REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By SOLYMAN HEATH,

REPORTER TO THE STATE.

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1855.

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.

[MEMO.] HON. SAMUEL WELLS resigned his office as a Justice of this Court, on March 31, 1854.

HON. JONAS CUTTING was appointed and commissioned in his place, on April 20, 1854, and took the oaths of office on May 6, 1854.

HON. GEORGE EVANS, ATTORNEY GENERAL.

ADVERTISEMENT.

This volume shows a few cases to have been presented to the Court in 1853, in the decision of which one of the Judges acted, whose appointment was not until 1854.

This, at first sight, may seem an irregularity. It is however explained by simply stating that those cases were not presented to the Court upon argument offered orally; but upon *written arguments*, which, together with the facts, might as properly be examined and adjudicated upon by a Judge of recent appointment as by any other.

ERRATA. — The reader is requested to correct with his pen the following errors: —

In Vol. 35, page 319, about middle of page, insert TENNEY, instead of SHEPLEY.
" " " 52, 14 lines from bottom, insert 4 *Sim.* for 4 *Sum.*
" " " 542, 14 lines from top, insert *land* instead of *law.*
In Vol. 36, page 16, 11th line from bottom, add the word *only.*
" " " 155, 2d. line of syllabus, insert *vests* instead of *rests.*
" " " 295, 2d line from top, insert *was* instead of *were.*
" " " 303, 3d line from bottom, insert *Smith* instead of *Smih.*
" " " 414, 3d line from bottom, insert *indebtment* instead of *indebtedment.*

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1853.

COUNTY OF LINCOLN.

COLBY, *petitioner, versus* DENNIS *& al.*

By R. S. c. 123, § 4, no review shall be granted until due notice has been given to the adverse party.

A notice, allowing such time as the law prescribes for parties in other cases, and returnable when the respondent may be heard, whether at the same term or another, is all that is required.

Under the statute of 1852, the granting of writs to review judgments against certificated bankrupts, is not at the discretion of the Court.

The statute is imperative as to all cases coming within its purview.

It operates on remedies only, and not on rights, and is, therefore, not liable to the charge of unconstitutionality.

It allows no limitation to the time within which the review may be sought.

It was repealed in 1853, but the repeal excepted all "actions pending." Within that exception, *petitions* for review were embraced and saved.

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

PETITION FOR REVIEW.

The petitioner, on Jan'y 28, 1842, gave to the respondents' intestate a promissory note of $436,43, payable on demand. Afterwards, on *October* 27, 1842, he applied to the appropriate court to be declared a bankrupt, and in 1843 obtained a discharge in bankruptcy. Upon that note the respondent recovered judgment against the petitioner by default in 1844.

On April 13, 1852, it was enacted by the Legislature that "any petition for review hereafter brought, shall be granted and allowed, if it shall be made satisfactorily to appear to the Court that the defendant in the original action had obtained his discharge in bankruptcy before or subsequent to the rendition of judgment in such action; provided that the cause of action accrued before the proceedings in bankruptcy, and that the claim or demand was of such a character as would be barred by a discharge in bankruptcy."

This petition is founded upon this statute. It asks for a review of the said judgment recovered in 1844. It was presented at the Oxford term of this Court, and an order was there passed for notice upon the respondents. That notice not having been served, a new notice was ordered at the first day of the October term, 1852, in this County, requiring the respondents to appear in fourteen days after the service was made upon them.

The respondents' counsel appeared at the return day, to object to the order of notice. The objection was overruled, and the prayer of the petition for review was granted, "not as matter of judicial discretion, but in obedience" to the statute of 1852.

The respondents excepted.

Lowell & Foster, in support of the exceptions.

1. The statute does not authorize the issuing of a notice returnable at the same term.

2. The application for review is too late. The R. S. c. 123, regulating reviews, requires the petition to be made within three years from the rendition of the judgment. The Act of 1852 does not in terms, nor by necessary implication, repeal any provisions of chapter 123. It merely prescribes a new cause for which a review may be granted. Recent Acts in derogation of former ones are to be construed strictly.

3. If construed to allow petitions so long after rendition of the judgments, it is retroactive and void, as it acts not merely on the remedy but on the right acquired by judgment.

4. The Act of 1852 was repealed in 1853. True the repealing Act saved "all actions pending." But this petition

was not an *action* pending. Proceedings commenced and pending under a statute are defeated by a repeal.

Ingalls, contra.

SHEPLEY, C. J. — This is an application for review of an action commenced by the respondents' intestate against the applicant on a promissory note bearing date on January 28, 1842, in which a judgment was rendered against the applicant upon default at the June term of the District Court in this county in the year 1844.

Before that judgment was rendered the applicant had, on May 30, 1843, obtained his discharge in bankruptcy.

By an Act approved on April 13, 1852, it was provided, that "any petition for review hereafter brought in any court in this State shall be granted and allowed, if it shall be made satisfactorily to appear to the Court, that the defendant in the original action had obtained his discharge in bankruptcy before or subsequent to the rendition of judgment in such action; provided that the cause of action accrued before the proceedings in bankruptcy and that the claim or demand was of such character, as would be barred by a discharge in bankruptcy."

Upon the testimony introduced the presiding Judge granted the review "not as a matter of judicial discretion, but in obedience to the Act of the Legislature."

Objection was made, that "the petition, order of notice and notice were insufficient." The petition was addressed to the Court at a term holden in the county of Oxford; and an order was there made for service of a notice on the respondents returnable in this county, but no service of it was made. This proceeding was authorized by statute, c. 123, § 4. Upon the first day of the term holden in this county in the month of October, 1852, the Court ordered notice to be served upon the respondents to appear during the same term within fourteen days next after service was made upon them. The provision of the statute is, that no review shall be granted until due notice has been given to the adverse party. The

statute does not prescribe the manner in which notice shall be given, nor the term to which it shall be made returnable. A notice allowing such time as the law prescribes for parties in other cases, and returnable, where the respondent may be heard, is all that is required.

It is insisted, that the limitation contained in the statute, § 6, that no review shall be granted, unless application is made within three years after rendition of the judgment, operates as a bar to this application for review; that it was not the intention of the Legislature to repeal that section or to change the law, but to add a new cause, for which reviews should be granted according to the former provisions.

The language of the Act, upon proof being made of the required facts, is peremptory without regard to the time, when the judgment was rendered. There were probably few, if any, judgments of the description named in the Act of 1852, rendered within three years before its passage; and the construction insisted upon, would have rendered the Act, had it not been repealed, nearly, if not quite ineffectual. Its provisions respecting this class of petitions for review are entirely inconsistent with the limitation of three years, which must be regarded as inoperative upon them.

It is further contended, that the Act of 1852 having been repealed by the Act of March 31, 1853, "saving all actions pending," petitions for review are not thereby saved; that by actions pending were intended actions of review commenced after reviews had been granted.

The saving clause must have been intended to save something, which would have been otherwise destroyed; to save something out of that, which was repealed. The Act of 1852 speaks of the "original action," thereby implying, that the petition might be regarded as an action. When this Court is authorized to grant reviews "in all civil actions," petitions for partition are included by express words. If the saving clause in the Act of 1853 should be construed to be applicable only to actions of review sued out after a review had been granted, it is doubtful, whether it could have any legal effect;

for when a review has been already granted, it being an Act passed and entirely finished, the repeal of the Act authorizing the review to be granted might have no effect upon the action already commenced and pending. In the Act authorizing reviews the application and proceedings are spoken of as a "case," "cause" and "suit." A petition must be considered to be pending after it has been regularly entered in Court, although no party respondent has appeared. If this were not so, the Court could not properly act upon it without some special grant of authority, and there could be no proper record of its proceedings respecting it. The conclusion must be, that it was the intention of the Legislature to save pending petitions.

It is finally insisted, that the Act of 1852 is not a constitutional Act. And it is said, that a person has a vested right in a judgment, which by the existing laws cannot be reviewed. He may have a vested right in a judgment, whether the suit, in which it was recovered, is or is not liable to be reviewed. But it is not certain, that a judgment not liable to be vacated by a review will continue to be a valid judgment. The law, which authorizes the judgment, does not guarantee that it shall remain a valid judgment. It may be liable to be reversed for error. If so reversed, the obligation of the contract is not impaired. The remedy, by which that judgment was recovered, is alone affected. If the time for commencing writs of error should be extended and made applicable to cases, in which no writ of error could by the existing laws be maintained, the remedy only would be affected, and yet the judgment might be annihilated. If judgments were recovered, where there was no law authorizing a review, an Act authorizing reviews to be granted in cases, in which judgments had already been recovered, could act only upon the process by which those judgments had been recovered. The obligation of the contract would not be impaired or affected thereby.

The opinion in the case of *Oriental Bank* v. *Freese*, 18 Maine, 109, stated, that the constitution did not "prohibit the Legislature from passing such laws as act retrospectively, not

on the right of property or obligation of the contract, but only upon the remedy which the laws afford to protect and enforce them." The justice or wisdom of such legislation is not a subject for the consideration of this Court.

Exceptions overruled.

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

MOORE *versus* HOLLAND.

A party, after resting his case, and after hearing opposing testimony from the other side, is entitled to introduce cumulative evidence, though in support of a point upon which he had previously introduced evidence; *unless* the Judge, before the opposing testimony was offered, had given notice that such cumulative evidence would be excluded.

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

TRESPASS.

The plaintiff introduced several witnesses, and then rested his case.

The defendant, before proceeding to call his witnesses, gave notice that he would insist upon requiring the plaintiff before stopping, to put in all his evidence, except what might be of a rebutting character.

The defendant then called and examined many witnesses and stopped.

The plaintiff then offered cumulative evidence, material further to strengthen a point in his side of the case. This evidence was excluded, the Judge being of opinion that the rule forbids the introduction of such evidence, at this stage of the trial, inasmuch as the plaintiff had, before resting his case, introduced testimony to the same point. The verdict was for the defendant, and the plaintiff excepted.

Gould, for the defendant, submitted that the enforcement of the rule, excluding cumulative testimony, after notice given by the adverse party, was merely at the discretion of the Court, and that, therefore, exceptions would not lie.

Gilbert, for the plaintiff.

SHEPLEY, C. J. — This Court has decided that, in our practice, no rule exists by which a party is prevented from introducing cumulative testimony upon any point after he has rested his case and testimony has been introduced by his opponent; while the right of the Court is recognized, (in the exercise of its judicial discretion,) to enforce such a rule after giving seasonable notice that it will be enforced. In this case such a rule appears to have been enforced, and testimony material to sustain the plaintiff's case appears to have been excluded, without previous notice of such a rule.

Exceptions sustained. Verdict set aside and new trial granted.

URAN *versus* HOUDLETTE.

A judgment is a debt of a higher order than was the simple contract upon which it is founded.

A discharge in bankruptcy is no bar to a judgment recovered *after* the defendant's application to be decreed a bankrupt, although founded upon a claim, which, until merged in the judgment, *would have been* provable in bankruptcy.

ON FACTS AGREED.

DEBT ON JUDGMENT.

The plaintiff held a note against the defendant, payable in Nov. 1841, and recovered judgment upon it Dec. 24, 1842. Five days before the recovery of the judgment, viz., on Dec. 19, 1842, the defendant filed his petition to be decreed a bankrupt. Upon that petition such proceedings were had that he obtained, in 1844, a full discharge from all the debts due from him on said 19th of Dec. 1842, which were provable in the court of bankruptcy.

Upon the plaintiff's judgment, an execution was issued in 1845, and placed in the hands of an officer for service. Whereupon the defendant applied to the court of bankruptcy "for a supersedeas or such other remedy as would restrain the officer from executing said execution." Upon that application the

court of bankruptcy issued a precept directed to the officer, restraining him and all other sheriffs, and directing him not to execute said precept. To that direction the officer conformed, and the execution was returned "in no part satisfied."

The supersedeas was granted without notice to the plaintiff, and its introduction was objected to by him, but it was received. This is an action upon said judgment.

The case was submitted to the Court.

J. S. Abbott, for the plaintiff.

F. Allen, for the defendant.

HOWARD, J. — The note of the defendant was merged and extinguished by the judgment. That having been rendered upon the note, after he had filed his petition for a discharge in bankruptcy, it constitutes a debt, originating at the time, and was not provable under the commission. Consequently the discharge was no bar to the judgment, and furnishes no defence to this action. *Holbrook* v. *Foss*, 27 Maine, 441; *Pike* v. *McDonald*, 32 Maine, 418.

Judgment for the plaintiff.

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

PARTRIDGE *& al., petitioners, versus* LUCE.

Where a co-tenant of land, *after* petitioning for a partition, and *prior* to the interlocutory judgment of *fiat partitio*, has conveyed his interest, advantage of the conveyance can be taken by plea in bar.

But a sale, made *after* such interlocutory judgment, furnishes no objection to the petitioner's title.

The owner of upland, bounded on the sea, will hold the flats for one hundred rods from highwater mark, provided they extend so far, but not beyond that distance.

A petition for partition of land, described as bounded on the sea, or on a bay of the sea, is to be held as a petition for a division of the flats as well as of the upland.

On such a petition, it is the duty of the commissioners to divide the flats as well as the uplands.

If, in such a case, the commissioners have left the flats undivided, their report will be recommitted, for the purpose of having the flats divided, unless it appear to the Court that they are incapable of division.

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

Petition for Partition of a lot of land.

The petitioners collectively owned eleven sixteenths and the respondent five sixteenths of the land. It is described in the petition as bounded westerly by a highway; southerly by a line, [described;] easterly by Owl's Head bay; northerly by a line from the highway to an iron bolt in the ledge at highway mark, and to *the eastern boundary*, being about one acre.

It consisted partly of upland and partly of flats adjoining the same, the highwater mark being a line curving into the upland. The distance between highwater and low water mark was about 20 rods

After the requisite preliminary proceedings commissioners were appointed to make partition. They divided the upland down to highwater mark. They did not, however, make partition of the flats, but left them undivided.

The Judge recommitted the report, in order that a partition of the flats as well as of the upland should be made.

To that recommitment, the respondent excepted.

Lowell & Foster, for the respondent.

1st. The object of this bill of exceptions is to bring the subject matter before the full Court, with a view to have the question settled, as to the divisibility and partition of the flats, and the basin-formed harbor of Rockland, between adjoining owners of upland lying upon the banks of the continuous curving shores.

2d. In order to avail himself of the judgment of the full Court, the defendant, for the purposes of the trial, contends that the flats beyond and below highwater mark are not the subject of *this process* of partition, and if it were otherwise, and if the flats be the subject of partition, then it is suggested that the language of the prayer of the petition does not require the commissioners to extend the partition beyond highwater mark. R. S. c. 121, § 2 & 18; *Mayhew* v. *Norton*,

17 Pick. 357; *Kennebec Ferry Co.* v. *Bradstreet*, 28 Maine, 374; *Lincoln* v. *Wilder*, 29 Maine, 169; *Davis* v. *Prentiss*, 16 Pick. 435; *Emerson* v. *Taylor*, 9 Maine, 42; *Lapish* v. *Bangor Bank*, 8 Maine, 85.

3d. Should it be decided that the law authorizes the partition of basin-formed flats, when reasonably practicable, then it is submitted, that the flats and shores disclosed in this case are of such a character as to render a partition by metes and bounds impracticable, or so extremely difficult that it ought not to be required or attempted.

Ruggles, for the petitioners, suggested that, since the commissioners made their report, one of them has purchased a part of the petitioners' title, and that the petitioners have sold to various persons all their interest.

SHEPLEY, C. J. — If the exceptions be overruled and the recommitment confirmed, one new commissioner, at least, must be appointed.

The opinion of the Court was drawn up by

WELLS, J. — It was suggested at the argument of the exceptions, that some of the petitioners had conveyed their interest in the premises since the appointment of the commissioners. If such conveyance to third persons had been made after the commencement of the petition and before the interlocutory judgment, that partition shall be made, no advantage could be taken of it without a plea in bar. *Upham* v. *Bradley*, 17 Maine, 423. The petitioners would be at liberty to take issue upon such plea, and to have it tried by a jury. *Mitchell* v. *Starbuck*, 10 Mass. 5. But the interlocutory judgment establishes the rights of the petitioners, and they cannot be investigated anew without setting aside that judgment. It is then too late in the present stage of the proceedings, to enter into the inquiry as to the proper parties to the process.

It is contended by the respondent, that the petition does not require a division of the flats, that they are not embraced in the description of the premises of which partition is sought, and that the statute does not authorize a partition of them.

In the petition the premises are bounded "easterly by Owl's Head bay." Whatever is included within that boundary would by the interlocutory judgment belong to the petitioners, so far as it was the subject of private property. A bay is an arm of the sea, extending into the land. It is a part of the sea. And the boundary is to be regarded in the same manner as if it had been stated, that the premises were bounded on the east by the sea.

The principle of the Colonial Ordinance of 1641 has been adopted in this State, so that the owner of lands bounded on the sea shall hold to low water mark, where the tide does not ebb more than one hundred rods, but he cannot claim beyond those limits, where the tide ebbs to a greater distance. The owner of the upland bounded on the sea can hold the flats for one hundred rods from highwater mark, provided they extend so far, but not beyond that distance. *Storer* v. *Freeman*, 6 Mass. 435; *Lapish* v. *Bangor Bank*, 8 Greenl. 85; *Mayhew* v. *Norton*, 17 Pick. 357; *Winslow* v. *Patten*, 34 Maine, 25.

No satisfactory evidence was presented to the Court to show, that the flats were incapable of a division, and such a result cannot be anticipated. The exceptions must be overruled, and the order of the presiding Judge, that the report should be recommitted for the purpose of dividing the flats, is confirmed.

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

KENDALL *& al. versus* LEWISTON WATER POWER CO.

A submission to referees under the statute is one of the modes provided by law for the decision of causes.

The *course of proceedings* upon such a submission may be altered at the pleasure of the Legislature.

Such an alteration merely affects the remedy, without impairing the obligation of any contract.

Upon the abolishment of the District Court, awards, which had been made returnable to that Court, might rightfully be returned to this Court, at any term prior to the period limited in the submission.

In making up judgment upon an award, interest on the amount awarded cannot be included

On Exceptions from *Nisi Prius*, Shepley, C. J., presiding.

Award of Referees.

The parties, on Feb'y 19, 1852, submitted their respective claims to arbitration, in the mode prescribed by R. S. c. 138, it being provided in the submission, that the award should be returned to the District Court by July 9, 1852.

The referees heard the parties in March, 1852. Their award, though headed "District Court, June term, 1852," was in fact presented May term, 1852, to this Court, who directed that it should remain with the clerk unopened until the October term. At the October term it was opened and, though objected to, the Court ordered that it be accepted.

To that order, the Lewiston Water Power Co. excepted.

J. Goodenow, in support of the exceptions.

This report being returnable to the late District Court, and not having been made to the Court within the time limited in the submission, this Court was not authorized to accept it. *Bowes* v. *French*, 2 Fairf. 182; *Kingly* v. *Bill*, 9 Mass. 198; *Sargent* v. *Hampden*, 29 Maine, 70; *Same* v. *Same*, 32 Maine, 78; *King* v. *Dedham Bank*, 15 Mass. 447; *Swift* v. *Luce*, 27 Maine, 285.

T. A. D. Fessenden, contra.

Wells, J. — The report of the referees must have been in fact made as early as the May term of this Court in 1852. The agreement of submission provided, that the report should be made to the District Court, but that Court was abolished by the Act of April 9, 1852, which took effect on the first day of May following. It could not therefore be returned to that Court after that time.

The report purports to have been made at the June term of the District Court of 1852. But the hearing of the parties was in the month of the previous March, and the heading of the report was probably made before the abolition of the District Court, and was intended to express the term, to which

the report should be returned, and not the time when it was in fact completed.

