by a Senate composed of less than a majority of Senators, were considered to be fully enumerated in the latter clause of the third section of article four and part third, a Senate so composed would be deprived of the power to protect itself, to keep a journal of its pro-

ceedings, and of the power to punish its own members or others for obstructing its proceedings.

It is not unusual to find language used when a particular subject is under consideration, which would be too comprehensive to exhibit the idea intended, if not limited by the subject occupying the thoughts. The subject then under consideration appears to have been the "Legislative power." It does not treat of their organization. That had been provided for before. It treats of their power to do business after they have been duly organized. That language may, therefore, upon familiar principles of interpretation, be regarded as applicable only to such business as the Houses would respectively perform after they had become organized, and as not applicable to proceedings required to procure an organization. When considered as thus restricted, and yet as having its intended and appropriate meaning, there is found no limitation of the authority of the Senate, whether composed of a majority of the Senators or not, to determine under any circumstances, and for all purposes, who are not elected by a majority of the qualified voters to be Senators, and are eligible or qualified to be Senators.

If a Senate so composed could not constitutionally so determine, Senators legally elected by qualified voters, and having the qualifications required for Senators, might be excluded from the Senate, and deprived of the rights secured to them by the constitution. If all vacancies apparent from the proceedings of the Governor and Council, were to be filled by joint ballot of the members of the House and such Senators as shall have been elected, those Senators so elected could not be deprived of their seats by a subsequent decision of the Senate alone. Those who are assembled to make such elections by joint ballot, must of necessity and by a power fairly implied, determine who have been so elected; and when they have so determined, the vacancies are filled according to the provisions of the constitution, and the constitutional right to be Senators is secured to them. If the Senate alone could determine that such Senators were not legally elected, and not entitled to their seats, they could annul the proceedings of the

body or convention authorized to elect them and to decide that they had been legally elected. If this could be done once, it might be continued to be done, and the final organization of the Senate prevented for an indefinite time. This would neither comport with the language or intention of the constitution. The elections of Senators, respecting which the Senate is made the exclusive judge, are such as are made by the qualified electors. The election of Senators by a joint ballot must be made from the "lists" of persons voted for, and made by the selectmen and clerks of the several corporations composing the district, or from copies of them. Persons whose names are not upon such lists cannot be elected. The Senate, while determining who are constitutional candidates, must also be confined to such lists, and so must the Governor and Council, while ascertaining who appear to have been elected. This does not make such lists conclusive evidence who are truly elected Senators, or who have the qualifications required for Senators. No person, by such lists alone, can, therefore, be considered as conclusively entitled to be a Senator, or as certainly not entitled to be one, by an election by qualified voters.

By this construction, and by this only, upon the facts stated, can the Senate be constitutionally organized without considering some other branch of the government to possess powers not conferred upon it by the constitution, and without depriving the Senate of power conferred upon it.

The construction of the constitution presented by this paper will, under any perceivable circumstances, enable the State to have a constitutional government without conferring powers upon any branch of the government not found to be vested in it by the constitution, and without depriving any branch of any power conferred upon it, and will prevent any occasion for a resort to a government of necessity. No other construction has been presented leading to such results.

By the third section of article fourth and part third, each House "may compel the attendance of absent members in such manner and under such penalties as each House may provide." This power is expressly conferred upon each House

when composed of a less number than a quorum to do business. The word "members" in that section appears to have been used in the former clause respecting elections, as designating Senators who have not, as well as those who have, been qualified and been present as members of the Senate; and no sufficient reason is perceived why the word should not have the same meaning in the latter clause of the same section. The section would then authorize a Senate composed of less than a quorum to compel the attendance of those whom it adjudged to be members, whether they had ever been present as such or not. If this be not the true construction of the latter clause of that section, the Senate, after a majority of the Senators have been constitutionally elected, may fail to be organized and there may be no constitutional government in the State.

If the Governor and Council should ascertain that a majority of the whole number of Senators had been elected, and should summon them to appear at the appointed time and place, and a sufficient number to prevent a quorum should deny that they had been constitutionally elected, or should for factious purposes willfully refuse to attend, thereby to prevent a quorum, those who should attend, being less in number than could form a quorum, would then constitute a House or Senate expressly authorized to compel the attendance of the absent members.

This construction of a similar provision in the constitution of the United States appears to have been sanctioned by rules adopted by the Senate of the United States, as stated in Jefferson's Manual, on pages 24 and 25 of the edition published at Concord in the year 1823. The rule is said to be "in case a less number than a quorum shall convene, they are hereby authorized to send" "for any or all absent members." "And this rule shall apply as well to the first convention of the Senate at the legal time of meeting, as to each day of the session." This rule as applicable "to the first convention of the Senate," could not have been legally established unless the Senate, when composed of a less number of Senators than would form a quorum had authority, by the constitution, to compel the at-

tendance of absent members. The Senate of this State when so composed, to be enabled to compel the attendance of absent members, must determine who were elected. It would be expressly authorized to act as a Senate, to determine the manner in which their attendance should be procured, and the penalties to be incurred by their refusal to attend. It is only by its acts as a Senate, that a number less than a quorum composing it could for such purpose issue any legal precept, which must be issued in the name and by the authority of the Senate, or could cause the Legislature to be organized, or could keep a journal of its proceedings.

The Governor and Council are only authorized to ascertain who appear to be elected Senators, and have no power to determine who are elected. That power is entrusted to the Senate alone, and it must determine whether those appearing upon the "lists" to have been elected, were elected and had the qualifications required for Senators. Here then is an instance in which an express power is given to a Senate composed of less than a quorum, and it may by possibility be of a single Senator, to determine who are elected Senators and to compel their attendance. If any number of Senators, however small, may be designated as a Senate, and be organized and act, and may by an express power determine who are elected for one purpose, there can be no sufficient reason to conclude, that it was not the intention of the framers of the constitution, that a Senate composed in the same manner should act for all other constitutional purposes to determine who are not elected for the purpose of procuring an organization of the Senate in another and different mode.