By the first section of the Act before mentioned, the entire jurisdiction of the District Court was transferred to this Court, and the report, if completed at the time when the May term of this Court was held, as it appears to have been, was properly presented at that term.

But if the report should be considered as not having been made till the June term of the District Court, that period would be within the time specified in the submission, "within one year from the ninth day of July, A. D. 1851," and by the second sect. of the same Act, all processes returnable at a term of the District Court, which would have been holden next after the time when the Act before mentioned went into operation, if such Act had not been passed, were required to be entered at the next term of this Court following the abolished term of the District Court. If then the report was returnable at the June term of the District Court, it could be legally entered at the October term following of this Court. And it appears to have been accepted at the last named term.

A submission to referees under the statute, is one of the modes, which the law has provided for the decision of causes. Their report may be returned to Court, and become the basis of a judgment. It is the substitute for a suit at law, and a process for the determination of controversies. The Legislature has power to prescribe the course, which parties shall pursue in the trial of causes, and may change it at any time. Such legislation does not impair the contracts of the parties, but is intended to furnish the best mode for enforcing them. There can be no more objection to the changing of a court, to which a report is made returnable, than one to which a writ is required to be returned. Both are cases of remedies, over which the Legislature has control. It is true, that submissions arise from consent, but after the parties have entered into them, they may both become actors, and the proceedings are adversary, and are conducted in the manner prescribed by law. By the consent of those interested, several controversies are

investigated in one process. It is a trial of the rights of the parties, but not the less so because they have agreed upon the manner of commencing it, and have selected one of the ways, which the law permits them to follow.

By statute, c. 96, § 20, interest may be allowed in an action, from the time the verdict was returned, to the time of rendering judgment. But no provision appears to have been made for allowing interest upon reports of referees. In *Southard* v. *Smyth*, 19 Maine, 458, interest was claimed upon the sum awarded, in consequence of the delay arising upon the exceptions, but it was not allowed. The interest claimed in this case cannot therefore be allowed.

Exceptions overruled.

Howard, Rice and Hathaway, J. J., concurred.

GROSE *versus* HENRY HILT.

Under R. S. c. 76, § 18, 19 and 20, the obligation of a stockholder to pay corporation debts is made to depend upon the officer's certificate upon execution, that he could not find corporate property.

Before the existence of such execution and certificate, payments made by a stockholder upon any debt of the corporation, though it might give him a claim against the corporation, will constitute no defence to a suit by a judgment creditor, upon whose execution the prescribed certificate has been made.

The Act of 1851, c. 110, in relation to the liability of stockholders for corporation debts, was merely prospective.

The treasurer's certificate of a payment made by a stockholder towards corporation debts, is explainable by parol, especially to show the time of the payment, if in that respect the certificate be silent.

In a suit against a stockholder, liable for corporation debts, the judgment against him may include the cost of suit, in addition to the amount of his stock.

THE Georges Canal Company was incorporated in 1846, and made subject to the rule contained in the eighteenth section of R. S. c. 76, that, in case of deficiency of attachable corporate property or estate, the individual property of every stockholder shall be liable, to the amount of his stock, for all

debts due from the corporation contracted during his ownership of the stock, *provided* that, in every such case, the officer holding an execution against the company shall first ascertain and certify upon such execution that he cannot find corporate property or estate. By the twentieth section, a creditor of the company may, after such a return upon the execution, and after a certain prescribed notice, have an action of the case against the stockholder.

From the organization of the company, the defendant in this case was, and has ever since continued to be, holder of two shares, amounting to one hundred dollars.

The plaintiff recovered judgment against the company in April, 1850, to the amount of $99,79. Upon the execution issued on that judgment, the officer returned, January, 1851, that he could find no corporate property, and further returned March 1, 1851, that he had given the prescribed notice to the defendant.

This action of the case was brought March 5, 1851, to recover against the defendant the amount of his stock, $100, to satisfy said judgment.

Several persons having just claims, amounting to $100, against the company had received from the president his orders upon the treasurer to pay the same. These orders the defendant took from the holders, on April 30, 1849, by paying to them their respective amounts; and immediately surrendered them to the treasurer, taking his certificate of having received from the defendant $100, for payment of debts due from the corporation.

An Act, passed June 2, 1851, c. 210, provided, that when a stockholder shall have paid any just and legal debt of the corporation, and shall produce a certificate under the hand of the treasurer that he has paid such debt, he shall be exempted from further liability in his private property to the amount of such payment, whether a demand had or had not been made upon him by the officer.

After the passage of that Act, the defendant procured from the treasurer a new certificate of having made payment to

the amount of $100, of the corporate debts. The plaintiff, against objection by the defendant, introduced the deposition of the treasurer, showing that the payment by the defendant was the same payment made as above stated, on April 30, 1849. Many questions of law were reported by the Judge for the decision of the Court.

A. P. Gould, for the plaintiff.

M. H. Smith, for the defendant.

TENNEY, J. — The plaintiff recovered judgment against the "Georges Canal Company" at the Feb. term, 1850, of the late District Court, in the county of Lincoln, and upon an execution issued thereon, January 3, 1851, and placed in the hands of a deputy sheriff of that county, he returned under date of January 4, 1851, that by virtue of that execution, he had made diligent search for corporate property or estate of the "Georges Canal Company," but had been unable to find any. On March 1, 1851, he made further return upon the execution according to the provisions of c. 76, § 19, of the R. S. The present action is brought against the defendant, for the purpose of recovering of him individually, as a stockholder in that company, the amount of this execution, on the ground of his liability to pay a sum equal to the capital stock belonging to him, in addition to the capital stock, it being agreed that he has been the owner of two shares in the company since its incorporation, and has paid thereon the sum of one hundred dollars, the price of the two shares.

The defendant relies upon the fact, as a defence of this action, that he paid before the institution of this suit, a like sum to the creditors of the company and received, indorsed, the orders drawn in their behalf for their just indebtedness, and that he surrendered the orders to the treasurer of the company, and received his receipt therefor dated April 30, 1849, and contends that by the provision of sections 18, 19 and 20, of the chapter referred to, he is relieved from all liability.

The right of creditors of the company to resort to individual property, rights and credits of stockholders, arises in case

of a deficiency of attachable corporate property or estate, — "provided in every such case, the officer holding the execution shall first ascertain and certify upon the execution, that he cannot find corporate property or estate."

It is only in such a contingency, shown by such proof, that the property, rights and credits of a stockholder, are liable to be taken on an execution against the company ; or that an action on the case against such stockholder to recover of him individually the amount of his execution and costs, not exceeding the amount of the stock held by such stockholder, can be maintained. If the evidence, prescribed by the statute, of the want of corporate means to pay the execution against the company be wanting, the stockholder may pay the execution ; but it must be regarded a voluntary payment, and he may become an equitable or legal creditor of the company, by taking the place of the one whose claim he has satisfied. But the execution not being against the stockholder, he cannot be liable to pay the same, unless the steps pointed out in the statute have been followed. *Andrews* v. *Callender*, 13 Pick. 484. And it follows, that a payment made without liability to make it, does not, under the Revised Statutes, c. 76, § § 18, 19 and 20, take from a creditor the right to resort to his property, when such creditor has shown by the proper evidence that the corporate means have failed, and he has caused the requisite notice to be given in order to fix his liability.

In the case before us, the defendant paid no debt of the company after a certificate on an execution against it, that corporate property or estate could not be found, and notice to him of his liability ; and the payment which was made, was unavailing to release him from his previous liability, by virtue of the Revised Statutes.

The defendant also relies upon the statute of June 2, 1851, c. 210, which provides, that whenever any stockholder named in the eighteenth, nineteenth and twentieth sections of the seventy-sixth chapter of the Revised Statutes, shall have paid and satisfied any just and legal debt or debts of such corporation, and shall produce a certificate under the hand of the

treasurer of such corporation, that he has paid such debt or debts, and that the same has not been refunded to him, such stockholder shall thereby be exempted from further liability, &c., whether such debts shall or shall not have been demanded by an officer holding an execution against said corporation for such debts. It is manifest, that the Legislature intended to relieve a stockholder, who should bring himself within the provisions of this Act from further liability, without the returns upon an execution by an officer holding the same, required by R. S. c. 76, § § 18, 19 and 20. But from the language of the Act it is equally manifest, that its operation was designed to be prospective only. The payment referred to, is a payment to be made after the passage of the statute, and cannot embrace payments previously made. The tense used, "shall have paid and satisfied," is what Noah Webster denominates, "the prior future, indefinite," and which he defines to be "an action, which will be passed at a future time specified." Webster's Grammar of the English language in his Quarto Dictionary, 1st edition.

The language will be found, on examination of the object of the Act, to be singularly precise and exact. The payment contemplated is not to be made to the treasurer, but to a creditor; and the former is not supposed to have actual knowledge of the payment, but to give the certificate upon evidence thereof, which is satisfactory to him. And to relieve a stockholder from the liability, the statute requires two things; one, that he has paid and satisfied a just and legal debt of the corporation, and the other, the production of a certificate thereof, under the hand of the treasurer. Between a creditor seeking his remedy in this mode, and such stockholder, the treasurer's certificate is not made conclusive evidence of the payment, though it may be evidence that the company assent to it; and by established principles of evidence, it may be inadmissible as proof of payment. The treasurer's certificate must be subsequent in time to the payment to a creditor; hence the appropriateness of the language, which signifies that the stockholder shall have paid and satisfied debts of the corporation, when he shall apply to the treasurer for a certificate and obtain it.

The defendant contends that he has brought himself within the provisions of the Act of June 2, 1851, even on the ground that it was intended to be exclusively prospective in its operation, by the certificate of the treasurer of the company, dated Oct. 8, 1851. It would be competent for the defendant to prove that he had paid the just and legal debt of the corporation, by other evidence than the certificate of the treasurer, even if that should be deemed inadmissible for such purpose. And it is equally competent for the plaintiff to show at what time, and in what mode such payment was made, especially if it does not contradict or vary the statements contained in the treasurer's certificate. The time and manner of the payment relied upon in the defence of this action are not specified in the certificate; and the evidence introduced by the plaintiff, which is regarded as admissible, shows clearly that the payment was the same which was made before the receipt of the treasurer of the company, dated April 30, 1849, and does not bring the defendant within the provisions of the Act of June 2, 1851, and the plaintiff is entitled to recover in this action.

Is a creditor, who prevails in an action like the present, entitled to recover his costs, if by such recovery, the defendant is subjected to the payment of a sum greater than his capital stock in addition thereto? It is implied, that after the individual stockholder has received the notice referred to in chap. 76, sect. 19, he may make payment of the sum for which he is liable, before the levy of the execution upon his property, or the institution of a suit against him. And if he omit to make payment, and costs are incurred, it is for his own delinquency, and costs will follow the recovery of damages, under the general provision, that in a suit at law the prevailing party shall recover costs.

Several other questions presented by the case, become unimportant to a final decision of the cause, and an examination of them becomes unnecessary. *Defendant defaulted.*

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

Cole *v.* John C. Hilt. (†)

This, like the preceding case of *Grose* v. *Hilt*, was brought against a stockholder of the Georges Canal Company, by a judgment creditor, whose execution had been duly certified, to recover the amount of a corporate debt. The decision affirms the principles of the case, *Grose* v. *Hilt*, and also establishes the position that a surrender of a debt due from the company to the defendant, confirmed by the treasurer's certificate that the defendant had extinguished corporation debts to the amount of his stock, constitutes no defence, when the want of corporate property has not been evidenced by the officer's certificate on execution.

Metcalf *versus* Taylor *& al.*

A written contract is to be construed, and the meaning of the parties ascertained from an examination of all its parts. If some part appear at variance from another, the construction must be such as to harmonize the whole.

The payment and acceptance of the price of a vessel are sufficient to complete the sale, as between the seller and the purchaser, without any bill of sale or other written instrument.

Of the construction of an instrument, whether it constitutes a mortgage, or a contingent sale, or a contract to sell.

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

Assumpsit for labor and materials furnished in finishing the top work of a vessel alleged to be owned by the defendants. Shuman and Cox, two of the defendants, were defaulted; Taylor and Brown, the other two defendants, resisted the claim upon the ground that, at the time when the labor and materials were furnished, they had not *such* ownership of the vessel as rendered them liable to the action.

It appeared that Shuman and Cox had erected the vessel, and had nearly completed the hull on the 19th Oct., 1848. Upon that day a written contract was made concerning the vessel, signed by all the four defendants, Shuman, Cox, Taylor and Brown, as follows: —

"Whereas, Jacob L. Shuman and Hirah C. Cox, both of Damariscotta and State of Maine, owners and builders of an unfinished vessel now on the stocks, built by them the present season, and which they agree to finish and fit ready for sea with all reasonable dispatch, and with all the necessary appurtenances as is customary for such a class vessel, have granted, bargained and sold unto Isaac Taylor of Boston, Merchant, and Charles Brown of Eastham, Mariner, both of the State of Massachusetts, one third part of said vessel, for and in consideration of one dollar, the receipt whereof is hereby acknowledged.

"The condition of this agreement is, that the said Taylor and Brown shall pay or cause to be paid unto the said Shuman and Cox the sum of three thousand dollars, (one-half in cash and one-half in six months notes with interest,) when the said vessel shall have been launched five days and clear of lien claims. And the said Shuman and Cox shall, on the payment of said sum of three thousand dollars, make and convey a clear bill of sale of one third part of said vessel. And it is further agreed that the said Brown is to sail and command the said vessel for the term of six months, his term of service to commence when the said vessel is ready to receive her rigging, for which he is to receive seventy-five dollars per month.

"And it is further agreed that the said Taylor is to be the vessel's husband, when she is ready for sea, and for which he is to receive the usual rate of commissions, and at the end of the six months he shall render a true, full and complete account of the earnings of said vessel, and pay over the balance (after paying her disbursements) unto the said Shuman and Cox, they, the said Shuman and Cox, causing the said earnings to be applied to the payment of her outfits until they shall be paid. And it is further understood that the said Shuman and Cox shall keep the said vessel fully insured. But be it expressly understood and agreed, that at any time within the said six months, the said Shuman and Cox are at liberty to pay back the said sum of three thousand dollars, and the said Taylor and Brown shall re-convey, upon the payment of

such sum the said one-third part of said vessel, as the said Shuman and Cox shall direct, and then this instrument to be null and void, otherwise to remain in full force for the space of six months from this date. Dated Damariscotta, the nineteenth day of October, eighteen hundred and forty-eight."

It appeared that one Horace Hatch had brought an action against these same defendants for services and materials on the vessel similar to those furnished by the plaintiff. On the trial of that action, many witnesses were examined, whose testimony was reported; and the above recited contract was there introduced.

The parties in this suit agree that the testimony in that case is to be taken as testimony in this case, it being admitted that the plaintiff's labor and materials were supplied "for the vessel's top work after the three thousand dollars were paid by the defendants."

The case was taken from the jury, and judgment is to be entered by the Court, according to the legal rights of the parties.

The facts, as derived from the testimony, upon which the Court acted, will appear in the opinion.

Gould, for the plaintiff.

M. H. Smith, for the defendants Taylor and Brown.

The plaintiff does not pretend any express contract between himself and Taylor or Brown, but relies on their ownership in the vessel. But if they were owners in any respect, they were but mortgagees, and as such not liable. *Winslow* v. *Tarbox*, 18 Maine, 132. The only evidence is the contract of October 19, 1848. But that constituted neither a sale, nor a mortgage. It was only a contract not under seal, to mortgage to Taylor and Brown one third of the bark at some future day and on certain conditions; or, if it be a mortgage, by the terms of it, the mortgagees, Taylor and Brown, had no right to possession as mortgagees, until the vessel was ready for sea, which would not be until after the plaintiff's work was done. By the contract Shuman and Cox were to finish and fit her ready for sea with all the necessary appurtenances. She could not be ready for sea with

all the necessary appurtenances, until after the plaintiff's work was done. By the contract, Taylor was to be vessel's husband "when she is ready for sea."

And further, neither Taylor or Brown has ever taken possession under said contract as mortgagees.

The contracts not being a mortgage but only an agreement to mortgage, not under seal, the payment of the $3000 by Taylor and Brown would not constitute it a mortgage, nor by this act, subsequent to the execution and delivery of the contract, can this contract be made a mortgage, not being so when delivered.

SHEPLEY, C. J. By a written agreement made between the parties, this case is submitted to the decision of the Court upon the testimony reported in the case of Horace Hatch against the same defendants, and upon an admission that the materials and work "were delivered for the vessel's top work after the three thousand dollars were paid by the defendants." By defendants the parties doubtless meant Taylor and Brown, for they were to make the payment to the other defendants, Shuman and Cox, who were to receive it, and who had suffered a default to be entered.

The plaintiff having testified as a witness in the case of *Hatch* v. *Taylor et als.*, that testimony by the agreement becomes evidence in his own case. He states, that he made his charges to the vessel and owners, and "did it (the work) on that credit," and that it was not performed at the request of Taylor or Brown. They first became connected with the vessel by a contract made with the other defendants on October 19, 1848. The meaning of the parties is to be ascertained from an examination of the whole instrument, and if one part of it be found at variance with another, it must receive such a construction that the whole may operate harmoniously together.

It was an executory contract, providing for a future purchase and sale of one third part of the vessel, and not a contract, by which that part was then purchased and sold, either absolutely or conditionally, or in mortgage. Taylor and Brown were

pay the three thousand dollars when the vessel had been launched five days, and was clear of all lien claims. If those events should never happen, they would not be obliged to pay. The vessel before then might have been conveyed to others by Shuman and Cox, or have been attached and held as their property. If she had been lost by fire or otherwise, the loss must have been borne by them. If Taylor and Brown should fail to pay, they were under no obligation to convey to them. No part of the vessel could have been attached and held as the property of Taylor or Brown. Neither of them could have conveyed any part; nor had either any insurable interest in her.

A different construction might have subjected Shuman and Cox to a loss of one-third of the vessel, if Taylor and Brown had proved to be unable to pay: and might have subjected Taylor and Brown to a like loss, if the vessel had been wholly appropriated to the satisfaction of lien claims and they had been compelled to pay the three thousand dollars. The acknowledgment of one dollar received as a consideration is perceived to be no more than a formal declaration to make the contract valid. Although the language used is "have granted, bargained and sold," it cannot, consistently with the clear intention of the parties and with other language used by them, be considered as having any other meaning than an agreement to do so. The effect of the contract is an agreement to purchase and to sell and convey at a future time and upon the happening of future events. Upon such future sale being completed, certain other rights were secured by the contract to each party. It was not to become *functus officio* and null upon such sale and purchase of the property. It would continue to be valid to secure to Brown the right to command the vessel, and to Taylor the right to be her ship's husband for six months; and to secure to Shuman and Cox the right to require an account of her earnings and a right to regain the title by repayment of the price within the six months.

Upon payment of the three thousand dollars according to the contract after the vessel had been launched and had re-

mained five days free from lien claims, one-third part of the vessel became the property of Taylor and Brown. By the payment and reception of the money, both parties admitted that there had been a compliance with the terms of the contract; and the sale was then completed, although no bill of sale was then made as the contract required. The payment and acceptance of the price of a vessel is sufficient to complete the sale between the seller and purchaser, without any bill of sale or other written instrument. *Ludwig* v. *Fuller*, 17 Maine, 162; *Lyman* v. *Redman*, 23 Maine, 289. Although the plaintiffs in the case of *Pearce* v. *Norton*, 1 Fair. 252, recovered for the value of the vessel, they were considered as holding the legal title by way of mortgage. The fact that Cox, on December 8, 1848, to obtain an enrollment of the vessel, made oath that he and Shuman were the sole owners, cannot alter the legal rights of the parties. It only proves that he was in error.