The constitution requires the Senate to determine who are elected Senators by a majority of the qualified voters in each district. It contemplates it as an act to be performed on the day appointed for the first meeting of the members of the Legislature after they have been elected. There is a provision in the fourth section of the ninth article, that in case the elections required shall not be completed on that day, the same may be adjourned from day to day until completed.

Circumstances may prevent the Senate from being able to

determine in one day, and for several days, who are constitutionally elected, having the required qualifications.

It is not made the duty of the members of the House, to meet the Senators who have been elected to elect by joint ballot other Senators, before the Senate has determined who are not elected in all the districts. It is not however considered that Senators could not be legally elected by the agreement of both branches, before the Senate had determined who were not elected in all the districts; while it is considered that each House may rightfully refuse to proceed to an election by a joint ballot, until after a determination has been made by the Senate respecting the non-election of Senators in all the districts.

It is such Senators and such only "as shall have been elected," who are authorized to vote in joint ballot with the members of the House to elect other Senators. The words "shall have been elected," have reference to such Senators as shall have been elected by the qualified voters. If it should be admitted that these words may properly describe those Senators who have in any mode been elected before the elections by joint ballot are made, still the constitution contemplating all such elections should be made at one time, and on the day appointed for the first meeting of the Legislature, it would not have been expected or intended that other electors should be entitled to vote, if circumstances should require an adjournment to another day, after a part of the elections had been made by joint ballot.

When a determination has been made who are not elected Senators, and who are the constitutional candidates, and other persons have been duly elected Senators by joint ballot of the members of the two Houses, there can be no revision of that determination without annulling the elections made in joint ballot, which is entirely inadmissible. Such determination is therefore necessarily a final and conclusive one.

By a construction which will authorize a number less than a quorum to determine who are not elected Senators, and what vacancies exist, and who are the constitutional candidates, there may be a compliance with every requirement of

the constitution, and a constitutional government at all times secured; without such a construction there can be no such compliance, and no such security. And without such a construction occasions may frequently occur and circumstances be presented which will prevent the organization of a constitutional government, without the exercise of power not conferred upon it by some branch of the government, or without a resort to the organization of a government from necessity. There is little cause for alarm, that such powers may by possibility be exercised by one Senator. Such an occurrence can be expected but rarely, if ever. Powers more extensive and important may, under the constitution of the United States, and under those of several of the States, be exercised by one person. Experience has proved that the most important and delicate trusts are as faithfully performed by one, and by a few persons, as by a large number of persons.

To the first question, the answer is: — That section does require the Senate to determine who are elected Senators in a district before other persons can, by joint ballot, be elected Senators for such district.

It does contemplate that the Senate shall determine who are elected Senators in all the districts, and "that all existing vacancies should be ascertained and declared before proceeding to such election." And each House may rightfully refuse to meet the other to make such elections by joint ballot until all existing vacancies have been so ascertained and declared; while this mode of proceeding is not regarded as so essential, that Senators could not by the agreement of both Houses be legally elected before all existing vacancies had been so ascertained and declared.

To the second question, the answer is: — The provisions of that section do not contemplate a meeting of the members of the two Houses to make such elections by joint ballot "for the purpose of filling a part only of the vacancies existing in the Senate on the first Wednesday of January." Those provisions are not regarded as forbidding such a course, when adopted by the agreement of both Houses.

To the third question, the answer is: — A Senator so elected

is not entitled to vote in a meeting or convention of the members of the two Houses "held for the purpose of filling vacancies in the Senate existing on the first Wednesday of January."

To the fourth question, the answer is in the affirmative to the first interrogation put in that question; and to the second interrogation put in that question, it is in the affirmative. To the third interrogation it is: — All the powers required by the constitution to be exercised by the Senate to procure an organization of that House. To the fourth interrogation the answer is in the affirmative, and to the fifth also. To the sixth the answer is: — The Senate being authorized to decide upon the election of its own members, must have the right to determine upon what evidence it will do it.

To the fifth question, the answer is in the negative.

All of which is most respectfully submitted to the House of Representatives, by

ETHER SHEPLEY,
JOHN S. TENNEY,
SAMUEL WELLS,
JOSEPH HOWARD,
J. W. HATHAWAY,
JOHN APPLETON.

My concurrence extends to the answers to questions, 1, 2, 3, 5 and to the first interrogatory of question 4, and to such part of the opinion as gives less than a majority full power to do all necessary acts to complete the Senatorial board, but not to the full extent of powers indicated in the opinion.

JOHN APPLETON.

Not having been able to meet and confer with my associates in the consideration and adoption of the foregoing opinion, I have examined the same, and concur in the answers to the *fourth* and *fifth* questions, but not in all the reasons stated for coming to such conclusions. I do not concur in the answer to the *third* question, nor to so much of the answer to the *first* question as states that the members of the House may rightfully refuse to meet those Senators who have

been elected to elect others by joint ballot. To the *second* question, I answer that the provisions of the section referred to, do *authorize* a convention in the first instance for the purpose of filling a part only of the vacancies existing in the Senate on the first Wednesday in January.

RICHARD D. RICE.

IN SENATE, JANUARY 30, 1854, it was: —

ORDERED, That Justices RICE and APPLETON be desired to furnish to the Senate their opinions *in extenso* upon the questions propounded to the Justices of the Supreme Judicial Court of the 18th of January, instant.

Pursuant to that order, the opinions of Judges RICE and APPLETON were received by the Senate, as follows: —

OPINION OF JUDGE RICE.

To Hon. LUTHER S. MOORE,

President of the Senate of the State of Maine:

The undersigned, in response to the order of the Senate, dated January 30, 1854, presents some of the considerations for the answers by him returned to the questions propounded by the House of Representatives, January 18, 1854, to the Justices of the Supreme Judicial Court, and the reasons for his non-concurrence with a majority of the Court in all the answers by them returned.

The powers of our government, conferred by the constitution, are, primarily, divided into three distinct departments; the *Legislative, Executive* and *Judicial.* These departments are severally entrusted with certain specified powers which they are required to exercise, each for itself, entirely independent of the other. The powers confided to these departments, are in many instances, subdivided and distributed among different *branches,* and upon these branches are conferred powers, to be exercised, sometimes in concurrence with each other, and in other cases, by independent action; thus constituting a government, at once free, and so regulated by

checks and balances, arising out of the distribution of its powers, as to prevent precipitate and inconsiderate action, in times, when by reason of excitement, single bodies, acting under a common impulse, may be in danger of running into error.

Though our government is thus complex in its form, with important powers confided to the independent action of its different departments, and the different branches of those departments, yet there are in it no conflicting powers, but the legitimate action of the whole will be found to be entirely harmonious. Thus, when a power is conferred upon a department, or branch, to be by it exercised independently, the exercise of that power is, either by distinct provision, or by necessary implication, withheld from all others.

In the construction of provisions of the constitution, which may appear ambiguous, regard should be had to the general scope and object of the whole instrument, and when it is doubtful to which department or branch, the exercise of an independent power belongs, it should be assigned to that, by which, from its character, it can be most appropriately exercised.

These considerations being kept in view when cases of apparent conflict arise, will always afford a safe rule of interpretation.

The Legislative power of the government is vested in two distinct branches, a House of Representatives and a Senate, each having a negative upon the other. Some of the powers conferred on these branches, are common to both, and are to be exercised in concurrence. Others are confided to the separate action of each, and are to be exercised by each, with absolute independence of the other.

Prominent among the latter, stands the provision, in the third section of part third, article fourth, which declares that "each House shall be the judge of the elections and qualifications of its own members." This provision, so far as the Senate is concerned, may be deemed rather declaratory of existing rights, than as conferring new powers. Section five, of article four, part second, confers upon the Senate the power

to "determine who are elected to be Senators, by a majority of the votes, in each district," and as a necessary correlative, who are not elected, or rather, in what districts, if any, vacancies exist.

In the same class of independent powers, is found the power of the Senate to try all impeachments, and of each House to choose its own officers; to compel the attendance of absent members; to determine the rules of its proceedings; to punish its members for disorderly behavior; to keep a journal of its proceedings; to punish persons not members for disrespectful or disorderly behavior in its presence; or for obstructing any of its proceedings; or for threatening, assaulting, or abusing any of its members for any thing said, done, or doing in either House.

These powers can only be exercised by each House according to its discretion, and neither has the right to exercise them for the other, or in any way to dictate the manner in which they shall be exercised by the other. All of them may be exercised when a majority of members, or a quorum for doing business is in attendance, and many of them when less than a quorum is present.

The result of the possession of these independent powers is to authorize each branch, or House, to perfect its own organization. To the House, this power, in its fullest extent, has never been denied, or questioned. It is a power, incident to, and inherent in all independent deliberative bodies, founded upon the most universally recognized principles of parliamentary law.

Article fourth, part second, section fourth, provides, that the Governor shall issue a summons to such persons as appear to be elected, to attend and take their seats.

Like the credentials of the members of the House, the "summons" of the Governor is *prima facie* evidence of election, and authorizes those who "appear to be elected," in the first instance, to take their seats as members of the Senate.

These members, when assembled, the fifth section recognizes as "the Senate," and confers upon it the power, and imposes the duty, to determine who are elected by a majority

of the votes, to be Senators in each district. This section also contemplates that vacancies may be found to exist, and makes no distinction in the power of the Senate, dependent upon the number of those vacancies, but in all cases where vacancies exist, the duty of the Senate and the mode of its procedure in effecting its organization are the same.

It has been supposed that the power to act, does not exist, on the part of the Senate, unless a majority of its members appear to be elected, and shall have been summoned by the Governor. This opinion is based upon that clause of section third, part third of article fourth, which declares that "a majority shall constitute a quorum for the transaction of business."

In construing particular provisions of the constitution, care should always be taken to observe the connection in which they occur. Part second, of article fourth, treats of the election and qualification of Senators, and the *organization* of the Senate. Part third, of the same article, treats of the "Legislative power" after both branches have been duly organized and are in a condition to act as a Legislature; and the clause referred to, as limiting the power of the two Houses when less than a majority is present, is manifestly intended to apply to the transaction of that kind of business incident to legislation. Any other construction would be liable to obstruct and wholly prevent the organization of the Senate, even when a majority appeared to have been elected, and had been summoned by the Governor. An examination of the returns, or other evidence, might disclose errors which would compel the Senate to determine, that only a part of those who had been summoned, less than a majority had actually been elected. Under the construction contended for, that body would thereby be rendered powerless, unable to proceed, and that branch of the Legislature be practically dissolved. The same results would follow when less than a majority were "summoned" by the Governor.

The constitution is not justly chargeable with any such self destructive principles. It contemplates a government continuous and permanent in its character, and as the various

instruments by which it is carried forward decay, or pass away, it will be found to contain vital energies and recuperative principles sufficient under all circumstances, to reproduce others, of a similar character, in endless succession.