It is insisted that if they then became owners, they were mortgagees, not in possession in the character of mortgagees. No debt was due to them from Shuman and Cox, who were "at liberty to pay back the said sum of three thousand dollars," but were under no obligations to do so. The money was not loaned but paid for the purchase of property. Taylor and Brown could not therefore be regarded as mortgagees. The sale to them was conditional, liable to be defeated by performance of a condition subsequent. Thus holding the title of one-third of the vessel, they were liable as part owners for materials found and labor performed upon her after that time; and are therefore liable to pay the plaintiff.

Defendants defaulted.

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

FARRIN *versus* KENNEBEC & PORTLAND RAIL ROAD COMPANY.

It is requisite that a case marked on the county docket, as one in which some question of law is to be settled, should be transferred to the next law term.

If not so done, the Judge afterwards presiding at the county court may enter such judgment as to law and justice may appertain.

Thus in an action marked "law" upon the county docket, which the plaintiff neglected to enter at the law term, though there be a suggestion that the omission occurred through mistake or inadvertence, a nonsuit may be legally ordered.

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

CASE, for injury done by altering the grade of the street in front of the plaintiff's dwellinghouse.

At the *Nisi Prius* term, Sept. 1851, the parties submitted the question of damages, if any, to be determined by three referees, and put upon the files of the Court an agreed statement of facts, upon which, in connection with the referees' estimate of the damages, the case should be submitted to the Court, at its law term, in May, 1852. Prior to May, 1852, the law term for this county was abolished, and a *Nisi Prius* May term was established. The report of the referees was not accepted or presented at that term.

By statute of 1852, c. 247, taking effect from and after April 30, 1852, all cases of law or in equity then pending in the county court were required to be removed to, and entered at, the law term of this Court for the Middle District to be held at Augusta, in June, 1852.

This case, though marked "Law," was not entered at said law term, but remained on the county docket, and for that reason, the Judge, at the *Nisi Prius* October term, 1852, ordered a nonsuit to be entered. To that direction, the plaintiff excepted.

Gilbert, for the plaintiff.

1. The plaintiff was not by law obliged to enter his action above, because no questions of law could there be considered without a report of referees; and the report not having been

published, could not be noticed by the Court. Hence there was no question of law to carry up.

2. If the report could have been acted upon by the Court without publication, then the report itself would show that the plaintiff should have been nonsuited by his agreement, for their award was, that he had sustained no damage. There was therefore, at all events, no cause to enter the action above, and hence the nonsuit was erroneously ordered.

3. The act of inadvertently marking an action *law*, which presents no question of law, does not of itself render it necessary to enter the action at the law term, and a nonsuit should not be ordered for such a mere inadvertence.

If asked why, in view of the award against us, we should object to the nonsuit, our answer is, that we wish opportunity to object to the award, and get it set aside for the grossness of its wrong, and then go to trial before the jury.

Evans, for the defendants.

WELLS, J. — This action having been marked upon the docket, at the May term, 1852, as one in which some question of law was to be settled, should have been entered at the next succeeding law term within the district. By the Act of April 9, 1852, c. 246, § 10, in case such entries are not made, "the presiding Justice, at the next, or the second succeeding term after the law term, in which they should have been entered, shall enter up such decree, or render such judgment, by nonsuit, default or judgment on the verdict, or other mode, as to law and justice shall appertain."

It does not appear that the plaintiff failed to enter his action at the proper law term, through any mistake or inadvertence. It was his duty to have presented to the Court, at the May term, 1852, the report of the committee appointed to ascertain the damages, which he alleged he had sustained, and his omission to do so can form no excuse for not entering his action, as required by law. If the report had been opened at the May term, and it had appeared, that in the judgment of those appointed to ascertain the damages, none had been sustained, a

nonsuit would then have been entered. A copy of the report is not furnished with the papers, but it is stated in argument by the plaintiff's counsel, that the committee found, that the plaintiff had not suffered any damage. But the subsequent neglect to prosecute the action, in the manner provided by statute, was the ground upon which the nonsuit was ordered, and no just cause of objection can be made to that disposition of it.

Exceptions overruled.

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

BRYANT *versus* GLIDDEN *et al.*

The statute giving protection to mill-dams extends only to such streams as are *not navigable.*

A complaint, for flowing land by means of a mill dam, should therefore allege it to have been erected on a stream *not navigable.*

The omission of such an allegation should be taken advantage of before verdict, for the process being a civil suit, no motion in arrest of judgment can be allowed.

Though such a defect might have proved fatal, if seasonably objected to, it is not supposed a writ of *certiorari* would be granted, if, in point of fact, the stream was not a navigable one.

Upon the coming in of the commissioners' report, the case is to be tried by a jury in court, at the request of either party. Upon this trial, the report is to "be given in evidence, subject to be impeached by evidence from either party."

Until such report of the commissioners has been impeached by testimony, it is decisive of the parties' rights.

Such report can be impeached only for partiality, bias, prejudice or inattention or unfaithfulness in discharging the trust, or for error of such extraordinary character or grossness as should furnish a just inference of the existence of such influences.

The verdict of a jury, empaneled to try the case in court, after the commissioners' report has been returned, is defective, if it do not find the yearly damage; or if it do not find "what portion of the year the land ought not to be flowed," or if it assess, in one aggregate sum, the damage which accrued *before*, and also that which accrued *after* the complaint was filed.

Upon a verdict which finds neither the amount of "yearly damages," or "what portion of the year the land ought not to be flowed, no judgment can be rendered."

Notwithstanding such a verdict, a new trial must be granted.

A subsequent purchaser of the dam will be liable for the yearly damage upon the expiration of each year, reckoning not from the time of the verdict but from the filing of the complaint.

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

Complaint for flowing the complainant's land, by means of a mill-dam.

The complaint charges that for more than three years the respondents had raised to an increased height, and maintained at such height, a dam across the Damariscotta river, to raise a head of water necessary for working their water mill, thereby overflowing and injuring the meadow and marsh land of the complainant. The respondents pleaded the general issue, and also by brief statement, that they "have a right to maintain the dam described in the complaint, and to flow all lands that are thereby flowed, without any compensation." And also, by a second brief statement, that the said dam has been kept up and maintained for more than one hundred years, to the same height, at which it existed when the complaint was made, whereby the respondents have prescriptive right, &c. The verdict upon these issues was against the respondents.

Commissioners were then appointed, as prescribed by the statute. Their report referred to the Court the legal question in the alternative form, whether damages were to be assessed only for the flowing occasioned by the increased height of the dam or whether *all* the damages, occasioned by the dam, as it exists after having been increased in height, were to be assessed.

If the assessment is to extend only to the damages occasioned by the addition made to the original height of the dam, the commissioners report:—

1. That it is necessary for the profitable employment of the respondents' mill, that their dam should be maintained at its present height, and that they should have the privilege of flowing the complainant's meadow and marsh land, described in his complaint, during the whole of the year, except as hereinafter specified, and that no damage will be done to the complainant by such flowing.

2. That from the first day of June to the fifteenth day of September in each year, the complainant's land ought not to be flowed farther than it will be by keeping the water in the pond down to a certain iron bolt, designated as bolt A.

3. That no damage has been done to the complainant by the flowing of his lands described in his complaint so far as the flowing has been occasioned by the "increased height" of the respondents' dam.

If, in the opinion of the Court, the duty of the commissioners in the premises was to assess all the damages occasioned by the dam as it is, then the commissioners report: —

1. That it is necessary for the profitable employment of the respondents' mill, that their dam should be maintained to its present height, and that they should have the privilege of flowing the complainant's meadow and marsh land, described in his complaint, during the whole of the year, except as hereinafter specified, and that no damage will be done to the complainant by such flowing.

2. That from the first day of June to the first day of August in each year, the said land ought not to be flowed farther than it will be by keeping the water in the pond down to a certain iron bolt, designated as bolt B.

3. That from the first day of August to the fifteenth day of September, in each year, the complainant's said land ought not to be flowed farther than it will be by keeping the water in the pond down to a certain iron bolt, designated as bolt C.

4. That the yearly damage heretofore done to the complainant by the flowing of his said lands are as follows: —

For the year ending Sept.	1, 1846,	nothing.
" " " " "	1, 1847,	(twenty dollars) $20 00
" " " " "	1, 1848,	(" ") 20 00
" " " " "	1, 1849,	(" ") 20 00
" " " " "	1, 1850,	(" ") 20 00
" " " " "	1, 1851,	(fifteen ") 15 00
" " " " "	1, 1852,	(" ") 15 00
Making in all the sum of one hundred and ten dollars.		$110 00

The complainant, being dissatisfied with the report, requested that a jury should be empaneled to try the case at the bar of the Court.

At the trial before the jury, the report of the commissioners was introduced in evidence, with "a vast mass of other testimony."

The respondents requested the Judge to instruct the jury, 1st, that the report of the commissioners was conclusive, unless impeached by the complainant; 2d, that the report of the commissioners is conclusive on the rights of the parties, unless in the judgment of the jury, it is impeached by the other evidence; 3d, that in order to constitute such an impeachment, the jury must be satisfied, *either* that the said commissioners are censurable for their acts or omissions in relation to the report; *or*, were guilty of some misconduct or partiality or undue bias or prejudice; *or*, that they committed such gross error of judgment as would be evidence of such partiality, bias or prejudice; *or*, that the complainant was deprived of a full, fair and impartial hearing by the proceedings of the commissioners. 4th, That the report is not impeached by evidence, tending merely to establish a result different from that of the report, and that the word "impeached" as used in the statute, means more than the word "contradicted."

These requested instructions the Judge refused to give, but he instructed *that*, as the report of the commissioners was before them, (it being admitted for the complainants that there was no fraud therein,) they would be authorized to presume, in the absence of evidence to the contrary, that it was the result of an investigation on the spot, honestly and thoroughly made; *that* it was evidence of an important character, but was only evidence and not conclusive; *that* they probably would regard it as true, until shown to be erroneous; *that*, if there was evidence of error, they would weigh that evidence, and when weighed, if satisfied the report was erroneous, so far they would not be bound by it; and *that* the report and all the other evidence *were to be regarded as facts for their consideration.*

The ruling of the Judge upon the legal question submitted in the alternative form by the referees, need not here be presented, as the full Court expressed no opinion upon that question.

The jury returned a verdict, that the complainant has been damaged by the respondents' dam, in manner and form as he has alleged, and they assessed damages for the complainant in the sum of two hundred and fifty dollars.

In 1846,	no damages.	
" 1847,	"	$75 00
" 1848,	"	75 00
" 1849,	"	40 00
" 1850,	"	20 00
" 1851,	"	20 00
" 1852,	"	20 00
		$250 00

They also found that the water may remain as high as the bolt A, during the whole year, except that from the first day of June to the fifteenth day of July, the water should be no higher than the bolt B, and from the fifteenth of July to the fifteenth of September the water should be no higher than bolt C.

To the rulings of the Judge and to his refusals to give the requested instructions, the respondents excepted.

Evans and *Tallman*, in support of the exceptions.

1. The statute extends to mill owners no protection for erecting dams, except upon streams that are not navigable. It is not alleged in the complaint, that this stream is not navigable. For flowing lands by a dam on a stream that is navigable, the damages are recoverable only at the common law, and not by a complaint of this kind. The proceedings, thus far, have, therefore, been merely void; the defect not having been cured by the verdict. The Court had no jurisdiction, and, therefore, it is not too late to take the objection, and the proceedings will be stayed. *Farrington* v. *Bliss*, 14 Maine, 423; *Eddy's* case, 4 Cush. 28; 3 Johnson's Cases, 107;

Barnard v. *Fitch*, 7 Metc. 605; *White* v. *Riggs*, 27 Maine, 114.

True, the statute of Maine allows no arrest of judgment in civil suits, but this is not a motion in arrest of judgment. A judgment, if rendered on such a complaint, would be reversible on *certiorari*, and therefore the proceedings may, on suggestion, be stayed or dismissed in any stage.

2. The instructions, which we requested, as to the force and effect of the commissioners' report ought to have been given. 11 Pick. 359; 11 Metc. 297.

Ruggles, for plaintiff. 1st. The motion to dismiss or to stay proceedings is without foundation. Proceedings by complaint are not restricted to rivers not navigable. The statute on which the process is founded, c. 126, § 5, gives remedy *by complaint* to *any person*, sustaining damages in his lands, by their being overflowed by a mill-dam.

But, if so restricted, and if the river was navigable, that fact would be merely matter in defence. The character of the river need not be alleged in the complaint.

If, however, such an allegation be nesessary, it was but matter of form, and is cured by the verdict; and if it be matter of substance, the defect is cured by the respondents' brief statements, 1st, that they "have a right to maintain said dam, described in said complaint, and to flow all lands that are thereby flowed, without any compensation; thus, even on their own construction, furnishing a resistless implication that the stream was not a navigable one, *Stark* v. *Lyon*, 9 Pick. 62; and 2d, that they had a prescriptive right for a user of more than one hundred years. The complainants do not deny the length of user of the dam, but claim for an increase in its height. But, if the stream was a navigable one, no prescriptive right of flowing could arise.

2. The motion to dismiss, if at all allowable, cannot be made in the full Court. It belonged to the *Nisi Prius* term, in Lincoln county.

3. A motion of this kind is not allowable after the verdict. It is equivalent to a motion in arrest. But in civil suits such

motions are prohibited by statute, and this is a civil suit. To call it a motion to dismiss or to stay proceedings, and not a motion in arrest, is deceptive.

The respondents' exceptions are in substance that the commissioners' report is to be held decisive, unless impeached for fraud or some censurable conduct on their part; and the Judge at the trial refused so to instruct the jury.

Such new interpretation cannot prevail. The statute does not give, nor did it intend to give, to the report, any higher character than that of "evidence," liable to be impeached as any other evidence may be.

But a decisive answer to the new interpretation is that it is violative of the constitutional right of trial by jury. Constitution, Art. 1, § 20; *Burrill* v. *Marston*, 12 Maine, 354; *Cowell* v. *G. F. Manufacturing Co.*, 6 Maine, 282.

The respondents contend that the report was impeachable only for misconduct by the commissioners. But whether the Judge's refusal so to instruct was correct or not, is quite immaterial in this case, inasmuch as the jury found it *was impeached* as to the amount of damage. Therefore, from the withholding of the requested instructions, no injury could result to the respondents.

There was a motion by the respondents for a new trial. It was argued at the same time with the exceptions. Upon that motion, the respondents contended that the verdict was so defective that no judgment could be entered upon it.

1st, Because it does not find whether the dam was necessary for the raising of a head of water, for driving the mill.

2d, Because it does not find what portion of the year the land ought not to be flowed.

3d, Because it does not find what is the amount of the yearly damages, subsequent to the filing of the complaint.

Shepley, C. J. — This process was commenced to recover damages alleged to have been occasioned to the complainant's land by the respondents' mill-dam. A former verdict decided,

that the respondents had not a right to flow it without being liable to damages, if any were occasioned by an increased height of the dam. Commissioners were subsequently appointed to ascertain the amount of damages, if any, and to decide upon the other matters required by the statute. Their report having been made and not proving to be satisfactory to the complainant, he requested, that a jury might be impaneled to try the cause at the bar of the Court. The case is now presented after a verdict of that jury has been received.

For the respondents it is alleged, *that* the *complaint* is too defective to authorize any judgment to be entered upon it; — *that* the *verdict* is so defective, that no judgment can be entered upon it; and *that* it was found under erroneous instructions.

The complaint does not allege, that the dam was erected across a stream of water not navigable. The first section of the statute, c. 126, authorizes the erection of dams across streams not navigable, to raise water for working mills. It was not the intention to authorize at the pleasure of individuals the erection of such dams across navigable streams, thereby obstructing their navigation. Such right could only be obtained by a special Act of the Legislature, which reserved to itself the right to judge of the expediency of permitting it. If it had not done so, any person might obstruct the free use of navigable waters.

The language used in the fifth section is unlimited, providing, "that any person sustaining damages in his lands by their being overflowed by a mill-dam may obtain compensation for the injury by complaint;" but this must be considered in connection with other provisions of the statute, which clearly was not designed to afford this remedy and to protect a dam from removal as a nuisance and to decide upon the manner, in which it should be used, when it could have no legal existence. The whole proceedings have reference to claims authorized by the statute and not to claims not authorized by it. The statute was not designed to make an illegal act valid.

If a plea, alleging that the respondents had a legal right to maintain such a dam, could cure the defect in the complaint, the parties to such proceedings might cause a dam to have a legal existence without any law authorizing it, and might require the judicial department to entertain such proceedings and put the State to the expense of regulating a public nuisance.

It might have been the duty of the Court to have quashed these proceedings upon motion made before verdict, but the Legislature of this State has provided, that no motion in arrest of judgment shall be sustained in any civil action.

The words "civil action," as used in the statutes, include all legal proceedings partaking of the nature of a suit and designed to determine the rights of private parties. The Court cannot therefore refuse to enter up a judgment on account of this defect. As the testimony shows, that the dam was not in fact erected across a stream where it was navigable, there is no reason to conclude, that the proceedings can be rendered ineffectual by a writ of *certiorari*.

A like construction of a similar statute respecting the erection of dams appears to have been made in the case of *Cogswell* v. *Essex Mill Corporation*, 6 Pick. 94.

The verdict returned by the jury is very defective. No yearly damages are found. Nor is there any finding of "what portion of the year such lands ought not to be flowed." The verdict states from what time to what time the water should be no higher than to certain bolts designated; but this does not substantially determine what portion of the year the lands ought not to be flowed, for it does not appear, whether the lands would or would not be flowed by such regulated height of the water. Damages occasioned before and after the complaint was filed are assessed in one aggregate sum. The whole matter in issue is not found; and part is irregularly and incorrectly found.

It is said, that the omission to find any yearly damages may be regarded as equivalent to a finding, that there would be no damages in future. It is doubtful, whether a subsequent purchaser would be bound by any such constructive

finding. He might be entitled to have his rights regulated according to the provisions of the statute and to have a right to petition for an increase of damages or to maintain a new process. A verdict of a jury or an accepted report of commissioners made in conformity to the provisions of the statute is alone declared to be a bar to an action.

The damages occasioned for three years before the complaint is filed may be assessed in one aggregate sum. The subsequent damages are to be "yearly damages," for the recovery of which the owner of the land has a lien "from the time of the institution of the original complaint on the mill and mill-dam." These damages cannot be found to be different in different years and be incorporated with those occasioned before the complaint was filed, as appears to have been done in this case. This course would deprive the owner of the land of his lien and other parties of rights secured to them by the statute. When yearly damages are found, the time of their commencement is determined by "the institution of the original complaint," and not by the time of finding the verdict. A subsequent purchaser of the dam and mill is liable for the year's damages becoming payable after his purchase. *Lowell* v. *Shaw*, 15 Maine, 242. If other than yearly damages were found to the time of the verdict, and yearly damages were subsequently found, the effect might be, that the complainant might recover damages twice for part of a year.

In the case of *Commonwealth* v. *Ellis*, 11 Mass. 462, the Court directed, that execution should issue for a collection of the yearly damages to the time of finding the verdict. There was no assessment of any other than yearly damages. The complaint appears to have been filed at January term, 1806, and execution to have issued for damages to the 25th of September, 1807, when there could have been no number of complete years between those times. The case affords no sanction to a finding of any other than yearly damages subsequent to the filing of the complaint.

By the provisions of the fifteenth section, the owner or

occupant of the dam is forbidden to flow the lands during any portion of the time, when he is not allowed to do so by the report of the commissioners or verdict of the jury. Without any finding of such time this provision of the statute becomes ineffectual.