The Senate has the power when organized, and when a quorum is not present, to compel the attendance of absent members. There is no good reason perceived, why the same power should not exist before it has perfected its organization. Indeed it may be necessary that it should then possess that power, to enable it to effect this object. That power has been supposed to authorize a Senate composed of less than a quorum to compel the attendance of those whom it may determine to be elected, whether they have been duly qualified to act as members or not. This would seem to extend that power beyond its legitimate limits. The "members" whose attendance may be rightfully coërced, are those who have not only been elected *to be* Senators, but who have actually *become* such, by taking upon themselves the prescribed oaths of office, by which they are qualified to *act* as members of the Senate.

Should it be said that if this power, to its fullest extent, be denied to minorities, factious men may be enabled to prevent the organization of that branch of the Legislature, and thus all constitutional government be destroyed, the answer is, that the same result may be effected, by resignation, revolution, or usurpation. But the constitution, relying upon the intelligence and patriotism of our people, contemplates no such contingencies. When the time shall arrive in which citizens cannot be found, who are willing to assume the official trusts required by the constitution, and when they shall, with one consent, abjure all official station, then may we pronounce the experiment of maintaining a free government to be "a failure." It is believed no such unfortunate contingency is now apparent.

If these positions are correct, then it follows that those who "appear to be elected" and who are summoned by the Governor, whether more or less than a majority, constitute "the Senate" within the meaning of the constitution, with powers

sufficient to perform all those acts which are necessary to perfect the organization of that body as a branch of the Legislature. These powers are derived from distinct constitutional provisions, — they also would arise by necessary implication from the fact that the Senate is an independent, coördinate branch of the government, if the constitution were silent upon the subject.

The fifth section provides that "the Senate shall, on the said first Wednesday of January annually, determine who are elected by a majority of votes to be Senators in each district," and further provides the manner in which existing vacancies shall be supplied. This provision undoubtedly contemplates that the "determination" shall be made on the said first Wednesday of January annually. But the contingency is also contemplated by the constitution, in which all the vacancies may not be filled, on that day; as section four of article nine provides, that "in case the elections, required by this constitution on the first Wednesday of January annually, by the two Houses of the Legislature, shall not be completed, on that day, the same may be adjourned from day to day until completed."

There is no provision in the constitution, wherein the order of time in which the Senate shall determine who are elected in each district is prescribed, nor is there any express provision requiring the Senate to determine who are elected, in *all* the districts, before vacancies shall be supplied, by election, in *any*. If any such necessity exists, it must arise by implication, and not from any positive command in the constitution. The language used is suggestive of separate action. The Senate is to determine who are elected in *each* district.

Practically, the construction that all must be acted upon at the same time, might lead to very serious inconvenience. Thirteen members only, of the present Senate have been summoned by the Governor, leaving, apparently, eighteen vacancies. Suppose of these eighteen apparent vacancies, seventeen are indisputably such, and one only is contested. This contested seat may involve an inquiry into the legality of the proceedings, and the qualification of voters, in every town and plantation in the contested district. To determine the

question of election or non-election in such a case, must, necessarily, consume much time. Now must the seventeen undisputed cases be suspended, for an indefinite period of time, and the State deprived of the services of a majority of the members of the Senate, and that branch of the Legislature paralyzed, because the right to one seat is contested, and that, too, when the facts involved in the contested case in no wise affect the others? This case is put hypothetically for purposes of illustration. A construction leading to such results should not be adopted, unless dictated by the plain requirements of the constitution, or from the most stringent necessity.

But it has been suggested, that if such a contingency should arise, the two branches might, to obviate such results, proceed with the election in the undisputed cases, by agreement. To hold that the organization of one branch of the Legislature, in any case, depends upon the voluntary agreement of the other, would be to destroy its independence, and subordinate it to the will if not to the caprice of the other. Such is not the intention of the constitution. If the Senate is imperatively required by the constitution to determine who are elected, or who are not elected, in all the districts, before any vacancies can be supplied, it is not perceived on what principles a part only of those vacancies can be filled by the two Houses without a violation of that instrument. I know of no authority on the part of the two Houses to waive the positive requirements of the constitution, by agreement or otherwise. Any such agreement would be simply void, and no legal rights could be acquired under it.

In 1851, fifteen Senators were summoned by the Governor. Those Senators appeared, were qualified, and took their seats, May 14, 1851. A committee was appointed, to whom the returns of votes for Senators were referred. On a subsequent day that committee reported that the fifteen members (those summoned) were elected "*as appears by the returns*," and further reported sixteen existing vacancies. This report was accepted by the Senate, and the vacancies were filled by a convention of the members of the two Houses. Honorable Jeremiah Fowler, of the eighth Senatorial district, was one

of the fifteen declared to be elected as above, but his right to a seat was contested. The subject was referred to a committee of the Senate. A protracted examination was had, both before the committee and in the Senate. The Legislature adjourned from June to January following, and it was not until the 24th of February, 1852, that the Senate finally *determined* by a vote of fourteen to twelve, that Mr. Fowler was constitutionally elected. [*Senate Journal*, 1851–2.]

In 1843, the Governor summoned twenty-two Senators, who appeared and were qualified on the fourth day of January of that year. The Senatorial votes were referred, on that day, to a committee. On the sixth day of the same month, the committee reported, *in part*, excluding the fourth (Kennebec) district, declaring twenty-two members, including one from Penobscot, who had not been summoned by the Governor, to be elected. The committee also reported six vacancies, which were filled, by election in convention of the members of the two Houses, on the afternoon of the same day. In the fourth Senatorial district, one Senator only (Mr. Smiley) had been summoned by the Governor. The election of all the members in that district was contested. On the eleventh day of that month, the committee made an additional report, accompanied by a resolution, in which it was determined that John Hubbard, Jacob Main and David Stanley were constitutionally elected, thus excluding Mr. Smiley. This report was accepted by the Senate by a unanimous vote. [*Senate Journal*, 1843.] In view of this practical construction which has been put upon the constitution by the Senate, and acquiesced in by the House, at times when they could not be supposed to have been influenced, in this particular, by any improper motive, and in view of the fact that the Senate has power distinctly conferred upon it to determine who are elected, and necessarily when vacancies exist, and from the considerations already referred to, it would seem to follow as a legitimate consequence, that it is authorized to determine the order of time in which it will act, as matter of discretion. But in this, as in all other matters of discretion, it must act upon its official responsibility.

The same result would also follow from the familiar principle that when a general power is conferred, it carries with it, as an element, discretion as to its exercise, unless the manner in which it is to be exercised is specifically provided.

If, then, the Senate may, in its discretion, determine the order of time in which it will report existing vacancies, a corresponding obligation would seem to rest upon the House to concur in filling those vacancies — otherwise that conflict would arise in the exercise of powers, independent in their character, which the constitution does not contemplate.

The fifth section, before referred to, provides, "in case the full number of Senators to be elected from each district, shall not have been so elected, the members of the House of Representatives and such Senators as shall have been elected, shall, from the highest numbers of the persons, voted for, on said list, equal to twice the number of Senators deficient, in every district, if there be so many voted for, elect by joint ballot the number of Senators required."

It has been suggested that the language, "such Senators as shall have been elected," is applicable to such only as have been elected by the voters at the polls. This construction is supposed to be favored by the peculiar collocation of the words in that section. But when the concluding clause of the same section is considered: "and in this manner all vacancies in the Senate shall be supplied, as soon as may be, after such vacancies happen;" and when it is further considered that no inequality of right or power exists among the members of the Senate — that a Senator elected by a convention of the members of the two Houses, is, when duly qualified, clothed by the constitution with all the powers, and invested with all the rights which pertain to the office of Senator, it is not perceived on what principle he can be excluded from a participation in filling any vacancies which may exist, without reference to the time or manner in which they may have occurred.

While this construction does no violence to the language of the constitution, it preserves the just rights, and essential equality, of all the members of the Senate. This is also the

practical construction, which it is understood has been put upon a similar provision in the constitution of Massachusetts, by the Legislature of that State now in session.

These considerations, so far as they do not lead to concurrence with opinions already expressed by my learned associates, are advanced with great diffidence; but they have brought my mind to the following conclusions, as indicated in a note appended to the opinion of a majority of the Court, addressed to the House of Representatives: —

First. That if a majority of the whole number of Senators required by law are elected, and the Senate duly organized, the provisions of section 5th, article 4th, part 2d, of the constitution contemplate, but do not require, that the Senate shall determine who are elected to be Senators in all the Senatorial districts before the members of the House and such Senators as shall have been elected, proceed to elect, by joint ballot, the number of Senators required. The rule is not imperative.

Second. That the provisions of that section authorize a convention, in the first instance, for the purpose of filling a part only, of the vacancies existing in the Senate, on the first Wednesday of January.

Third. That a Senator elected by the members of the House of Representatives and such Senators as shall have been elected, to fill a vacancy existing on the first Wednesday in January, is entitled, when duly qualified to act as a Senator, to vote in a convention, held for the purpose of filling other vacancies in the Senate, existing, but which had not been filled, on said first Wednesday of January.

And I fully concur with the majority of the Court in their answers to the fourth and fifth questions.

All of which is respectfully submitted.

RICHARD D. RICE.

Augusta, January 31, 1854.

OPINION OF JUDGE APPLETON.

BANGOR, February 11, 1854.

SIR: — I received, yesterday, a communication from a committee of the honorable Senate, informing me of the request of that body, that I should furnish them with my opinion in full, upon the questions recently submitted to the Justices of the Supreme Judicial Court, by the House of Representatives. In compliance with their expressed wish, I have the honor to present the following considerations: —

The constitution of Maine, in article 4, part 2, section 5, provides for the filling of all vacancies existing in the Senate on the first Wednesday of January, and for those which may subsequently arise.

This section provides for two things to be done, and for the order of time in which they shall be done. What is last to be done, is consequential upon the performance of that which is first to be done, and it cannot be accomplished, till that which precedes it in the order of time shall have been determined.

The provision as to what is first to be done is in these words: —

"The Senate *shall*, on the said first Wednesday of January annually, *determine* who are elected by a majority of votes to be Senators *in each district*." The natural and obviously occurring meaning is, that *all* elections should be then determined, for if this be not done, they will not have been determined in *each* district, which this branch of the section requires; the object being at the same time to ascertain all vacancies in each district. The meaning of the word *each* is not satisfied and the idea indicated is not answered by a determination in less than in *each* district.

The section then proceeds as follows: —

"And *in case* the *full* number of Senators from *each* district shall not have been so elected, the members of the House of Representatives and *such* Senators, as shall have been elected, *shall*, from the *highest* numbers of persons voted for on said lists, equal to *twice* the number of Senators deficient, in *every*

district, if there be so many voted for, elect by joint ballot the *number of Senators required.*" The subsequent action required in this clause, involves and presupposes the ascertainment of certain facts. It is only "*in case* the *full* number of Senators to be elected from *each* district shall not have been *so* elected" that any subsequent action is to be had. It is not in case it is determined that part of the "Senators to be elected from *each* district" shall not have been so elected, that the constitution requires any thing to be done. If "the members of the House of Representatives and such Senators as shall have been elected" should go into convention with a partial determination of vacancies, by and under what portion of this section is such action commanded or required? It can only be by a construction by which *the full number* may be held to mean any portion of the full number — and by which the vacancies in *each district* may be held to mean the vacancies in part of the districts.