Although the question was not directly presented for decision, the Court expressed an opinion in the case of *Cogswell* v. *Essex Mill Corporation*, that "a jury once empaneled under that statute would be obliged to assess yearly damages, to limit the height of the dam, and to fix the time when it is not necessary to flow the lands at all. The jury is obliged under oath to perform these duties, and any verdict, which should show that they had neglected them, would be void."

On account of the defects already stated, the verdict in this case must be set aside, and a new trial must be granted.

As the report of the commissioners must again be presented, it will be important to consider its effect, that future instructions respecting it may be correct.

The statute provides that it shall be given in evidence to the jury, "subject to be impeached by evidence from either party."

The report states only, and it can only properly state, conclusions; and not the information obtained by personal examination and by testimony, on which those conclusions were based. If it were to have no other effect than the like testimony from others, it could have but little influence. It would exhibit merely the opinions of three intelligent persons, without any facts to sustain their opinions or to prove them to have been correct. It could not be expected to have as much weight as the testimony of the same persons, if examined as witnesses, for they could state, as witnesses, what they found to be true by examination, while they could not be permitted to relate the testimony received from others. If it were to be regarded merely as evidence; that is, as an opinion of those persons made evidence by the statute, the expensive proceedings to procure that opinion would be rendered almost useless, and the provisions of the statute requiring the appointment o commissioners would become burdensome and oppressive to

the parties, without the assurance of any essential benefit. It is but reasonable to conclude, that it could not have been the intention to cause so much delay, expense and trouble to so little purpose. The language used repels a contrary conclusion. It implies that the report is to be decisive of the rights of the parties, until its decisive effect is removed by its being impeached by evidence.

To impeach, as applied to a person, is to accuse, to blame, to censure him. It includes the imputation of wrong doing. To impeach his official report or conduct is to show that it was occasioned by some partiality, bias, prejudice, inattention to, or unfaithfulness in, the discharge of that duty; or, that it was based upon such error that the existence of such influences may be justly inferred from the extraordinary character or grossness of that error.

The word can have no less forcible meaning as used in the statute, without considering it to have required proceedings suited to occasion much delay, expense and trouble, without any important purpose or result.

Verdict set aside, and
New trial granted.

HOWARD and HATHAWAY, J. J., concurred.

WELLS and RICE, J. J., concurred in the result.

(*) THOMPSON *versus* MOORE.

A sale of goods may be valid between the vendor and vendee, though made with a design by both of them to defraud the creditors of the vendor.

In a suit by the vendee, for the value of the goods, against a third person who had appropriated them to his own use, the plaintiff's fraudulent design in purchasing the goods cannot be set up as a defence.

A mortgagee of goods, to whom they have become forfeited by the mortgager's neglect to pay the debt, may, even after selling the goods, waive the forfeiture, and thereby entitle the mortgager to recover of him the surplus avails over the amount due upon the mortgage.

(*) This and the previous cases in this volume, and all subsequent cases with this mark, were prepared by JUDGE REDINGTON, former Reporter.

On Exceptions from *Nisi Prius*, Shepley, C. J., presiding. Assumpsit.

The defendant owned a store in Newfield, and had a small lot of old goods remaining in it, which he authorized one John M. Thompson to sell for him.

John M. Thompson then went to Boston, and purchased, upon his own credit, goods amounting to twelve hundred dollars. He brought them to Newfield, and, before the packages were opened, sold them to his brother, this plaintiff, together with the defendant's goods, which were in the store.

The Boston creditors immediately afterwards attached the goods in a suit against John M. Thompson. That suit was compromised by the plaintiff's giving to the creditors his note payable in thirty days to the amount of fifty per cent. of their debt, and mortgaging the goods to secure the note. Within the thirty days the said payees sold the note and transferred the mortgage to the defendant, who, within sixty days from the pay-day of the note, sold a part of the goods, though not to an amount sufficient to pay the note. After the expiration of the sixty days he sold the residue. The whole of the sales amounted to enough to pay the note and leave a surplus of about $480, which he said belonged to the Thompsons, and which he was ready to pay them, if they would execute a proper discharge.

This suit is brought by Charles Thompson, the said mortgager, to recover said surplus.

There was much testimony tending to prove that the sale from John M. Thompson to the plaintiff was fraudulent, and made with a design between them to defraud John M. Thompson's creditors.

The Judge was requested to instruct the jury that, if said sale had been made fraudulently, and with the design aforesaid, this action is not maintainable. That instruction was not given, but the Judge instructed the jury, *that* it was not material for them to decide or inquire whether the sale from John M. Thompson was fraudulent as to his creditors, inasmuch as the plaintiff does not present himself as one of such

creditors; *that* if payment or tender of the amount due on the note, had not been made within sixty days from the pay-day named in the mortgage, the defendant being the assignee, became the absolute owner of the goods by the statute forfeiture of the plaintiff's rights; but *that* it was, however, competent for the defendant to waive such forfeiture; and *that* if he had understandingly and deliberately done so, they might return a verdict for any balance justly due from him to the plaintiff. The verdict was for the plaintiff, and the defendant excepted.

May and *Ingalls*, for the defendant.

Gould, for the plaintiff.

WELLS, J. — The defendant was not a creditor of John M. Thompson, and had no right to question the sale made by him to the plaintiff. Such sale was valid between the parties, although a fraud might have been intended against the creditors of the vendor. *Nichols* v. *Patten*, 18 Maine, 231. But a compromise was made with those creditors, and a mortgage given to secure their debt. The mortgage was subsequently purchased by the defendant, and he became authorized to hold the goods mortgaged, unless they were redeemed by the plaintiff, the mortgager.

If the mortgaged property is not redeemed within sixty days after the breach of the condition, the title of the mortgagee becomes absolute. But he may extend the time of performance, and waive the forfeiture. *Green* v. *Dingley*, 24 Maine, 131. *Flanders* v. *Barstow*, 18 Maine, 357; Greenleaf's Ev. § 304. It appears that the defendant sold a part of the goods mortgaged within sixty days after the mortgage became payable, and before his title had become absolute. This conduct would imply an understanding, that a disposition should be made of the property different from that prescribed by law. There does not appear to be any error in the instructions. *Exceptions overruled.*

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

(*) Bailey, *in equity, versus* Lot Myrick & N. W. Sheldon.

It is the aim of courts of equity, in deciding controversies, to make, at one and the same time, a final adjustment of the rights of all persons interested in the subject matter.

Several conveyances by a mortgager of distinct parts of the land, give to each of the grantees, and to persons claiming under them respectively, the right of redeeming, though not without paying the whole amount due on the mortgage.

In a bill in equity to redeem by one of such grantees or any person claiming under him, it is requisite that all other persons holding under any of such conveyances, should be made parties to the bill.

If the answer of the mortgagee shows information to have been received by him from the mortgager, that the right of redemption has been assigned to a third person, such third person must be made a party to the bill.

In a bill in equity to redeem by an assignee of the mortgager, it is not necessary to make the mortgager a party, if he have transferred all his interest in the subject matter.

Of the amendments, which may be allowed to such a bill.

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

Bill in Equity to redeem a tract of land containing about one hundred acres. It appears by the bill, answers and proofs, that in 1837, Nathan W. Sheldon conveyed the tract to Lot Myrick and others in mortgage, to secure the payment of notes amounting to $1000.

In 1842, Nathan W. Sheldon, by deeds of warranty, conveyed to Lemuel S. Hubbard two acres and to Joseph Stetson one acre and three quarters of the same land. Hubbard conveyed the two acres to Enoch Trask, who conveyed the same to Nathaniel Bryant, by whom it was conveyed to the plaintiff. The plaintiff is thus the owner of the two acres, subject to the mortgage, given to Lot Myrick and others.

Of the one and three fourths acres conveyed to Stetson a part was conveyed to him by Daniel Fly.

In 1843, Nathan W. Sheldon by warranty deed conveyed the whole mortgaged tract to Bartlett Sheldon, excepting the two acres deeded to Hubbard and also excepting the meeting-house lot and the grave yard; and at the same time took

back from Bartlett Sheldon a mortgage of a part of the tract to secure $696,28.

In 1846, Bartlett Sheldon conveyed with covenants of warranty to Lot Myrick and others the whole tract embraced by the first mortgage, and at the same time received from them a bond to reconvey to him, by quitclaim deed, upon payment of the amount due to them on the first mortgage.

Lot Myrick, in his answers, says he has been informed by Bartlett Sheldon, that on Jan'y 6, 1847, he, for a valuable consideration, assigned to William Hall and William Sheldon, the bond which had been given by Lot Myrick and others for the reconveyance; and that, soon afterwards, that bond became the property of William Sheldon. Hall deposes that he has no interest in it. The good faith of that assignment from Bartlett Sheldon is controverted.

In Dec. 1847, the right which Bartlett Sheldon, [as assignee of Nathan W. Sheldon the mortgager,] had of redeeming the mortgage given by Nathan W. Sheldon to Myrick and others, was sold on execution to the plaintiff.

Nathan W. Sheldon in 1850, mortgaged to James G. Houston a part of the one hundred acre tract to secure payment of four hundred dollars.

The Judge decreed, that the plaintiff was entitled to redeem. To that decree the defendants excepted.

Ruggles, for the plaintiff.

Paine, for the defendants.

Wells, J. — One ground, upon which the plaintiff claims the right to redeem the mortgaged premises, is, that he owns the interest of the mortgager in two acres, which are a part of the premises. And such appears to be the fact. By statute, c. 125, § 6, the mortgager, or person claiming under him, may redeem the mortgaged premises," &c. Where the mortgager has conveyed to two or more persons, they all claim under him, and if one alone could not redeem, the others declining to do so, he would lose his estate. And one, who is willing that the estate should be foreclosed, ought not

to be compelled to redeem. Hence one owning a part of the right of redemption, may redeem the whole estate, but the mortgagee is entitled from him to all the money due on the mortgage. *Gibson* v. *Crehore*, 5 Pick. 146.

If there were no other question in the case excepting what relates to the two acres before mentioned, and there were no other persons interested in the premises than the present parties to the bill, the plaintiff would be entitled to a decree in his favor at the present time.

It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those, who are compelled to obey it, and also that future litigation may be prevented. All persons materially interested in the suit are to be made parties to it. Story's Eq. Pl. § 72.

It is stated in the bill, and admitted in the answer of Nathan W. Sheldon, that he conveyed to Joseph Stetson, on the 12th day of April, 1842, a part of the mortgaged premises. And it also appears, that Daniel Fly has title to a portion of that conveyed to Stetson. Stetson and Fly, claiming under the mortgager, have an interest in the redemption of the premises, and upon contributing their proportion of the money due on the mortgage, will have a right to what was conveyed to them. They are directly interested in the subject matter of the bill, and should be made parties to it.

Nathan W. Sheldon, on the 20th day of October, 1843, conveyed to Bartlett Sheldon the whole of the mortgaged premises, excepting certain parcels mentioned in his deed, and took back a mortgage of a part of the premises. Bartlett Sheldon on the 6th of January, 1846, conveyed the premises to Lot and Josiah Myrick, who gave to him a bond conditioned to reconvey the premises, upon the payment of the money due on the notes, originally given by Nathan W. Sheldon to them as administrators of Josiah Myrick, at different periods within four years from the date of the bond.

Lot Myrick says in his answer, that he has been informed

by Bartlett Sheldon, that on the 6th of January, 1847, the bond was assigned by him for a valuable consideration to William Hall and William Sheldon, and that soon after the bond became the property of William Sheldon alone. It appears by William Hall's deposition, that he claims no interest in the bond. It is alleged, that the bond was assigned before the sale of the right of redemption as the property of Bartlett Sheldon. What effect shall be given to the conveyance of Bartlett Sheldon to Lot and Josiah Myrick, and whether their bond was assigned to William Sheldon in good faith, are questions in which William Sheldon is interested. He would not be bound by a decree unless he were a party to the bill, but could open the litigation afresh, and claim the right to redeem so far as it was conferred upon him by the bond. If the plaintiff were permitted to redeem, William Sheldon could then commence a suit in equity against him, and require a decision upon his claim. He must therefore be made a party to the bill. But Bartlett Sheldon having conveyed all his interest in the premises and assigned the bond, no longer appears to have any interest in the subject.

Nathan W. Sheldon when he conveyed his interest in the premises to Bartlett Sheldon still retained a part in mortgage, and would have the right of redemption in such part. But on the 9th of October 1850, he mortgaged a part of the premises to James G. Houston, to secure the payment of four hundred dollars. The case does not very clearly disclose, that the part mortgaged to Houston was a portion of the same, which Bartlett Sheldon had previously mortgaged to Nathan W. Sheldon, but it probably was, or else he mortgaged that to which he had no title. Houston is to be regarded, so far as the facts are at present developed, as an owner of the right to redeem a portion of the premises, and must also be made a party to the bill.

The plaintiff has liberty to make those persons defendants in his bill, who are required to be parties, as before mentioned, and then the interests of all in the mortgaged premises can be duly considered, and a decree passed, which will deter-

mine their respective rights. Unless the plaintiff makes the necessary motion to amend, the bill will be dismissed. This motion will be granted upon the payment to the defendants of their costs, excepting those costs, which have arisen for the testimony already taken. *Haughton* v. *Davis*, 23 Maine, 28.

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

(*) GAY *versus* WALKER.

According to the text books, a reservation in a grant, to be valid, must be made to the grantor, and it cannot be made of part of the thing granted, or of any thing repugnant to the grant; it can only be of something not previously *in esse*, something created out of the thing granted.

A restriction in a grant may take effect as a reservation, if it do not necessarily deprive the grantee of essential benefits from the grant.

A reservation cannot be regarded as repugnant, if notwithstanding it the grantee acquire a valuable interest in the thing granted.

A grant to one, who already owns adjoining land, though it provide that the land granted shall remain "common and unoccupied," may nevertheless convey to the grantee a valuable interest, by securing a right of passing and a free flow of light and air to his other land, with an unobstructed prospect from it.

A right of way reserved in a grant of land, is, by legal intendment, a new thing derived from the land, and is not repugnant to the grant.

So a free flow of light and air to, or an unobstructed prospect from, the grantor's dwellinghouse may be secured by a reservation in a grant made by him of adjoining land.

Thus, in a grant of land adjoining to other lands, owned and occupied by the grantor, language requiring the granted land "to be common and unoccupied" may take effect as a valid reservation.

ON FACTS AGREED.

CASE.

The plaintiff owned a tract of upland and adjoining flats. It was bounded southerly by a bay of the sea. Two streets crossed it nearly parallel with the shore. His house and store stood upon the upper side of the upper street. In 1834, he sold the lot A to one Tolman; and in 1835, sold to Tolman the lot B.

Gay *v.* Walker.

N
W
E
S
Plaintiff's Land.
Public Street.
Lot A sold to Tolman in 1834.
Plaintiff's Land.
Private Way.
Public Street.
Lot B sold to Tolman in 1835.
Dft's Store.
Plaintiff's House and Store.
Shore of the Bay.
Plaintiff's Lime Kilns.
Plf's Wharf.

In the deed conveying the lot B, immediately after the description of the land, and preceding the *habendum*, the deed contained the words, "the said land is to be common and unoccupied." In 1847, the defendant hired the lot B "for the purpose of building a store thereon," and immediately afterwards built the store, and has ever since maintained it.

This action is brought to recover damages for erecting and maintaining that store. It is agreed, that by limiting the plaintiff's prospect, some injury occurred to him from the erection and continuance of the store.

The question of law intended by the parties to be determined by the Court, is upon the legal effect of the words in the deed, "the said land is to be common and unoccupied;" whether the defendant had a legal right to erect and maintain the store upon that lot.

If the action is not maintainable, the plaintiff is to become nonsuit. If it be maintainable, the amount of damages is to be referred to Richard Robinson, as referee, on whose award and report being accepted, judgment is to be entered.

Ruggles and *Gould*, for the plaintiff.

M. H. Smith, with whom was *Stevens*, for the defendant.

What is the legal effect of the words; "the said land is to be common and unoccupied?"

1. They do not constitute a *reservation*, because it is essential to a reservation, that it be not a part of the thing granted; and *a fortiori* it cannot be the whole of the thing granted, nor can it be of any thing repugnant to it, nor that takes away the fruit of it. Reservation is defined to be a keeping aside or providing, as when a man lets, or parts with his land, but reserves or provides for himself a rent out of it for his own livelihood. Sometimes it has the force of a saving or exception, but an exception is always a part of the thing granted and of a thing in being, and a reservation is of a thing not in being, but is newly created out of the lands and tenements devised. Jacob's Law Dictionary; Co. Litt. 143.

Shepherd's Touchstone, pages 79, 80, defines, a reservation

to be a clause of a deed whereby the feoffor, &c, doth reserve some *new* thing to himself out of that which he granted before, and states that, to be a good reservation, it must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, as if the reservation be of the grass or of the vesture of the land, or of a common or other profits to be taken out of the land, these reservations are void.

4 Kent's Comm. 468, defines a reservation to be a clause in a deed, whereby the grantor reserves some new thing for himself out of the thing granted and not *in esse* before.

The plaintiff could not easily have found a more comprehensive word in the English language, than the word "unoccupied," nor one that would more fully deprive the grantee of any use of the land.

Webster defines "occupy" "to take possession, to keep in possession, to possess, to hold or keep for use, to use."

Crabb's Synonymes, page 236, in treating of the words to hold, occupy, possess, states, "occupy, in latin *occupo* (from *ob* and *capio,*) to hold or keep, signifies to keep so that it cannot be held by others; we hold a thing for a long or a short time, we occupy it for a permanence, we hold it for ourselves or others, we occupy it only for ourselves, we hold it for various purposes, we occupy it only for the purpose of converting it to our private use;" and on page 238, in treating of the words occupancy and occupation, it is stated that they are words which derive their meaning from the different acceptation of the primitive verb occupy, the former being used to express the state of holding or possessing any object, the latter to express the act of taking possession of or keeping in possession; he who has the occupancy of land enjoys the fruits of it. Harper's reprint of the 4th London edition.

But the import of the words in question was, that neither the grantee or any one else should ever possess or hold, or keep the land for use, or appropriate it to any use. He was neither to raise crops upon it, or erect buildings there or in any manner enjoy any fruit from it.

The plaintiff's counsel seems to view the words, as if intended to prevent the erection of any buildings whereby to obstruct the view from the plaintiff's house, the harbor and to his lime kilns. Had the words merely provided that no building should be erected on the land, they would have presented a case, differing *toto coelo* from the case at bar.

There can then be no ground for insisting that the words constitute a reservation; and if they do, the reservation is utterly repugnant to the grant itself, and is therefore void.

2. Neither are they a *stipulation* as to the manner of holding. A stipulation is a contract or bargain. Here was no contract or bargain by the defendant with the plaintiff. If the words could constitute a stipulation, it would be void, because without consideration, and because repugnant to the conveyance.

3. They cannot be relied on as a *covenant* because they were *inter alios.*

4. The words do not constitute a valid *exception.* Shepherd's Touchstone, pages 77, 78, 79, defines an exception to be a clause in a deed whereby the feoffer, &c. doth except somewhat out of that which he had granted before by the deed, and states it must be a part of the thing granted and not of some other thing, it must be a *part* of the thing only, and not of *all*, the greater part or the *effect* of the thing granted, or if the exception be such as it is repugnant to the grant and doth utterly subvert it and take away the fruit of it, as if one grant a manor or land to another excepting the profits thereof, or make a feoffment of a close of meadow or pasture, reserving or excepting the grass of it, or grant a manor excepting the services, these are void exceptions, or if the exception be of a particular thing out of a particular thing, as if one grant white acre and black acre excepting white acre, or twenty acres of land by particular names excepting one acre, these exceptions are void. *Dorrell* v. *Collins*, Cro. Eliz. 6.