The election is to be made "from *twice* the number deficient in *every* district," and "the number of Senators required" is to be elected. Twice "the number of Senators deficient in every district" is not twice the number deficient in part of the districts, nor is "the number of Senators required" a part or parts of such number. If *all* vacancies are not ascertained — if "twice the number of Senators deficient in *every* district" be not determined — it will be impossible to do what this section requires — that is, supply "the deficiency in *every* district," for it will not have been ascertained — nor to elect "the number of Senators required," for in such event "the number of Senators deficient" will not have been determined. It is only "*in case the full* number of Senators to be elected from *each* district shall not have been *so* elected" and "twice the number of Senators deficient in *every* district" shall have been determined "from the highest numbers of the persons voted for, on said lists," that the constitution commands that there *shall* be an election and that the duty to obey arises as a constitutional obligation.

The electing body is described as composed of "the members of the House of Representatives and *such Senators as*

shall have been elected." Such Senators as shall have been elected? When? To what time does this refer? Most manifestly to the first Wednesday of January. It can refer to no other period of time. It follows then that one elected in this mode is not and could not have been referred to as constituting one of the electors, for he would not have been a Senator at the time referred to, and his Senatorial rights would have arisen from the very election contemplated in this section.

The last clause provides that "in this manner all vacancies in the Senate shall be supplied *as soon as may be* after such vacancies happen." The preceding portion of this section refers to vacancies existing *on* the first Wednesday of January. This relates to vacancies happening after this time, as by death, resignation or in any other mode, and provides that the manner in which they shall be filled shall be the same, as in case of vacancies existing at the time of the first meeting of the Senate.

Other and different provisions might have been made, and they might or might not have been more convenient. The true inquiry is as to the meaning of the words used. In the construction here presented, the plain and natural meaning of the words used, has been regarded. From the report accompanying the questions proposed by the House of Representatives, it appears that "it has been the uniform usage in this State, since the formation of the government, to determine and declare all vacancies, existing in the Senate on the day appointed for the meeting of the Legislature, in each year," before proceeding to elect by joint ballot, the number of Senators required. An uniform usage of so long continuance, while not conclusive, may yet justly be regarded as no slight confirmation of the correctness of the preceding construction of this section of the constitution.

These views afford an answer to the first three questions of the House.

Either House when first assembled, and consisting of less than a quorum, is obviously not clothed with the powers and cannot exercise the functions of one having a constitutional quorum. But because a quorum has not been elected, or be-

ing elected may not be present, neither the government nor the Legislative branches of the government cease to exist. Every Legislative body is necessarily subject to those rules of procedure and is possessed of those powers without which it would be impossible to accomplish the purposes of its existence. The power to punish for contempts, except when committed by their own members, is not given to the House of Representatives of the United States, yet it has been judicially determined to exist by the highest tribunal of the Union — as a power necessarily derived from implication. The first Congress under the constitution was held at New York, on March 4, 1789, but a quorum not being present, the House met and continued its existence by successive adjournments till the first of April, when a quorum having taken their seats, the election of its officers took place. A quorum of the Senate was not had till April 6, when a message was sent to the House, informing them of that fact, and that a president had been elected for the sole purpose of opening and counting votes. During this time a journal was kept — the bodies thus assembled were respectively termed the House or Senate — and their Legislative existence had relation back to the day of their first meeting. That a Legislative body, when less than a quorum, may organize so far as may be necessary to call that body into existence — that it may continue its existence by successive adjournments — that it may keep a journal and record its proceedings — that it has the power of self-protection incident to all Legislative bodies — that, when a quorum is had, it then becomes possessed of full Legislative power — that its Legislative existence relates back to the date of its temporary organization — and that during all this time it is entitled to its appropriate designation as Senate or House, as the case may be, cannot be doubted. Thus much is necessary by the law of self-preservation inherent in all Legislative bodies, and is believed to have been sanctioned by universal usage.

Whether the Senate has or has not further power, is to be ascertained by recurring to article 4, part 2, which relates to the Senate and its organization, and provides for the develop-

ment of its organic number in case of vacancies arising from failure to elect.

Before examining the sections of the constitution bearing on the remaining questions presented, certain considerations resulting from the views already presented, obviously occur. The theory of the constitution contemplates a full Senate — and the first duty imposed on the Senate relates to the filling of all vacancies existing on the day of its meeting, without regard to their number, whether many or few. The full number of Legislative bodies is ordinarily obtained from without as by popular elections. The mode by which the Senate is filled is peculiar and anomalous, the initiatory steps to obtain a full Senatorial board arising from within its own body, and its full number is the result of an election by an electoral body, of which its own members constitute a part. Each House is the judge of the election of its members, and no power is given to either House to judge of the election of the members of the other. The ascertainment of its condition — the preliminary steps necessary to the development of its constitutional number, are given to the Senate as a part of its organizing power and for the purposes of its organization.

The question then arises, whether those powers can be exercised by less than a quorum.

By article 4, part 2, section 3, the lists of votes for Senators, duly attested, are required "to be delivered into the secretary's office thirty days at least before the first Wednesday of January." The next section provides, that the Governor and Council, after examining "the returned copies of such lists," shall "issue a summons to *such persons as shall appear to be elected* by a majority of votes in each district, to attend that day and take their seats."

The persons who appear to the Governor and Council from the lists to be elected as Senators, and who attend and "take their seats," as such, without regard to their number, are, immediately on taking their seats, and before any addition can be made to their number, denominated "the Senate" by the fifth section. The Senators, thus summoned, whether few or many, are "to take their seats" — that is, assume the func-

tions of Senators. They each form a part of the Senate. They are Senators, in fact, and of right. The section then declares that the Senate — that is, that those thus summoned, "shall determine who are elected," &c. No negative words restricting the power of those thus summoned are to be found. The object to be obtained, is a full Senatorial board by the action of those who *appear to be elected*, and have been summoned and taken their seats. The powers of each branch are separate and distinct. The power of determining vacancies is given in express terms to the Senate — that is, to those thus assembled. It is not given to any other branch of the government, and resort should not be had elsewhere, unless under the pressure of the most urgent necessity. No such necessity exists.

The conclusion is, that the constitution contemplates a full Senate — that it recognizes less than a quorum as a Senate, and as clothed with limited powers — that they may determine vacancies — give the House the necessary information of their existence, and coöperate with them in completing the Senatorial board. These powers are necessary to the complete organization of the body. In other respects, the Senate, when having less than a quorum, and in the process of completing its number, is equally with the House subject to the general infirmity of power incident alike to each branch of the Legislature when in that condition.

Article 4, part 3, relates to "Legislative power," and embraces both the power of general, as well as of that particular legislation, which is to be exercised by each House in providing penalties by which to compel the attendance of absent members, or to determine its rules of proceedings, &c.

The third section of article 4, part 3, provides that "each House shall be the judge of the *elections* and *qualifications* of its own members, and that a majority shall constitute a quorum to do business." This section presupposes that each House has had a quorum, and has been organized, and in possession of full "Legislative power." In terms, it applies to each House, and to those who have become members in any mode provided for in the constitution. It recognizes the power of

adjudication of the election of members, and of their qualifications,—a power essential and important to every Legislative body as a part of the Legislative duty of each House. After a full House, or its constitutional equivalent, a quorum, has been had, and the House has been organized, can less than a quorum judge of the election and qualification of its members? If so, they can do more than adjourn, and they must have this power only because it is no part of the business of the House. If they cannot do this, after the House or Senate has had a quorum and been organized, it is difficult to perceive how a body in the process of procuring an organization, can with less than a quorum conclusively bind by its determination the same body, when its full number shall have been obtained; in other words, that a minority of the Senate can have greater powers while adopting the necessary proceedings to procure its full number, than the same number would have after the Senatorial board shall have been completed. If less than a quorum, while organizing, have this power, to determine conclusively, and forever bind the Senate when complete in its numbers, they must have it equally whether such condition is the result of absence or failure to elect.

It is obvious, that if to "determine who are elected, is to have the same force and effect as the phrase "shall be the judge of the *election and qualification* of its own members," if the powers of a Senate, when its numbers are complete, are to be forever concluded by the action of less than a quorum, while in the process of completing its numbers,—in the present case the power of the Senate to judge will in advance have been taken from it, even before by the constitution the right to exercise it will have existed. If this power exists in less than a quorum, while completing its numbers, it must exist equally whether arising from absence or failure to elect; and a Senate when complete in its numbers and organization, will enter upon the discharge of its duties shorn of its power to judge of membership and qualifications.

Such a meaning, if possible, must be given to each part of the constitution as will give the fullest scope to the general

intention of the instrument, and as will least conflict with its particular provisions. The Senate has power to "determine." "Each House shall be the *judge* of the elections and qualifications of its own members." It is a determination for the purpose of procuring a full Senate, and is to be regarded as part of its organizing power. It is to be limited to the purpose in view. This limitation of meaning is further strengthened by the marked difference of phraseology in these two forms of expression. One not constitutionally a candidate, as an alien, may be elected and take his seat, and exercise the functions of a Senator; and yet because not possessing the constitutional qualifications his seat may be vacated. The words used in these sections differ; the purposes for which they are used are different, and the force and effect to be given to them should be in conformity with the objects to be attained in each case. A determination for immediate action in the one case — a final and conclusive judgment in the other.

The Senate, in the first instance, is composed exclusively of those "*who appear to be elected.*" The completion of its full number is the first official duty imposed upon it by the constitution. The time and delay incident upon investigating cases of contested elections could hardly have been contemplated in reference to an act, which, if practicable, is required to be done on the first day of its official existence. The determination would rather seem to be one to be based on existent materials — already in the archives of the State, and not upon the contradictory testimony of witnesses both as to elections and *qualifications* hereafter to be had — and after the delay incident to a protracted examination of complicated facts in an indefinite number of cases. The evidence upon which the Senate would be authorized to decide, would seem to be the "returned copies of such lists," from which "the highest numbers of the persons voted for" is to be obtained.

These conclusions, for aught I can perceive, are inevitable, unless the "determination" of less than a quorum is to be held conclusive upon the Senate when filled — a result, which

would deprive it of one of its powers clearly granted, most essential and necessary and to which I am not prepared to assent. I have the honor to be,

Very respectfully,

Your obedient servant,

JOHN APPLETON.

Hon. LUTHER S. MOORE,

President of the Senate of Maine.

INDEX.

AID TO AN OFFICER.

See ASSAULT AND BATTERY, 5.

AMENDMENT.

See RECORD, 4. SEAL, 2. TRUSTEE PROCESS, 13.

ARABIC NUMERALS.

ARBITRATION AND AWARD.

ASSAULT AND BATTERY.

ASSESSORS AND ASSESSMENT.

ASSIGNMENT, ASSIGNOR AND ASSIGNEE.

BASTARDY.

BETTERMENTS.

BILLS AND PROMISSORY NOTES.