5. Do the words then constitute a *condition?* This, it is believed, is the most plausible construction, for which the

plaintiff can contend. But such a construction is unsustainable. The object of a condition is to avoid or defeat an estate; and all conditions are void, that are repugnant to the estate granted or inconsistent with the use and enjoyment of it. "If the condition be that the grantee shall not alien the thing granted to any person whatever, or that, if he alien to any person, he shall pay a fine to the grantor, such conditions are void, as being repugnant to the estate. * * * So, if a foeffment be made of land in fee, on condition that the foeffee shall not enjoy the land, or shall not enjoy the profits of it, or that the heir of the feoffee shall not inherit it;" Shep. Touch. 129, 131. "Conditions are not sustained when they are repugnant to the nature of the estate granted, or *infringe upon the essential* enjoyment and independent rights of property, and tend manifestly to public inconvenience." 4 Kent's Comm. 131.

Had the words in question only provided against some particular mode of using the land, as that the grantee should not erect a tannery or a powder factory upon it, this possibly might have been a good condition subsequent, and if the grantee had violated it, he would have forfeited the estate granted, provided the grantor claimed and entered for condition broken. But it will be noticed that the words in question not only provide that the land shall be common, but also unoccupied, thus taking away the whole benefit of the grant, and all use and enjoyment of the land, and they are most clearly repugnant to the grant, and are therefore void.

But if the foregoing positions taken by defendant's counsel are incorrect, and the words in question are operative and in force as a condition, it will avail the plaintiff nothing. The grant is upon condition that the land is to be common and unoccupied. This is a condition subsequent.

A breach of a condition subsequent in a deed, does not give a right of action, such as the plaintiff has here commenced. The only effect is to cause "the *cesser* of the estate," provided there is an entry or claim for that purpose

and not otherwise, so that before the plaintiff can sustain any action because of the breach, he must first enter for condition broken. This he has not done. 4 Kent's Com. 123.

SHEPLEY, C. J. — The plaintiff, on May 30, 1835, conveyed to Walter E. Tolman a small lot of land opposite to his store and dwellinghouse. Following the description and preceding the habendum the deed contained these words. "The said land is to be common and unoccupied." The defendant being the lessee of those deriving title from the grantee has erected a building upon the lot and occupied it as a store.

It is not difficult to perceive, that the intention of the parties by the use of those words was to explain and qualify the grant in such manner, that the land should remain unoccupied in any other manner than commons or squares are usually occupied in villages for the enjoyment of light, air and free passage.

It is insisted, that effect cannot be given to the language without a violation of established rules of law, either as a reservation, an exception, or a covenant. That it cannot be regarded as a reservation, because a reservation cannot be made of a part of the thing granted or of any thing repugnant to it, but must be of something not in being and created out of the thing granted.

There will not be found any thing repugnant to or destructive of the grant, if it be regarded as thus qualified; for the grantee will not necessarily be deprived of essential benefit from it. He appears to have been the owner of another lot of land separated from this only by a private and narrow way, the value of which might be materially increased by having this remain unoccupied, so that there might be over the whole of this lot free access to that without any obstruction to prevent its being open to the sight of passengers in the adjoining streets. His other lot appears to have been so situated, that it might afterwards be expected to be used for the erection of buildings upon it for the purposes of trade.

The rent of such buildings might be expected to be so increased by having this lot remain occupied only as a common, that it would more than compensate the grantee for the amount paid to purchase it. A reservation cannot be regarded as repugnant and void, when the grantee, if it be permitted to be effectual, may acquire a valuable interest in the thing granted.

Nor can it in this case be considered void, because it does not reserve something not in being and newly derived from the thing granted.

A right of way over land conveyed may be reserved; and yet the grantor would have had the same right to pass over his land before the conveyance, but it would not have existed as a thing separate from the land; and when the land is granted and the right of way is reserved, that right of way becomes in the sense of the law a new thing derived from the land.

The owner of land not covered by any erections made upon it may have a free flow of light and air over it to his dwellinghouse built upon adjoining land, and he may convey it and reserve the same flow of light and air over it without obstruction, and such reservation may be good as something not in the sense of the law before existing, but derived from the thing granted.

The provision contained in this deed is, in substance, one which secures to the grantor the free flow of light and air over the land granted to his dwellinghouse and store, and an unobstructed view of them and of his other lands, by those traveling in the adjoining streets, as well as an unobstructed view of his lime kilns from his dwellinghouse and store. He had these privileges, while he was the owner of the land conveyed, yet when they were separated from it, they had as a separate matter a new existence.

A reservation to be good must also be made to the grantor. It is not the less made to him, if it be so made, that others can derive advantage from it. It will be considered as made to him, when valuable rights are secured to him, although it

may be perceived, that others may also be benefited by it. It is admitted, that the plaintiff has suffered injury by a violation of that provision in the deed.

Defendant defaulted.

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

(*) HEALD, *in error*, *versus* THE STATE.

The repeal of a penal statute defeats all pending prosecutions.

Such repeal precludes the rendition of a judgment, althongh a *nolo contendere* had been pleaded prior to the repeal.

If, subsequently to such repeal, a sentence be imposed upon such a plea, the proceedings may be reversed on writ of error.

WRIT OF ERROR.

The statute of Aug. 29, 1850, c. 202, enacted that no person, (unless authorized in a specified mode,) should be a common seller of any strong or intoxicating liquor, on pain of forfeiting not less than twenty or more than three hundred dollars, recoverable by action of debt or by indictment.

At the October term of the District Court, 1850, the plaintiff in error was indicted for being a common seller in violation of that statute, and pleaded *nolo contendere*. He then filed a motion in arrest of judgment, which was overruled. To that overruling he filed exceptions, which were entered at the S. J. Court at its May term, 1851, at which term, the exceptions having been withdrawn, the cause was remanded to the District Court for further proceedings.

At the term of the District Court, commenced on the *second Tuesday* of June, 1851, the plaintiff was adjudged "guilty," and sentenced to pay a fine of $25, with costs taxed at $40,65.

But prior to the term, at which the judgment and sentence were rendered, the Act of *June* 2, 1851, c. 211, had gone into effect. This statute, among other things, prescribed for the same offence, a penalty different from that prescribed by the Act under which the indictment against the plaintiff had

been found, and it also repealed all former Acts inconsistent with its own provisions.

This writ of error is brought to reverse the judgment upon which said sentence had been rendered.

The errors assigned were, —

1. That the indictment does not charge any offence against any statute or common law of the State, existing and in force at the time of the trial, conviction and sentence.

2. That it does not charge any offence against any statute or common law of the State, existing and in force at the time of the sentence aforesaid.

3. That the act charged was not one at the common law, but by statute only; and the statute creating it had been repealed before the judgment and sentence were rendered.

To this assignment of errors, *Tallman*, Attorney General, in behalf of the State pleaded *in nullo est erratum.*

Gould, for the plaintiff in error.

1. No judgment in a criminal case can be rendered after the statute, upon which the prosecution is founded, has been repealed. *Commonwealth* v. *Marshall*, 11 Pick. 350; 1 Kent's Com. 535; *Thayer* v. *Seavey*, 11 Maine, 287.

2. This indictment was founded on the statute of 1850. By the 18th section of the law of June 2d, 1851, all Acts inconsistent with that of 1851 were repealed; and this judgment was rendered subsequent to the 2d of June, 1851.

The 8th section of the law, 1851, is a revision of the whole subject matter of the statute of 1850, which by *necessary implication* would have repealed that statute without a provision to that effect. *Commonwealth* v. *Cooley*, 10 Pick. 37; 7 Mass. 140; *Bartlett* v. *King*, 12 Mass. 537; *Goddard* v. *Boston*, 20 Pick. 410; *Ellis* v. *Page*, 1 Pick. 45.

The case was submitted without argument for the State.

Howard, J. — The plaintiff in error was prosecuted and convicted, under an Act, of August 29, 1850, (c. 202,) "in relation to common sellers of intoxicating liquors." But, before judgment and sentence were awarded, that Act had

been repealed unqualifiedly, by the statute of 1851, (c. 211, § 18,) without any saving clause, as to actions or prosecutions pending upon its provisions. There was then no law in force, upon which the judgment can be sustained. *Inhab'ts of Saco* v. *Gurney*, 34 Maine, 14, and cases there cited.

The errors, therefore, are all well assigned, and the judgment is reversed.

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

(*) SOUTHARD *versus* PLUMMER *& al.*

A marriage contracted since the statute of 1844, c. 117, confers upon the husband no ownership in property, which, at the time of the marriage, belonged to the wife.

The right to the exclusive possession and to the exclusive control of such property remains to her after the marriage as fully as before.

The entry upon her land and the removal of her personal property give to the husband no right of action against persons acting under her directions.

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

Trespass for breaking and entering the plaintiff's close, and carrying away therefrom several articles of his personal property.

In March, 1848, the plaintiff married a woman who owned a farm, with a house upon it, and articles of furniture and other personal property.

Testimony was introduced tending to show, that after the marriage and while the plaintiff and his wife were residing together in the house, the defendants entered and removed from the house the articles as mentioned in the declaration of the plaintiff's writ.

The defendants introduced evidence tending to prove, that the articles belonged to the wife before and at the time of the marriage, and that it was by her order that they entered the house and carried them away.

The jury were instructed, that if the real estate entered

upon and the articles of property taken, were the property of the wife before the marriage, and if the entry and taking were by her direction and under her inspection, the action was not sustainable. To that instruction the plaintiff excepted, the verdict having been against him.

That the legal positions pertaining to this case may the more distinctly be understood, some extracts from recent statutes are here presented. —

"An Act to secure to married women their rights in property, passed in 1844. —

"Be it enacted, &c. Section 1. 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; (provided, it shall be made to appear by such married woman, in any issue touching the validity of her title, that the same does not in any way come from the husband after coverture.)

"Sect. 2. Hereafter, when any woman possessed of property, real or personal, shall marry, such property shall continue to her notwithstanding her coverture, and she shall have, hold and possess the same, as her separate property, exempt from any liability for the debts, or contracts of the husband.

"Sect. 3. Any married woman possessing property by virtue of this Act, may release to the husband the right of control of such property, and he may receive, and dispose of the income thereof, so long as the same shall be appropriated for the mutual benefit of the parties."

"An Act, passed in 1847, to amend an Act 'to secure to married women their rights in property.'

"Sect. 1. The Act 'to secure to married women their rights in property,' passed 22 March, 1844, shall be amended by striking out the proviso in the first section thereof, which proviso is hereby repealed, and inserting in lieu thereof at the end of the section the following words; 'exempt from any liability for the debts or contracts of her husband;' so

that the section as amended shall be as follows; 'Sect. 1. 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 her husband.'

"Sect. 2. The said first section shall be subject to the proviso, that if it shall appear that the property so possessed, being purchased 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."

"An Act passed August 10, 1848, in addition to 'an Act to secure to married women their rights in property.'

"Sect. 1. Any married woman, who is seized and possessed of property, real or personal, as provided for in the Act to which this is additional, shall be entitled to the appropriate remedies, as authorized by law in other cases, to enforce and protect her rights thereto; and she may commence, prosecute or defend any suit, in law or equity, to final judgment and execution, in her own name, in the same manner as if she were unmarried, or she may prosecute or defend such suit jointly with her husband. And she is hereby authorized to make and execute any bond or contract, or to do and perform any matter or thing, which may be necessary to the prosecution or defence of any such suit, but no arrest of the person of any married woman shall be authorized under any execution, which may be recovered against her.

"Sect. 2. In all such suits, where the wife shall prosecute and defend in her own name, judgment shall be rendered and execution issued and enforced by or against her, in the same manner as if judgment had been rendered for or against her before her marriage.

"Sect. 3. When any married woman shall die intestate, seized or possesssed of any property, real or personal, in her

own name, exempt from the debts or contracts of her husband, the same shall descend or be distributed to her heirs; but any married woman may, by will duly executed, devise and bequeath any property of which she is, or may be hereafter so seized or possessed."

"An Act amendatory, passed February 23, 1852.

"Any married woman who is or may be seized and possessed of property real or personal, as provided for in the Acts to which this is additional, shall have power to lease, sell, convey and dispose of the same and to execute all papers necessary thereto in her own name, as if she were unmarried, *and no action shall be maintained by the husband of any such married woman for the possession or value of any property held or disposed of by her in manner aforesaid.*"

Act of April 26, 1852. — "Sect. 1. Hereafter, when any man shall marry, his property shall be exempt from any and all liability for the debts or contracts of his wife, made or contracted before marriage; but an action to recover the same may be maintained against such husband and wife; and the property of said wife, held in her own right, if any, shall alone be subject to attachment, levy or sale on execution, to satisfy all liabilities for such debts and contracts, in the same manner as if she were unmarried.

"Sect. 2. In any such action, the wife may defend alone, or jointly with her husband; but no arrest of the person of such husband or wife shall be authorized upon any writ or execution arising under this Act."

Ingalls, for the plaintiff.

1. By the common law, the rights of the husband in property of the wife were well settled and clearly defined.

2. Prior to the marriage of the plaintiff in March, 1848, the "Act to secure to married women their rights in property," of March 23, 1844, and the Act additional thereto of Aug. 2, 1847, had been passed. The alterations and additions in the latter Act do not affect this case. The former Act does not authorize a *feme covert* to sell, devise, lease or otherwise make any disposition of her property, so as to deprive

the husband during his life of all benefit to be derived from it; and the common law, regulating the rights and duties of husband and wife, must be regarded as operative so far as it had not been changed by the provisions of the statute. *Swift* v. *Luce*, 27 Maine, 285. By the marriage of the plaintiff therefore, he acquired in the property of the wife, the right to its possession, use and enjoyment under the common law.

3. This right was a vested right, an interest in property, which it was not competent for the Legislature, by any Act subsequent to the marriage, to take away. Statutes, therefore, passed since 1848, can impair none of the plaintiff's common law rights. *Kennebec Proprietors* v. *Laboree*, 2 Greenl. 275.

4. The control of the wife's property implied by the 2d sect. of the statute of 1844, is a limited control, extending only to its defence and protection, and consistent with the right of the husband to a common enjoyment with the wife of its use and income. Act of 1848, c. 73; *Swift* v. *Luce*, 27 Maine, 285.

5. The case finds sufficient to warrant a jury in coming to the conclusion, that the wife had released to the husband the control of the property, which control it was not competent for the wife to revoke. This question should have been presented to the jury.

Ruggles, on the same side.

The Act of 1847 has no application to the facts of this case. The Act of 1848 was subsequent to the marriage, and can therefore have no effect. The question therefore is solely upon the statute of 1844. That statute, being so widely in derogation of common law rights, is to receive a strict construction. To the statute itself, I make no objection. My objection is merely to the construction of it claimed by the plaintiff's counsel.

In view of the immense importance to domestic happiness, it is not to be supposed, that the Legislature could intend the entire removal from the husband of all oversight and control of the wife's personal estate. It would at once degrade and

discharge the marital relation, set the parties at variance, and in all cases facilitate, and in many cases require a separation. If the husband, from any misfortune become poor, she may deny him bread, and transfer him to the poor house, while herself luxuriating in wealth. He may be expelled from the house, and her paramour substituted to the possession. It is a divorce of the husband, without notice of the process.

The construction, claimed by the defendants, with all its boasted tenderness and humanities, degrades the domestic relation and is fraught with mischiefs, which if not immediately developed, will leave terrific marks upon the next age.

The point at issue has been already decided in *Swift* v. *Luce*, 27 Maine, 285. That decision shows, that the Act of 1844, (the only one applicable to this case,) did not authorize a *feme covert* to sell or dispose of her personal property, without the assent of her husband; and that the only object of the law was to protect her property from liability to pay her husband's debts.

The Act of 1848, authorizing an action jointly by the husband and wife, clearly indicates that he had some rights in or control over her property.

The Act of 1852 gives to the wife authority to dispose of all her estate. Does not this imply, that prior to that Act, she had no such authority? Is it not a Legislative exposition of the meaning of the former Acts?

Lowell and *Carleton*, for the defendants.

Wells, J. — Both the real and personal property in reference to which the trespass is alleged to have been committed, belonged to the wife of the plaintiff at the time of the coverture, and when the acts, of which complaint is made, were done by the defendants. They acted under the authority of the plaintiff's wife, and the question presented is, whether they were justified in conforming to her orders and directions.

By the common law the husband has a freehold estate in the real property of the wife, and the use and control of it, and

by the marriage the title to personal chattels in her possession passes to him.

By the Act of March 22, 1844, c. 117, § 2, it is provided, that "hereafter when any woman possessed of property, real or personal, shall marry, such property shall continue to her notwithstanding her coverture, and she shall have, hold and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband."

The phrase "such property shall continue to her notwithstanding her coverture," implies that it shall remain her property, and that the coverture shall not deprive her of it, and the possession of it "as her separate property" gives her an entire dominion over it. This language could not have been employed simply for the purpose of exempting the property from attachment for the debts of the husband, and from liability on his contracts. It is very evident, that something more was intended, that her right of property and control over it should remain, not only against the creditors and contracts of the husband, but against the husband himself.

This construction is strengthened by the terms of the third section of the Act, which provides, that "Any married woman possessing property by virtue of this Act, may release to the husband the right of control of such property, and he may receive and dispose of the income thereof; so long as the same shall be appropriated for the mutual benefit of the parties." The control of the property having been given to the wife, it then became necessary by further legislation to authorize her to release it to the husband.

And as the wife of the plaintiff did not release it to him, it continued to her and she could direct the defendants to enter upon the real estate, and take and carry away the personal property. It would be doing violence to the language and spirit of the Act to say, that it did not confer upon the wife the control of the property independently of her husband. And she might exercise that control herself personally, or through the agency of another. The statute having given to her the direction and management of her property, would

necessarily and by implication clothe her with all the power requisite for the performance of those acts, and would justify the defendants, who were employed by her.

Exceptions overruled.

HOWARD and HATHAWAY, J. J., concurred. RICE, J. dissented.

(*) MEDCALF *versus* SECCOMB *& als.*

As to facts which a magistrate is required to state in the caption of a deposition, his certificate in the caption is conclusive.

Unless referred to in the caption, neither the original citation nor the officer's return upon it can be received to control the magistrate's certificate.

Neither can the affidavit of the adverse party be used to disprove the magistrate's certificate that such party was notified of the taking of the deposition.

A discontinuance as to one of the joint defendants will not invalidate the prior lawful proceedings, in relation to the remaining defendants.

A deposition, taken before such discontinuance, to be used against all the original defendants, may after the discontinuance be used as evidence against the remaining defendants.

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

ASSUMPSIT. The suit was commenced in *January*, 1850, and was brought against Asa P. Hodgkins, Edward R. Seccomb, Isaac Taylor and Stephen R. Griggs. Hodgkins entered no appearance to the suit; the other defendants appeared and defended.

The plaintiff, *in October*, 1850, took the deposition of one Hall. Annexed to the deposition was the return of a deputy sheriff, dated June 5, 1850, certifying that he had served a citation for taking the deposition upon Asa P. Hodgkins. The deposition itself showed that Hodgkins put two interrogatories to the deponent. The caption contained no reference to the officer's certificate, but stated *that* the adverse party was duly notified to attend and was present; *that* the deposition was taken at the request of the plaintiff, to be used in

an action of the case now pending in, &c., between Samuel Medcalf and Asa P. Hodgkins and others; — and *that* the cause of the taking was that the deponent was "about to depart and go beyond these limits before the next term of said Court." At the term of the Court in June, 1851, the plaintiff by leave of Court discontinued as to Hodgkins, and used him as a witness on the trial against the other three defendants. He also offered the deposition of Hall, taken as above stated. To the admission of this deposition, the defendants objected. It did not appear, otherwise than by the caption, that either of the three defendants attended or were notified to attend at the taking of the deposition. The defendants offered to file affidavits that neither of the present defendants or their counsel was notified or attended. The Judge refused to receive the affidavits, and admitted the deposition, which was read to the jury. The verdict was for the plaintiff, and the defendants excepted to the ruling and decision of the Judge.