CONSIDERATION.

See CONTRACT, 8, 9, 10. SEAL, 3, 4.

CONSTABLE.

CONSTITUTIONAL LAW.

See OPINIONS AS TO ORGANIZATION OF THE SENATE, PAGE 563. RAIL ROAD, 2, 3, 6.

CONSTRUCTION OF DEEDS.

CONTRACT.

CORPORATION.

COST.

COUNTY COMMISSIONERS.

COURTS.

COVENANT.

CUSTOM.

DAMAGES.

DEDICATION.

DEED.

DEPOSIT.

See WITNESS, 1, 2, 3, 4, 5.

DEPOSITIONS.

DEVISE.

DISCONTINUANCE.

See ARBITRATION, 5, 6.

DISSEIZIN.

See SEIZIN AND DISSEIZIN.

DOWER.

ENTAILED ESTATES.

See DEVISE, 5, 6, 7.

EQUITY.

See BOND, 5. TRUSTS AND TRUSTEES, 5, 7, 12, 14, 15.

ERROR.

ESTATE TAIL.

See DEVISE, 5, 6, 7.

ESTOPPEL.

EVIDENCE.

EXCEPTIONS.

EXECUTION.

EXECUTORY DEVISE.

EXECUTORS AND ADMINISTRATORS.

FEES.

FENCES.

FLATS.

INFANCY.

INSANE HOSPITAL.

INSOLVENCY.

See CONTRACT, 4.

INSOLVENT ESTATES.

1. From the decision of commissioners of insolvency upon the estate of a person deceased, an appeal may be taken by a claimant, whose demand has been disallowed, if the appeal be claimed and notice of it given in writing *at the probate office*, within twenty days after the return of the commissioners. *Pattee* v. *Lowe*, 121.

2. There is no prescribed form, in which such notice is to be given. It is not rendered invalid by being addressed only to the register of probate. *Ib.*

INSURANCE.

See SHIPPING, 12, 13, 14. TRUSTEE PROCESS, 15, 16.

INTEREST.

1. Upon a note for money payable at a future pay-day, whether in an entire sum or by installments, "*with interest to be paid annually*," the interest which may have accrued in any year, may be recovered, if sued for before the pay-day of the principal. *Bannister* v. *Roberts*, 73.

2. In a suit brought upon a note payable by installments with interest annually, and declaring for the principal and interest, no interest upon interest is recoverable, unless the suit be commenced before the pay-day of the last installment. *Ib.*

JOINDER OF PARTIES.

1. To maintain assumpsit against one who, after the loss of a vessel at sea, has received the insurance money upon her freight, all the part owners must join, as co-plaintiffs. *White* v. *Curtis*, 534.

2. Advantage of a non-joinder may be taken on the general issue. *Ib.*

JOINT STOCK COMPANY.

1. Joint stock associations, though with a common object, and for the purpose of dealing exclusively in personal property, and with a community of profit and loss, are not necessarily co-partnerships. *Cox* v. *Bodfish*, 302.

2. In a suit brought against the depositary of such an association by one of its members to recover his aliquot part of the joint fund, it is no defence that available debts are yet due to the company. *Ib.*

3. Such an association was formed to operate by trade and labor in a distant State. Its constitution divided the stock into shares of $500, and provided that each member, by subscribing to render his personal labor should be

LEVY OF LAND.

See ATTACHMENT, 3, 4, 5, 6.

LIEN.

MANUFACTURING ESTABLISHMENTS.

See REGULATIONS IN MANUFACTURING ESTABLISHMENTS.

MARRIED WOMEN.

MONUMENTS.

See WAYS, 21, 22, 23.

MORTGAGE.

See BOND, 1, 2, 3, 5, 6.

POUNDS AND IMPOUNDING.

See STATUTE, 3, 4.

PRACTICE.

See EVIDENCE, 4, 5, 6. NONSUIT. PLEADING, 1.

PRESCRIPTION.

See WAY, 1, 2.

PRESUMPTIONS OF LAW.

PRINCIPAL AND AGENT.

PRIVITY OF INTEREST, CONTRACT, &c.

PROBATE COURT.

PUBLIC LANDS.

RAIL ROAD.

REPEAL OF STATUTES.

REPLEVIN, REPLEVIN OF A PERSON AND REPLEVIN BOND.

RESERVED LANDS.

RULES OF COURT.

SALE.

SEAL AND SEALED INSTRUMENTS.

See AGENT AND AGENCY, 1, 2, 3.

SEIZIN AND DISSEIZIN.

See PARTITION OF LAND, 7, 8, 9.

SELECTMEN.

See INSANE HOSPITAL, 1, 2, 3.

SENATE.

See CONSTITUTIONAL LAW, 563.

SETTLEMENT.

See PAUPER.

SET-OFF.

SHEEP.

See POUNDS, &c. 1, 2, 3, 4.

SHIPS AND SHIPPING.

TIDE WATERS.

See Rail Road, 6.

TOWN MEETINGS.

See Ways, 14, 15, 16.

TRESPASS.

See Arbitration and Award, 24. Partition of Land, 1, 2, 3.

TROVER.

TRUSTS AND TRUSTEES.

TRUSTEE PROCESS.

USE AND OCCUPATION.

VESSELS.

See SHIPS AND SHIPPING.

WAGES.

See REGULATIONS IN MANUFACTURING ESTABLISHMENTS.

WATER POWER.

See GRANTS, 1, 2, 3, 4, 5.

WAYS.

WILL.

See DEVISE.

WITNESS.

See ARBITRATION AND AWARD, 23. EVIDENCE, 4, 5, 6. EXECUTORS AND ADMINISTRATORS, 3.

WRIT.