M. H. Smith, for the defendants.

The deposition of Hall should not have been admitted.

The rejection of it would not have involved any contradiction of the caption, or of the certificate of the justice therein, that the opposite party was notified and present.

When the deposition was taken Hodgkins was a party defendant. He alone was notified, and it appears by the deposition itself, that Hodgkins appeared at the taking and put two questions. These facts are in accordance with the caption, and the defendants do not wish to contradict them.

The fact that the other defendants were not notified and did not appear, is not inconsistent with the fact that Hodgkins was notified and did appear.

The case finds that after taking the deposition and long before using it, the plaintiff discontinued this suit as to Hodgkins, and that he proceeded against the other defendants, using this same Hodgkins as a witness against them, after having used him as a joint defendant just long enough to

enable him to attend to the taking of this deposition, and to enable the plaintiff to take the deposition without any knowledge of the present defendants, depriving them of the benefit of all cross-examination or objection.

To allow a deposition to be used in evidence under such circumstances would be opening a wide door for abuses, and would make the taking of depositions yet more of an art than it now is.

The caption states that the deposition was taken to be used in an action between Samuel Medcalf and *Asa P. Hodgkins & als.* But it was used in no such action.

The caption states no legal cause of taking. R. S. c. 133, § 17 & 4, Art. 3; Stat. of 1849, c. 123.

A. P. Gould, for the plaintiff.

HOWARD, J. — It has been determined that the certificate of a magistrate, of facts required to be stated in the caption of a deposition taken before him, is conclusive. *Cooper* v. *Bakeman*, 33 Maine, 376. There was, therefore, conclusive evidence of notice to Hodgkins, one of the defendants when the deposition was taken; and that, by statute, is to be deemed sufficient as to all. R. S. c. 133, § 8. Neither the supposed notification, nor the officer's return upon it, form any part of the caption, (in which no reference is made to either,) or control the certificate of the magistrate. *Norris* v. *Vinal*, 33 Maine, 581, appendix.

No objection appears to have been made, that the caption was deficient in not stating fully the cause of taking the deposition, and the presiding justice did not rule upon that point, nor do the exceptions embrace it. Such an objection is not presented by these exceptions, and cannot be considered.

The discontinuance against Hodgkins cannot be regarded as an abandonment of prior lawful proceedings in the suit, nor are they invalidated by his ceasing to be a party, in a manner provided by law, upon any reasonable construction of the statute. The design of the eleventh section of the R.

S., c. 115, appears to have been to enable a plaintiff to avoid some of the disabilities at common law, in reference to the joinder of parties, and to allow him to amend his writ, by striking out the names of one or more of several defendants, and to maintain his proceedings in the action against the others. Statutes of amendments and *jeofail* are intended for relief against technical difficulties presented in the course of legal proceedings, and in that view should receive judicial construction. *Exceptions overruled.*

RICE, APPLETON and CUTTING, J. J., concurred.

(*) INHABITANTS OF WEST BATH, *petitioners for certiorari.*

Applications for writs of *certiorari* are to the discretion of the Court.

Such an application, when made for the purpose of quashing the proceedings of the County Commissioners in the establishment of a way, will be rejected, if the Commissioners had jurisdiction, and if substantial justice was done by their action; although their record may not, in all particulars, show an exact compliance with the statute requirements.

That there was, *in fact*, such a compliance may be proved *aliunde* the records.

Such evidence, however, cannot be heard by the Supreme Judicial Court for the District. It must be presented at the Supreme Judicial Court for the county.

PETITION FOR CERTIORARI.

Certain persons describing themselves of West Bath, in Sept. 1852, presented their petition to the County Commissioners, setting forth that the selectmen of that town had laid out an alteration of a town way and reported the same to the inhabitants of the town at a meeting called to act upon its acceptance, and that the town unreasonably refused and delayed to allow and approve said alteration, and to put the same on record; by which said petitioners alleged themselves to be aggrieved, and therefore prayed that the alteration might be accepted and approved by the County Commissioners.

Upon that petition, the County Commissioners adjudged that the town had unreasonably refused and delayed to allow

and approve the way, as altered by the selectmen. Whereupon the County Commissioners approved the way, as so altered, and ordered that the town clerk be notified to make a record accordingly.

It is for the purpose of causing the County Commissioners' adjudication to be quashed, that these petitioners at the term of this Court held on the 24th of Jan. 1853, prayed for a writ of *certiorari*, that the record of the Commissioners may be brought up for examination.

And the petition pointed out the following causes for quashing the said record: —

1. The County Commissioners had no jurisdiction in relation to the road.

2. In the petition, on which the Commissioners acted, it was not stated, that the town, within one year next before the filing of said petition, unreasonably refused or delayed to allow and approve said way.

3. The said way does not pass over, or from, or by the land or lands under the possession or improvement of either of the petitioners.

4. In said petition, it is not stated that said road leads from or by land under the possession and improvement of either of the petitioners.

5. The Commissioners did not adjudge that the town, *within one year from said hearing*, ureasonably refused and delayed to approve the way; or that the petitioners were aggrieved by any such refusal or delay; or that the petitioners or either of them possessed or improved any land from, by or through which said road led to any highway or town way.

6. The alteration and location of the town road was not of common convenience or necessity.

7. The Commissioners did not alter the said town road as had been prayed for.

Porter & Smith, in support of the Commissioners' proceedings, offered evidence to show that the refusal of the town to

approve the road was within one year next before the application to the Commissioners; and also to prove that the petitioners possessed and improved lands, from which the proposed town way led to other public ways.

They however suggested that such evidence might not be receivable here, but was to have been offered rather at the term held in the County of Lincoln.

Tallman, in support of the petition for the writ of *certiorari*.

RICE, J. — It is contended by the petitioners that the County Commissioners have assumed to act upon a matter not within their jurisdiction, and that their action is consequently void.

Section 34, c. 25, R. S., provides, "if any town shall unreasonably refuse or delay to approve and allow any town way, or private way, laid out or altered by the selectmen thereof, and to put the same on record, any person aggrieved by such refusal or delay, if such way lead from land under his possession or improvement, to any highway, or town way, may, within one year thereafter, apply by petition in writing to the commissioners."

It is alleged, that it is not stated in the petition to the County Commissioners, that the town unreasonably refused and delayed to allow and approve of said town way within one year from the filing of the petition on the meeting of the Commissioners. Also that it is not stated in the petition to the Commissioners that said road leads from or by land under the possession or improvement of either of the petitioners.

Petitions for writs of *certiorari* being addressed to the discretion of the Court, it has been the uniform practice to refuse to grant such writs when sufficient appears to show that the Commissioners had jurisdiction of the subject matter upon which they had acted, and that substantial justice had been done, though their records may not show that their proceedings had been, in all respects, technically correct.

In this case it does not appear from the petition to the

Commissioners, nor in the record of their proceedings, that the way in question leads from land under the possession or improvement of either of the petitioners to any highway or town way, nor that said application was made to the Commissioners within one year from the time of the alleged unreasonable refusal and delay of the town to approve and allow said way.

To give the County Commissioners jurisdiction, the petition must come from a person aggrieved in the manner described in the statute, and also be presented within the time therein specified. But though these facts do not appear from the original petition, nor from the records of the Commissioners, evidence was offered, tending to establish them; and it was affirmed by counsel, in presence of the Court, and not controverted by the opposing counsel, that these facts were fully established by proof before the Commissioners. Such evidence, before the proper tribunal, is admissible in this class of cases.

The Act of 1852, concerning the Supreme Judicial Court and its jurisdiction, c. 246, was intended to effect an entire separation between courts held for the final determination of questions of law, and those in which evidence is to be introduced for determining facts.

Under this Act all original entries must be made in the Courts held in the several counties, in which all questions of fact must be heard and settled, or the evidence there produced, reported, as is provided in the eighth and twenty-first sections, for the determination of the questions of law arising thereon, by the Supreme Judicial Court, sitting as a court of law and equity.

There being in this case questions of fact undetermined, which may materially influence the judgment of the full court in the exercise of its discretion, it is dismissed from the docket of the Supreme Judicial Court for the district, and will stand on the docket of the Supreme Judicial Court to be held in the County of Lincoln, where the parties may have an opportunity to present such proofs as they may deem expedient,

and if any questions of law shall arise thereon, it may then be entered in the Court of law for the district, for the determination of such legal questions as shall be thus presented.

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

(*) SAMPSON *versus* BOWDOINHAM STEAM MILL CORPORATION.

From the performance of certain corporate acts by persons designated in a charter of incorporation, the existence of the corporation may be inferred, without record evidence of its first meeting or of its acceptance of the charter.

From what corporate acts such an inference may be deduced.

When by a by-law of the corporation, its officers are to hold office *for a year*, and until others are chosen in their room, *it seems* unnecessary, in the warrant calling the annual meeting, to insert "*that officers are to be chosen*;" although another of the by-laws prescribes that such warrant shall "specify the business to be transacted."

When the prescribed officers are elected without such specification in the warrant, and the corporation, by its acts, recognize the existence and authority of such officers, the election will be deemed valid.

The by-laws of a corporation authorized its directors to manage all its prudential concerns, and the directors, by a document signed by them in that capacity, certified that the plaintiff had previously advanced a specified sum for the corporation, which sum with its interest, was still due to him; *Held*, that upon such certificate an action may be maintained against the corporation.

Such certificate is to have full effect as the foundation of a suit, notwithstanding the existence of a by-law, prescribing that the directors shall hold stated meetings and keep a record of their votes and doings.

Such a by-law is merely directory, and does not impair the rights of others.

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

ASSUMPSIT, based upon an instrument in the following form; which was read to the jury.

"This is to certify that James Sampson paid in behalf of the Bowdoinham Steam Mill Corporation, the sum of six hundred and seventy-five dollars on the sixteenth day of Sep-

tember, A. D. 1845, which sum is now due to him, with interest from that date. $675. February 26, 1847.

"Nathaniel Purington,
"Wm. Purington,
"Wm. Lunt,
"Wm. Higgins,
} Directors of the Bowdoinham Steam Mill Cor."

The reading of that instrument was objected to by the defendants, who alleged that its signers were never legally directors of the Corporation.

The plaintiff offered in evidence the Act incorporating the Bowdoinham Steam Mill Corporation, passed March 25, 1837, and also a book proved to be the book of records of the Corporation, and containing its by-laws.

The defendants objected to the introduction of the records and of the by-laws.

A witness, who appeared by the records to be the clerk of the Corporation, testified, (under objection made by the plaintiff,) *that* the defendants sold the steam mill and property in 1837 or 1838; *that* they had had no property since; *that* he did not know that they, as a Corporation, had since done any acts; and *that* he had since that sale had no knowledge of their pecuniary condition.

The record showed the sale to have been in 1845.

The plaintiff was always a member of the Corporation.

Joseph W. Russell, Esq. testified, (under objections made by the defendants,) that in 1847 and 1848, he was employed by the signers of the above certificate, claiming to act as Directors, to defend an action against the Corporation.

The case was then submitted.

The full Court are to consider the foregoing testimony, so far as it is admissible, either party being at liberty to put in the book of records or any part of it, so far as the same may be legal testimony. If upon the facts thus presented the action can be maintained a default is to be entered.

So far as the records and by-laws became material in the estimation of the Court, they are sufficiently presented in the opinion.

Russell, for the plaintiff.

Gould, for the defendants.

1. The instrument offered by the plaintiff is not a promissory note, or an obligation to pay. It is simply a "certificate" or written admission of the fact that the plaintiff paid that sum for the Corporation on September 16, 1845.

Corporations are not bound by the admissions of Directors or stockholders.

Angel & Ames on Corp. (2d edition,) p. 249, and authorities cited in note (b.); Ib. 168.

It was offered simply as *evidence* of a *prior* indebtedness, and the *only* evidence.

2. But if regarded as a *contract*, upon which an action can be maintained, it is not binding upon the Corporation, because it was not executed by a *majority* of the *Directors legally elected.* Angel & Ames on Cor. (2d ed.) p. 231.

No meeting of the Corporation was ever legally called, for the choice of Directors, after the *first*, and *quere* as to that.

Art. 7 of the by-laws, provides, that the *notices* calling all meetings of the Corporation "shall specify *the business to be transacted at said meetings.*"

No meeting for the choice of Directors was ever thus called.

The board of Directors consisted of *five* persons. Only *two* of those chosen at the *first meeting* signed the paper in question. The other two persons, who signed it, were never elected Directors, at a meeting *adjourned* from that first called, but purport to have been elected at a meeting adjourned from a *new*, but *illegal* call.

An *adjourned* meeting could have no power to act upon other matters than those for which it was *originally called.*

The by-laws do not provide for the *adjournment* of meetings from year to year, but article 7 provides that "the meetings of the Corporation shall be called by the clerk, &c., by posting up notices which shall specify the business to be transacted at said meeting;" thus giving the members an *opportunity* to attend at the choice of Directors.

The book purporting to be a book of records, and the record of the election of those persons signing the certificate, were therefore *inadmissible.*

3. The Directors of this Corporation had no *authority* to execute a contract, of the *character* claimed for this instrument or writing; it is not among their *enumerated* powers in Art. 5 of the by-laws. It would seem more appropriately to be within the province of the treasurer. By-laws, Art. 4.

4. The power to make a contract *(if they possessed it,)* was exercised in an *illegal manner;* their board could act only by *vote.* Art. 5 of by-laws; Angel & Ames on Corp. (2d ed.) p. 176.

5. A *single* act only, is produced, to show that the persons claimed to be Directors were such *de facto.* This is not sufficient. But the acts of officers *de facto* are only binding on the Corporation as respects *third persons.* The plaintiff is a *member* and an *officer* of the Corporation, if they have any. He was elected a *Director* at the first meeting.

6. This action is brought to recover the amount of a debt of the Corporation paid by *one of its members.* The remedy is against other stockholders for *a contribution.* R. S. c. 76, § 22.

Shepley, C. J. — The legal existence of a Corporation capable of performing corporate acts, may be inferred from the grant of its charter, and that the persons named in it, or they and others associated with them, have held meetings, chosen officers, adopted by-laws, and performed other corporate acts, without a production of a legal record of the first meeting, or a formal acceptance of the charter. *Trott* v. *Warren,* 2 Fairf. 227; *Penobscot Boom* v. *Lampson,* 16 Maine, 224.

The first meeting of the defendant corporation appears to have been holden on June 19, 1837, when officers were chosen and a committee to draft by-laws. This meeting was continued by several adjournments to January 1, 1838, when the by-laws reported by the first named of that committee were accepted, and new officers were chosen.

By the first article of the by-laws it is provided, that all the officers named shall hold their office for one year and until others are chosen and qualified to act in their stead, unless sooner dismissed.

By the seventh article it is provided, that notice for meetings "shall specify the business to be transacted at said meetings."

The corporators appear to have been legally notified by the clerk to meet on May 9, 1843. The meeting then organized, was continued by adjournments to Jan'y 1, 1844, when a vote was passed to elect the officers of the Corporation; and they were accordingly chosen; and among them were five Directors. This meeting was continued by adjournment to Jan'y 6, 1845, when five directors and other officers were again chosen. At this meeting a vote was passed authorizing and requesting these Directors to sell the steam mill at public or private sale, and to leave the logs and other property of the corporation at their disposal.

The plaintiff and four other persons were then chosen Directors. No Directors have since been chosen. The four other persons then chosen Directors, on Feb. 26, 1847, made and subscribed the paper, upon which this suit has been commenced, stating that the plaintiff paid in behalf of the Corporation $675, on Sept. 16, 1845, "which sum is now due to him with interest from that date."

1. It is insisted in defence, that they were not legally chosen, because there was no specification in the notice for calling the meeting of any such business to be transacted as the choice of officers.

The first article of the by-laws had prescribed the business to be transacted once a year, at an annual meeting, to be the choice of officers. That business would be presented at each annual meeting by the by-laws presumed to be known to each member of the Corporation. It could not be considered as business transacted without notice. In no instance does there appear to have been a statement in the notice for calling a meeting, that it was called for the choice of officers. Yet the

clerk, treasurer and directors chosen, have been constantly recognized in the records, and in meetings legally called for the transaction of other business, as officers of the Corporation. The construction uniformly put by the Corporation upon that provision of its by-laws, appears to have been, that it had reference to other business than the choice of officers. It appears, that at a legal meeting called, after those Directors were chosen, to meet on May 29, 1845, a vote was passed "that "the Directors be authorized to receive Gen. Joseph Berry's notes in lieu of William Lunt's." This was in payment for the steam mill, which appears to have been sold by vote of the Corporation. It could refer to no other persons than those chosen and existing as such by its own records; and it recognized them as its Directors. It cannot now, under such circumstances, be permitted, against its creditors, to assert that it had no Directors capable of transacting business. If it were permitted to do so, it might repudiate and annul all the business transactions, including the purchase and sale of its real and personal property, conducted through its Treasurer and Directors, or agents by them appointed.

2. It is insisted, that the paper made on February 26, 1847, is a mere admission of the fact of a past payment made by the plaintiff, and that the Corporation is not bound by the admission of its Directors respecting a past transaction.

It does not appear to be the admission of a past transaction without the performance of any act respecting it at the time. On the contrary, a due-bill appears to have been given to the plaintiff, stating the amount then presently due to him, and the time when he became a creditor appears to have been named for the purpose of giving him a claim for interest from that date.

3. It is further insisted, that the Directors by the by-laws were not authorized to make the contract, except in a meeting and by vote recorded.

The fifth article of the by-laws provides "it shall be the duty of the board of Directors to manage all the prudential concerns of the Corporation; give orders and directions for

the transaction of all the business of the Corporation." This is sufficiently extensive to authorize them to adjust all claims presented, and to find whether any and what sums were due from the Corporation. That article of the by-laws also provides, that "they shall hold stated meetings and keep a fair record of all their doings, votes and directions." The authority is not conferred upon them only when they thus meet and act. The provision is directory to them and does not affect the rights of others.

The debt due to the plaintiff does not appear to be of the character provided for by the statute c. 76, § 22.

Defendant defaulted.

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

(*) SOUTHARD *versus* PIPER *& al.*

Under the Act of 1844, c. 117, amended by the Act of 1847, c. 27, a woman, during coverture, may acquire property by purchase in her own exclusive right.

In property thus acquired, and paid for with her money, though the husband was the agent employed by her in making the purchase, he has no right of possession, and can maintain no action for taking it away against persons acting under her direction.

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

TRESPASS for taking and driving away several cattle from a farm occupied by the plaintiff and his wife.

The farm with some other property belonged to the wife by a devise from her former husband. There was testimony tending to show that the cattle were purchased by the plaintiff, as agent for his wife, subsequent to their intermarriage, and paid for by her property; and that they were afterwards driven away by the defendants under her directions.

The Chief Justice instructed the jury that if the cattle were thus purchased by the plaintiff acting as the agent of his wife, and paid for by him with her property, and were

taken and driven away from the farm by her direction, the action was not maintainable.

The verdict was for the defendants, and is to be set aside if the instructions were erroneous.

Ruggles and *Ingalls*, for the plaintiff.

Lowell and *Carleton*, for the defendants.

WELLS, J. — The only difference between this case, and that of *Southard* v. *Plummer & al.*, reported in this volume, page 64, relates to the cattle, which were purchased by the plaintiff as the agent of his wife, and for which payment was made by her property.

By the Act of March 22, 1844, c. 117, § 1, which was amended by that of August 2, 1847, c. 27, "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," &c.

By these Acts the wife of the plaintiff could purchase property during coverture, and there does not appear to be any legal objection to the employment of her husband, or any other person, in making the purchase. While acting as her agent, he could not acquire any title to himself in the property purchased.

Although such property is acquired by the wife after coverture, she has the same control over it as she has over that which she possessed before the coverture. The third section of the Act of 1844, before mentioned, embraces property belonging to the wife at the time of the marriage, and that obtained by her afterwards. She has the control of it irrespective of the time when it is acquired.

Judgment on the verdict.

HOWARD and HATHAWAY, J. J., concurred.

RICE, J., dissented.

(*) RANDALL, *& al. versus* FARNHAM.

The interest which a mortgagee has in the mortgaged land is not subject to be taken on execution. A levy of it would be void.

The receipt, by a levying creditor, of the amount of his claim, though after the year allowed by law for redeeming, vacates the title derived from the levy.

A promissory note, given for such a claim, is not invalid for want of consideration.

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

ASSUMPSIT upon a promissory note for $200, payable to the plaintiffs.

In 1844, William H. Morse and two others conveyed land to the defendant, and took from him a mortgage of it to secure the purchase money.

In 1845, they, by their deed in common form of a quitclaim, released to him all their rights in the land. Before the registry of that deed, Morse's undivided part of the land was attached on two suits, of which the plaintiffs had the control, and within thirty days after the rendition of the judgments, (though not until after said quitclaim deed had been recorded,) the executions recovered in said suits, were levied on the attached estate.

After the expiration of the year, which the law allowed for redeeming, the defendant gave to the plaintiffs the note now in suit, and took from them a paper specifying that they had received two hundred dollars in full for the amount levied on the two executions, and thereby "discharged all claims of said creditors under said levies." This receipt was ante-dated, so as to show, upon its face, that it was given prior to the expiration of the year allowed for redeeming.

The defence was, that there was no consideration for the note.

The case was submitted for the opinion of the Court.

Randall and *Booker*, for the plaintiffs.

Gilbert, for the defendant.

SHEPLEY, C. J. — The suit is upon a promissory note made

on January 1, 1849, and payable to the plaintiffs. The defence is, that it was made without consideration.

The report states that the defendant introduced a deed from William H. Morse and others to himself, made on September 24, 1845, and recorded on June 18, 1847. This deed upon examination is found to be a release of all title to a lot of land, which they had conveyed to the defendant on October 14, 1844, by a deed duly recorded, and which the defendant on the same day had reconveyed to them in mortgage. It was admitted that attachments of that lot were made on two writs, one in favor of Aaron Hobart and others, and the other in favor of Benjamin Randall, against said Morse after the date of the deed made on September 24, 1845, and before it was recorded. Judgments appear to have been obtained in those suits and levies to have been seasonably made upon that part of the lot formerly owned by Morse on October 25 and 28, 1847.

After the right of the owner of that lot to redeem it by payment of those levies had expired, the plaintiffs, acting as attorneys for Hobart and others, received the note now in suit from the defendant in satisfaction of those executions and gave him a receipt therefor dated back to July 31, 1848. No deed of release or other conveyance was made by the judgment creditors to the defendant. It does not appear, that the attachments were made before the record of the conveyance made to the defendant on October 14, 1844. After that time the only title of Morse to that lot was derived from the conveyance made to him and others in mortgage. No levy could be legally made on that interest, and those levies appearing to have been made only on that interest must be regarded as void. The title of the defendant appears to have been good without any act to redeem it from them. Yet the consideration for the note does not fail, for the executions, issued on the judgments recovered against Morse remaining unsatisfied by the proceedings to make levies, were satisfied by the defendant's note and the receipt given to him in discharge of

them. The attorneys would be authorized to receive satisfaction of those unsatisfied executions.

If the attachment were made before the record of the conveyance made to defendant on Oct. 14, 1844, and the levies were so made as to be operative on that title, it does not follow, that the note would be without consideration.

A reception by a mortgagee of his debt after a foreclosure of his mortgage operates as a waiver of the forfeiture and an extinguishment of his title. *Cutts* v. *York Manf. Co.* 18 Maine, 190; *Batchelder* v. *Robinson*, 6 N. H. 12; *Converse* v. *Cook*, 8 Verm. 164. No good reason is perceived, why the reception of his debt, after the time allowed by law for the redemption of a levy, should not have like effect upon the title of a judgment creditor acquired by the levy. He could not receive the money as yet due from his debtor, and still claim to hold the estate by his levy without being chargeable with fraud; and the law would justly presume that he intended to waive the forfeiture and permit his title to be extinguished by a redemption, rather than that he intended to act fraudulently.

The burden of proof rests upon the defendant to show, that there was no consideration for the note. If he would object, that the plaintiffs acting as attorneys had no authority to waive the foreclosure and accept payment of Hobart and others' debt, he could prove it by their testimony; and it would be reasonable to expect him to do so, when it does not appear, that they have repudiated the transaction, or have claimed any interest whatever in the land since that time, or attempted to disturb any one in possession of it.

Mr. Randall being one of the plaintiffs, all claim by virtue of his levy is extinguished. *Defendant defaulted.*

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

(*) CHADBOURNE *versus* DUNCAN.

The sale of a vessel, like that of any other personal chattel, may be effected verbally and without writing.

If, between part owners of a vessel, the respective claims growing out of her employment have been liquidated, the balance due to either may be recovered by action at law.

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

ASSUMPSIT for money had and received.

There was evidence tending to show *that* the defendant had effected insurance upon the brig Mechanic, and that he had received the amount as for a total loss; *that* this amount was something over $6000; *that* he was part owner, and had bills against the brig, which, being deducted from that amount, reduced the insurance money in his hands to $3200; *that* the owners of $\frac{15}{16}$ths had received their respective proportions of that sum; *that* he retained in his hands a balance of $200, as the proportion due upon the remaining sixteenth. The plaintiff claimed to be owner of that sixteenth, and demanded the $200 of the defendant, who replied that he did not know to whom it belonged. Whereupon this suit was brought. The only evidence introduced by the plaintiff to prove his title was the deposition of Miss Cushing, stating as follows, viz.: —

"I, Martha Cushing of Phipsburg, county of Lincoln, State of Maine, of lawful age, do testify on oath and say, that I heard Capt. Thomas Cushing, jr., on his return from a voyage in the brig Mechanic of Bath, in the spring of the year *one thousand eight hundred and forty-eight*, say to his father, who was one of the assessors of the town of Phipsburg, and, as I think, in the presence of Mr. Josiah Chadbourne, who had been his mate in that voyage, that he had sold to said Chadbourne one sixteenth of said brig Mechanic, and directed him to assess that part of said brig to Mr. Chadbourne as his property, and said part of said brig was taxed to Mr. Chadbourne, and I saw him pay the money to the collector of Phipsburg therefor; and the second year the collector called again to see

Chadbourne for his tax. Mr. Chadbourne was not at home, and the collector chalked up the amount over the door. The next voyage Mr. Chadbourne again went to sea with Thomas Cushing, jr. and in said brig, and on their return voyage Capt. Cushing being sick left the brig at Holmes Hole, Martha's Vineyard, and Mr. Chadbourne carried the brig to Boston. Subsequently Mr. Chadbourne went master of the brig."

There was evidence, that after the suit was brought, the defendant said all he wanted was to know to whom he should pay the $200, that being the sum which he was ready to pay.

The Judge instructed the jury, that to effect a sale of a vessel or a part of a vessel, it was not necessary there should be a bill of sale or any other writing; and that a valid sale might be made verbally.

The defendant requested the Judge to instruct the jury, that the plaintiff, if part owner of the vessel with the defendant, could not maintain the suit. In reference to this request, the instruction was, that if the plaintiff owned one sixteenth of the brig, and the sum due for that sixteenth was liquidated between the parties, so that there was no question as to its amount, an action at law could be maintained therefor after demand, if in other respects he was entitled to recover.

The Judge was also requested to instruct the jury, that the defendant being part owner of the vessel, had no authority to insure the plaintiff's interest without a special authority, or an authority implied from previous transactions between the parties.

The instruction was, that if satisfied of the truth of the facts testified to, the jury were authorized to infer from the evidence that the defendant had authority to insure the plaintiff's interest, or that the plaintiff ratified the insurance.

The verdict was in favor of the plaintiff for $216. To the instructions and rulings of the Court the defendant excepted. He also filed a motion for a new trial.

Tallman, for the defendant.

Porter & Smith, for the plaintiff.

HOWARD, J. — The sale of a vessel, like that of any other personal chattel, may be proved by parole. Between the vendor and purchaser, neither a bill of sale, nor a change of registry is necessary, in order to complete the transfer. The instructions on this point were unexceptionable.

The requested instructions, in respect to the right of one part owner to maintain an action against another, and in regard to the plaintiff's claim upon the defendant, for money received as insurance upon the vessel, were given with suitable qualifications. The defendant has no occasion to complain of them, as being adverse to his legal rights.

The motion for a new trial was not heard by the Judge presiding at *Nisi Prius*, and unless it is based on the evidence as reported by him, it is not properly before us. Stat. 1852, c. 246, §§ 8, 13; *Parker* v. *Marston*, 34 Maine, 387. But if the exceptions contain the whole evidence, as stated by counsel, and not controverted, then there was evidence, that Cushing, claiming to own one sixteenth part of the vessel, professed to have sold his interest to the plaintiff; that the latter claimed to own it; that it was taxed to him, and that he paid the taxes one year at least. He was in possession of the vessel, and there is no evidence of an adverse claim to that sixteenth. There was no proof that the defendant was a part owner, but it is not denied by others, that he obtained the insurance for the owners. He claimed to hold in his hands the balance for the owner of that sixteenth, and to have paid to the owners of the other portions of the vessel, their respective proportional parts of the amount received for insurance, upon a total loss, as it is asserted. Upon the evidence now before us, we cannot say that the verdict was against law, or the evidence in the case.

Exceptions and motion overruled.

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

(*) WHITE *versus* OLIVER.

Upon the erection of a building under a special contract, the contractor, though he may have departed from the contract as to the size of the building and quality of the work, yet if the building have been accepted, is entitled to recover for the labor and materials at the contract price, deducting so much as they are worth less on account of the departures.

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

ASSUMPSIT to recover for labor and materials expended in erecting for the plaintiff a dwellinghouse upon her own land.

The defendant introduced evidence tending to prove a contract between the parties, by which the house was to be built of certain dimensions and quality of finish, for the sum of $450; and that it was built of different dimensions, and some parts of it were yet unfinished. Upon the question whether the work and materials were of suitable quality, there was conflicting testimony.

Before the work was commenced, the defendant advanced to the plaintiff $300, and, before this suit was brought, she entered into possession of the house.

The plaintiff's counsel contended, upon evidence which is not stated in the exceptions, that, if there had been a contract, it was waived by the parties.

The Court instructed the jury, that if there was a contract, and if the plaintiff had not fulfilled it, and if it had not been waived, "he must make it good to the defendant, and was entitled to receive for the house only the balance that would remain, after deducting from the contract price as much as it would cost to make the house what it should have been by the contract."

To this instruction the plaintiff excepted and the verdict was for the defendant.

Gilbert, for the plaintiff.

The rule prescribed in the instructions is erroneous. Its operation would be unjust. The contractor may have built a valuable house in a manner different from the specifications in his contract; defendant takes it and has the benefit of his

labor and materials. Suppose the contract price to have been $1000. It is worth, as built, but $900. But it would cost five hundred dollars, not to *complete*, but to *alter* the house and make it conform in work, materials and style in all respects, to the specifications. Thus by this rule, he would receive but $500 for what cost him $900, and for what the defendant, who might have rejected it, nevertheless chooses to take, notwithstanding the failure of exact performance. The law cannot be so unjust.

Neither is it a sound rule that the contractor shall recover what the house is actually worth in all cases. This doctrine has been overruled in some of the States, perhaps wisely.

But the true rule is found to be that *he shall recover a sum to be ascertained by deducting from the contract price so much as the house is worth less on account of the deviation proved.*

This rule, it will readily be perceived, in cases, not of failure to complete, but of deviations, or of inferior quality of workmanship or materials, may have an operation totally different from that given to the jury. Where the non-fulfilment consists in a failure to complete, the result is the same, because the cost of completion shows the diminished value resulting from the failure.

Not so however in the other class of cases. The house is finished, but not as agreed. The proprietor has taken possession and must pay. The house is of less value than it would have been, if built according to the contract, yet is valuable, and it might cost more than its value to reconstruct, and make it what it would have been by the specifications.

In *Jewett* v. *Weston*, 11 Maine, 346, a house was to be built by contract. There was a deviation. The defendant took the house, and the jury were allowed to deduct from the contract price as much as would compensate the defendant for any failure of fulfilment. The Court, to support that doctrine, cite *Hayward* v. *Leonard*, 7 Pick. 181. In that case the facts were similar.

The jury were instructed to render a verdict for what the house was worth. There was a new trial, because, as the

Court said, the jury "*should have been instructed to deduct from the contract price so much as the house was worth less on account of these departures.*"

This is the rule for which I contend. It is just. The defendant in taking the house, which she might have repudiated, waives matters of taste and all similar considerations; but nevertheless is entitled to have it at a price proportionate to that for which she was to have had a better house.

Ingalls, for the defendant.

In this case the whole question of contract, waiver and fulfilment was properly left to the jury. The only question raised by the exceptions is as to the measure of damages. Upon this point the instructions of the presiding Judge were in accordance with well established principles. *Hayden* v. *Madison*, 7 Maine, 76; *Jewett & al.* v. *Weston*, 11 Maine, 346; *Hayward* v. *Leonard*, 7 Pick. 181; *Thornton* v. *Place*, 1 Moody & Robinson, 218; *Phelps* v. *Sheldon*, 13 Pick. 50; *Smith* v. *First Congregational Meetinghouse in Lowell*, 8 Pick. 177; *Leggett* v. *Smith*, 3 Watts, 331.

Howard, J. — If the plaintiff constructed the house for the defendant, under a special contract, as the evidence tended to show, there were such departures from it admitted, that he cannot recover the stipulated price, in a suit upon the agreement. But, as the defendant took possession of the house after the work was done, claiming it as her own, as it is understood, the plaintiff may recover in general *indebitatus assumpsit*, for the labor and materials; the value to be estimated in reference to the contract price, and the benefit derived by the defendant under the agreement, and not to exceed that price.

In such cases, the rule of damages laid down in *Keck's* case, (Buller's *Nisi Prius*, 139,) has been much discussed. But the opinion now prevails, and it may be regarded as settled doctrine, that the party accepting the labor and materials under such agreement terminated, may be entitled, in respect to the compensation to be made, to the benefit of the

contract which he has not repudiated, or contributed to break; and the party furnishing, though he may have failed to fulfil the agreement may still recover for the services and materials the contract price, after deducting so much as they are worth less on account of his departures from the contract. *Jewett* v. *Weston*, 11 Maine, 346; *Hayward* v. *Leonard*, 7 Pick. 181; *Snow* v. *Ware*, 13 Metc. 49; *Jewell* v. *Schroeppel*, 4 Cowen, 564; *Ladue* v. *Seymour*, 24 Wend. 60; *Lucas* v. *Goddwin*, 3 Bing. N. C. 737; Chitty on Contracts, 569, note a; 2 Greenl. Ev. § 104.

The rule embraced in the instructions to the jury, that there should be deducted from the contract price as much as it would cost to make the house what it should have been by the contract, might operate unjustly upon the plaintiff, after he had furnished the labor and materials, and the defendant was enjoying the benefit of them. To make the house such, might cost more than the original contract price, and thus the defendant might receive the labor and materials of great value, without making any compensation. If she chooses to take and enjoy the fruits of the contract, she is bound to pay for them, upon the plainest principles of justice, after a deduction is made upon the rule stated. Having accepted the materials and services, she cannot require the plaintiff to reconstruct the house, so as to make it conform to the specifications in the contract, nor by a deduction from the contract price, to furnish the means for that purpose.

Exceptions sustained.

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

(*) McLellan *versus* Cox *& als.*

Persons, severally owning distinct fractional parts of a vessel, and sustaining no additional relation to each other, are merely tenants in common.

A declaration made by one of such part owners or tenants in common, admitting a joint liability of all the owners, is not admissible as evidence against the others.

The existence of a *community of interest* among such owners, unless it be shown to be a *joint interest*, will not constitute the declarations of one of them to be evidence against the others.

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

Assumpsit, to recover $115,11, the amount of articles furnished for victualing the brig Ellen Maria, and delivered to Capt. Hoyt, the Master.

The defendants were the general owners of the brig in different proportions. The plaintiff's account was made against the "owners of the brig Ellen Maria." It was exhibited to the defendant Cox, who indorsed upon it over his signature that he considered it correct, and that the owners were holden, and that he was willing to pay his part, being one quarter. The defendants introduced a receipt signed by the plaintiff, for $28,78, paid by Cox, being in full for his one fourth part of outfits of the Ellen Maria.

The defence was, that the brig had been let to Capt. Hoyt *upon shares*, to be victualed, manned and run by him and under his control, and that the supplies now sued for were furnished on his credit alone.

Capt. Hoyt, for the defendants, testified, *that* he sailed the brig on shares, and had the sole control and management of her; *that* he supposed it was for him to victual and man her, though there was no definite bargain made to that effect; and *that* he did in fact victual and man her, and after paying "port charges," &c. divided the net earnings, one half to the owners, and the other half to himself.

To discredit this testimony, the plaintiff read a paper which the witness had signed, certifying that he sailed as master of the Brig Ellen Maria, and was to receive wages and commissions for his services, and that he contracted the plaintiff's bill on account of the brig and owners. In relation to this certificate, Hoyt testified that he was about to sail on a voyage to California, and was apprehensive the plaintiff would stop him for this debt; that the certificate being drawn up by the plaintiff, he signed it, that he might thereby get opportunity to start unmolested upon his voyage.

The plaintiff put in a letter from Cox to him, written in reference to his said previous indorsement on the account and saying, "I told one of the other defendants, as I did you, that I knew nothing about the matter, *except what I had from Hoyt.*"

There was much other testimony.

The plaintiff's counsel requested the Judge to instruct the jury, "that such declarations and admissions as the defendant Cox may have made were, in this trial, to be considered by the jury as effectual against the other defendants as himself, so far as they had any bearing upon the question of the defendants' liability, it being admitted that the defendants were joint owners and as such jointly liable, if at all."

But the Judge remarking, that it had not been contended, that the defendants were a co-partnership, instructed the jury in a manner at variance with this request.

The verdict was for the defendants, and the plaintiff excepted; and also filed a motion for a new trial.

Gilbert, for the plaintiff.

The letter from Cox furnishes a resistless inference, that he had received information from Hoyt, that the goods were purchased on the credit of the owners. This tended to show a contradiction, and to discredit Hoyt's testimony, and was therefore a proper consideration for the jury. But, by refusing to give the requested instruction, the Judge withdrew this consideration from them. For since the defendants were all liable, if any one was, this consideration, if efficacious against Cox, as it certainly was, must be so against all the defendants.

Where a joint interest of several defendants has been established, the admission of one is the admission of all. 1 Greenl. Ev. § 172, 175; Gilb. on Ev. 59, note; 1 Phil. Ev. 75; 2 Stark. Ev. 25.

It is the same rule that allows the admissions of one of several debtors upon a promissory note. *Hunt* v. *Brigham*, 2 Pick. 581; *White* v. *Hale*, 3 Pick. 291; *Frye* v. *Barker*, 4 Pick. 382; *Getchell* v. *Heald*, 7 Greenl. 26; *Pike* v. *War-*

ren, 15 Maine, 390; *Dinsmore* v. *Dinsmore*, 21 Maine, 433; *Shepley* v. *Waterhouse*, 22 Maine, 497.

The question now under consideration was directly decided in Massachusetts. *Martin* v. *Root*, 17 Mass. 222.

It has also been directly decided by this Court. *Davis* v. *Keen*, 23 Maine, 69.

It has, in this case, been assumed that, as to the effect of admissions made by one of two or more persons, there is a distinction between cases in which their liability is as co-partners and cases in which their liability is as tenants in common. But the authority shows no such distinction. If such a distinction had existed, it would have been applicable in the case last cited, but it was not adverted to.

In another view, the refusal to give the requested instruction was erroneous, and prejudicial to us. Hoyt's testimony was material. It had already been partially impeached. The admission of Cox's declarations as operative against all the defendants, would have weakened further the credit of that testimony.

Fuller and *Edwards*, for the defendants.

The plaintiff's request for instructions asserted that it had been "*admitted* that the defendants were joint owners, and as such jointly liable, if at all." We had no control over the form in which the plaintiff should present his request for instructions. But such an admission was never made by us.

So far from admitting this doctrine of joint ownership, the defendants distinctly deny it, and deny ever having admitted it. Their admission is correctly stated in the exceptions to be "that defendants were *general owners*, at the time when the bill sued for was contracted."

One question only seems to arise under the exceptions, viz.; are the defendants liable in the present action by reason of any admissions or declarations of the defendant Cox?

As to the effect of Cox's declarations, the defendants contend; —

1. That the general relation of ship owners is that of *tenants in common*, having distinct though undivided interests.

This relation is a *legal presumption*, any other being the exception and requiring to be specially proved. Kent's Com. vol. 3, pt. 5, § 45; 2 Ves. & B. 242; 4 Johns. Ch. 522; 1 East, 20; 2 Barn. & Cres. 12; 8 Taunt. 774.

The distinct nature of the interests of such part owners or tenants in common, may be seen from the fact that they can sell only their own undivided shares. *Willings* v. *Blight*, 2 Peters' Ad. R. 288. That they may sue each other before any final balance of accounts. *Macy* v. *D'Wolf*, 3 Woodb. & Minot. That there is no lien by one on the share of another for outfits and supplies. *Macy* v. *D'Wolf*. And insurance procured by one part owner is not binding on the others, without express authority. *Bell* v. *Humphries*, 2 Stark. R. 286; *Foster* v. *U. S. Ins. Co.* 11 Pick. 88.

2. The plaintiff must establish a *joint* interest among the defendants, by *other witnesses than the defendants themselves*, before he can derive any benefit from their admissions.

An apparent joint interest is not sufficient to render the admission of one party receivable against his companions, *where the reality of that interest is the point in controversy.* A foundation must first be laid by showing *aliunde* that a joint interest exists. Greenl. on Ev. vol. 1, § 177; *Burgess* v. *Lane*, 3 Greenl. 165; *Whitney* v. *Ferris*, 10 Johns. 66; *Harris* v. *Wilson*, 7 Wend. 57.

3. Persons holding this relation of part owners of a ship cannot bind each other by their admissions, even though they are parties on the same side of the suit.

It is a *joint* interest and not a mere *community* of interest that renders such admissions receivable. *Dan & al.* v. *Brown & al.* 4 Cowen, 483, 493; Greenl. on Ev. vol 1, § 176; *Jaggers* v. *Binnings*, Stark. Ca. 64.

The doctrine of *Cady* v. *Shepherd*, 11 Pick. 400, as to declarations of co-partners, made since the dissolution, respecting business of the firm, is believed to be the true view to be taken of Cox's declarations. "These admissions are competent evidence, but whether the other partners are necessarily or conclusively bound is another question. Doubtless

they may disprove the truth of such confessions; they may prove payment or other discharge, or *that the claim never had legal validity.*"

4. There is no pretence that Cox was *agent* for the owners. Had he been such agent, his declarations would only be admissible in regard to transactions *in which he was at the time engaged.* An agent's declarations are received, not as admissions, but as parts of the *res gestae. Haven* v. *Brown,* 7 Greenl. 421.

5. Cox's admissions of liability were not binding on *himself,* much less on the other owners. They constitute, not the *confessio facti,* but merely the *confessio juris,* an admission of what he supposed the law to be. Where one, through a mistake of the law, acknowledges himself under an obligation, which the law will not impose on him, he is not bound thereby. *Warder* v. *Tucker,* 7 Mass. 452; *Freeman* v. *Boynton,* 7 Mass. 488; *May* v. *Coffin,* 4 Mass. 347; *Louisville Man. Co.* v. *Welch,* 10 Howard, 461.

Where admissions involve matters of law as well as matters of fact, they are obviously entitled to little weight, and in many cases have been altogether rejected. Stephen's *Nisi Prius,* vol. 2, 1603.

Howard, J. — It is admitted that the defendants were the general owners of the vessel, when the supplies were furnished for which this suit is brought. It appears that they were part owners of distinct fractional portions, respectively; and there is no evidence that they sustained any relation to each other, excepting that of shipowners, generally. Upon well settled principles, they were tenants in common of the vessel. Abbott on Shipping, 68; Collyer on Part., § § 1185, 1187; 3 Kent's Com. 39, 40, 151; Story on Part. § 417, and notes and cases referred to by those authors.

When the master is agent of the owners he may bind them for the necessary supplies and repairs of their vessel, but not so where no agency, express or implied, exists. There was evidence in this case tending to show that Hoyt, the mas-

ter, hired the defendants' vessel "*on shares*;" that he had the possession, and sole control and management of her, and sailed, victualed and manned her, on his own account; and that he was owner *pro hac vice*. The whole evidence was submitted to a jury, with instructions not appearing to be objectionable, and the verdict, which was for the defendants, we cannot regard as unauthorized. As owner, *pro hac vice*, the master, having no agency or authority from the general owners, would be answerable for the necessary supplies procured by himself. 3 Kent's Com. 137, 138; *Webb* v. *Pierce*, 5 Law Reporter, (new series,) 9; (U. S. Circuit Court, District of Massachusetts,) and the cases there cited, English and American, showing the law on this subject to be well settled in both countries. *Lyman* v. *Redman*, 23 Maine, 289.

But the plaintiff insists, that the liability of all the defendants was established, by proof of the admissions of one of them to that effect. There is no proof, however, that they were in partnership, enjoying the rights and powers, or subject to the duties and obligations of partners, in respect to the vessel, her possession, transfer, control and management, or liability for debts or forfeitures. While shipowners may be in partnership as owners, their general relation is that of tenants in common, and their partnership relation, though provable, cannot be presumed from the fact of being part owners. They are not agents for each other, unless made such upon authority conferred for that purpose, expressly or by implication. Their acts are not binding upon each other without such special authority; nor can the unauthorized admissions of one implicate or bind the others. Collyer on Part. § 1229, and notes; Story on Part. 453; *Hardy* v. *Sproule*, 31 Maine, 71. Where two were partners, and also part owners of a vessel, the admission of one, as to the subject of part ownership, but not of the co-partnership, was held not to be binding on the other, by Lord Ellenborough. 1 Stark. R. 64; Smith's Mercantile Law, 187; *Dan* v. *Brown*, 4 Cow. 483. So the admission of one tenant in common of real or personal property, as such, will not bind his co-tenants.

There was no *joint interest* shown between the defendants, although a community of interest appeared to exist between them, as part owners of the vessel. The admissions of Cox, one of the defendants, could not, therefore, bind the others. 1 Greenl. Ev. § § 176, 177.

Exceptions and motion overruled.

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

CHAPMAN *versus* SECCOMB *& al.*

The intention of the parties to a contract, is to be regarded in its construction, and that intention is to be ascertained from the whole instrument.

Where the parties to a suit pending in Court, agree in writing to refer it, with stipulations that it shall be withdrawn, each party to pay his own cost; if one of the referees declines to act, the agreement becomes inoperative, and the action may stand for trial.

And whether one of the referees refused to act, may properly be left to the determination of the jury.

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

ASSUMPSIT. Plea, general issue and brief statement, in substance that *this action* had been settled on March 10, 1851, as by the agreement signed by the parties, a copy of which follows: —

"Newcastle, March 10, 1851.

"We, the undersigned, parties in the suit of Nath'l T. Chapman and Seccomb, Taylor & Co. and others, with reference to the brig Itasca, hereby agree to refer the above suit to the arbitration of the following gentlemen, viz, Alexander Teague, William P. Harrington, and to abide by their decision, and to withdraw the suit from the District Court, now pending in Lincoln county, each party paying their own costs; and the said Chapman hereby agrees to warrant and defend said Seccomb, Taylor & Co. against any further proceedings of any name or nature pertaining to his bill against

said brig Itasca and owners. The above named referees are at liberty to choose a third in case of disagreement.

"Nathaniel T. Chapman,
"Seccomb, Taylor & Co."

After this agreement was read, the plaintiff called Wm. P. Harrington, who testified, that he was referee, he did not decline to act as referee. Both of us went into the office and looked over the book and came to no conclusion. He then declined.

Defendant contended that, that part of the agreement by which the parties agreed to withdraw the suit from Court, was binding, even if the referees declined to sit; and further, that the referees by going into the office and looking over the books did accept of the trust, and having so done and commenced action and investigation, they were not at liberty to decline.

But the Judge instructed the jury, that if they should believe that either of the referees refused to act, the agreement to refer would become inoperative and could not prevent the maintenance of the suit.

To this ruling and instruction the defendants excepted.

M. H. Smith, for the defendants.

By the written agreement of March 10, 1851, signed by plaintiff and defendants, the parties agreed, 1st, to refer the suit to two referees, these referees met the parties, looked over the book and *then* declined. By meeting the parties and looking over the book the referees accepted the trust, and were not at liberty to decline after accepting, and the jury should have been thus instructed.

By said agreement the parties also agreed, 2d, to withdraw this suit from Court, each party paying their own costs. This was an agreement independent of any other than the agreement to refer, and the jury should have been permitted to have passed upon this agreement.

A. P. Gould, for the plaintiff.

1. The agreement was for a disposition of the action in

Court, *by a reference* to the individuals named. The contract is *entire* and to be considered *as a whole.*

2. The just and reasonable construction of it, is, that upon the *reference* being completed, the action was to be disposed of in Court. That reference could only be completed by an acceptance of the trust by the referees. They refused to act, and the agreement became a nullity. It would be absurd to give the agreement such a construction as to deprive the plaintiff of all his legal rights in case the referees refused to act.

3. It is a familiar principle, that the construction of a contract shall be *reasonable,* and that the situation and *true intent* of the parties, and the *subject matter* are to be considered, in determining its meaning. Chitty on Con. (4th Am. Ed.) p. 63, and note 1, and authorities cited in note.

4. It was an agreement to *refer* the action, and the additional stipulations merely had reference to the mode in which the agreement was to be carried out.

RICE, J. — In the construction of contracts, regard should always be paid to the intention of the parties; and that intention should be ascertained by a consideration of the whole instrument. In this case the parties were litigating their rights in a court of law. It was manifestly their intention to put an end, not only to the existing suit, but to all further litigation arising out of the same subject matter. To this end they agreed to refer this action to the arbitrators, to abide their award, to withdraw the suit from court, and the plaintiff warranted against any further proceedings, pertaining to his bill, adverse to the brig Itasca and owners.

These several propositions are evidently dependent upon each other. It was intended by the parties to be in full, not a partial settlement of all matters in relation to plaintiff's claim upon the Itasca and her owners. The determination of the pending action was the basis upon which all the other agreements depended.

Neither party had the power to compel the arbitrators to

accept the trust confided to them. The refusal of those arbitrators, or either of them to act, rendered it impossible for the parties to proceed under their agreement, and consequently discharged the agreement itself. Whether there was a refusal on the part of either of the arbitrators to act in the premises, was matter of fact, simply. This fact was properly left by the Court to the determination of the jury.

Exceptions overruled.

HOWARD and HATHAWAY, J. J., concurred.

COBURN *& als. versus* PAINE.

Where notes were given in payment for logs, by the purchaser, and one of the payees gave a receipt for such notes "on account of logs sold by us," such receipt has no tendency to show, that the *maker of it* was the agent of his joint-owners, in the sale of the logs.

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

ASSUMPSIT, on a promissory note, signed by the defendant, of this tenor: —

"Bath, August 1, 1844. For value received, I promise to pay Franklin Glazier, Abner Coburn and William M. Rogers, (the plaintiffs,) or their order one thousand dollars in fifteen months and grace."

The execution of the note was admitted, and the defence was alleged payment.

The defendant introduced a receipt signed by William M. Rogers, of the following tenor: —

"Bath, August 1, 1844. Received of Wm. Paine his notes for five thousand dollars of one thousand each, payable in three, six, nine, twelve and fifteen months, payable to Glazier, Coburn and myself, on account of logs sold him by us."

He also introduced a receipt of Jan. 28, 1845, of one Otis Kimball, for a note of $250 to be delivered said Rogers to be applied on one of his $1000 notes, and two other receipts of

said Rogers, dated October 7, 1846, and July 10, 1847, for $100 each, "on account of logs sold him."

He also produced an account current between said William M. Rogers and himself, rendered by Rogers, and a part of which was in his handwriting, running from May 3, 1844, to January 20, 1847, in which there appeared to be a balance due to the defendant. In this account, the payment of four several notes of $1000 each, is charged to defendant, and he is credited with the five notes of $1000 each of August 1, 1844.

The defendant showed by two witnesses, the mark of those logs purchased of the plaintiffs, that they were sawed by him, and that Rogers had charge of logs of a similar mark of those sold by plaintiffs.

The plaintiffs then put into the case, four notes signed by defendant, payable to them, of $1000 each, dated August 1, 1844, due in three, six, nine and twelve months and grace, from their date.

At the request of the defendant, the Judge instructed the jury: —

1. That they might consider the evidence of the receipt of Rogers for the notes, and from that consider whether there is evidence tending to show that Rogers acted as the agent of Coburn and Glazier in selling the logs, August 1, 1844.

2. That if he acted as their agent in the sale of logs, jointly owned by himself and the other plaintiffs, and notes were given by defendant, payable to the plaintiffs jointly, the adoption of the note and the commencement of a suit upon it, is proof of a ratification by Coburn and Glazier of the acts of Rogers.

3. That the same facts tend to prove an agency in Rogers in behalf of the other plaintiffs respecting the logs.

Other instructions were given, which it is unnecessary to specify, to show the ground on which the case was decided.

The jury returned a verdict for the defendant.

Tallman, for the plaintiffs.

The first instruction probably was understood by the jury

to justify them in concluding that the receipt authorized them to find that Rogers acted as agent of Coburn and Glazier in selling the logs to defendant. That receipt was simply for notes payable to plaintiffs on *account* of logs sold defendant by plaintiffs; "sold him by us," is the language. How were the jury from this authorized to infer that Rogers sold the logs to the defendant, or that in such sale he acted as agent of plaintiffs? It is a declaration of Rogers that plaintiffs sold the logs to defendant. This instruction was not justified or authorized by the language of the receipt or the circumstances connected with it; neither could, by that receipt, the commencement of this suit by plaintiffs be considered by the jury proof of a ratification by Coburn and Glazier of the acts of Rogers, as the jury were instructed by the second instruction; for there was no act of his to ratify. Neither do those facts tend to prove an agency in Rogers in behalf of the other plaintiffs respecting the logs; the third instruction was therefore erroneous.

Gilbert, for defendant, maintained that the reception by Rogers and possession of the notes given by defendant for the logs, is proof of his agency. But the exceptions on this part of the case were immaterial, for it was not necessary to prove agency at all, for Rogers is one of the payees, and might as such receive the money for the notes.

HATHAWAY, J. — The *first* instruction requested and given was concerning the receipt of Rogers for the notes as tending to show, that he acted as agent of Coburn and Glazier in selling the logs. The *second* was concerning certain acts of the plaintiffs, Coburn and Glazier, as proof of their ratification of the acts of Rogers as their agent, *if he acted as such.* The *third* instruction was, "that the same facts" (the facts mentioned in the first and second instructions,) "tend to prove an agency in Rogers in behalf of the other plaintiffs respecting the logs."

But the receipt contains nothing which indicates such agency, and does not tend to show it. It was given "on account of

logs sold him by us." For aught that appears by the receipt, it is as probable that the sale was effected by them all together or by any other one of them, as by Rogers, and the jury were erroneously instructed that it tended to prove an agency, which it had no tendency to prove.

Exceptions sustained, and new trial granted.

SHEPLEY, C. J., concurred; HOWARD, J., concurred in the result.

LONG *versus* RHODES.

The discretionary power of the Court, to accept, reject, or recommit a report of referees, is only a judicial one, to be exercised upon consideration of the facts and circumstances of the case.

The wishes of one of the parties, dissatisfied with the award, or the willingness of the referees to have the case again opened and more fully considered, furnish no ground for rejecting or recommitting the referees' report.

Where no new evidence is offered, and no prejudice, bias or mistake, on the part of the referees established, their award must be accepted.

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

SUBMISSION, under the statute, to A. C. Spaulding, Cephas Starrett and Anson Butler, whose award in favor of Long was presented for acceptance.

The defendant filed a written motion, praying that the submission and report for the causes set forth, might be recommitted.

The reasons set forth in the motion were, that the defendant believed the referees had mistaken some of the facts on which they had based their judgment, and that they would upon mature consideration correct the errors and render a just award. He also presented a paper, signed by the referees, saying, that the hearing before them was informal, the principal evidence consisted of the statements of the parties, not under oath and without counsel. This paper concluded thus, "one of the parties, who is disappointed and feels aggreived by the result to which we arrived, having expressed a wish

for the cause to be again opened and more fully and maturely considered, the referees, after some reflection have concluded, that it may be well to do so, and hereby certify their willingness that the rule and report shall be re-committed accordingly for that purpose."

The District Judge refused to re-commit the report and ordered that it be accepted. To which order the defendant filed exceptions.

Lowell & Foster, for defendant.

Wilson, for plaintiff.

HOWARD, J. — The late District Court had discretionary power to accept, reject, or recommit reports of referees for further consideration. R. S. c. 138, § 9. By statute, (1845, c. 168,) when such reports are before this Court, on exceptions, it has the same discretionary power over them as the District Court possessed. But that discretion must be exercised judicially, and upon consideration of the facts and circumstances of the case.

The report of the referees is *prima facie* correct, as the decision of the tribunal selected by the parties, and must be accepted, unless some satisfactory reason be shown for disposing of it in a different manner. The case presents no facts or circumstances from which we can perceive any ground for overruling the decision of the District Court. No newly discovered evidence is pretended; and no prejudice or bias, or mistake, on the part of the referees, is shown; and they express no doubts of the correctness of their conclusion, or dissatisfaction with the result. The wishes of a party dissatisfied with the award, or the willingness of the referees to have the case "again opened, and more fully and maturely considered," furnishes no ground for rejecting, or recommitting the report, and it must be accepted. *Exceptions overruled.*

SHEPLEY, C. J., and TENNEY and HATHAWAY, J. J., concurred.

WINSOR *versus* CLARK *& als.*

In a disclosure upon a poor debtor's bond, a surety upon the bond is incompetent to act as one of the justices of the peace and quorum.

But, if the debtor take the prescribed oath before two justices of the peace and quorum, of whom a surety on his bond is one, the damage for the breach of the bond is to be assessed under the provisions of the Act of 1848, c. 85, § 2.

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

DEBT on a poor debtor's relief bond.

The debtor took the oath prescribed by the statute, before two justices of the peace and quorum, one of whom was surety upon the bond.

There was evidence tending to show, that all objections to the justices were waived, and also evidence that this waiver extended only to the residence of the magistrate. The defendant requested the instruction, that if the jury, under the instructions of the Court, should find the conditions of the bond had been broken, that the plaintiffs were entitled to only nominal damages, no evidence on that point being offered.

The jury were instructed, *that* if one of the justices was found to have been a surety on the bond, he would be incompetent by reason of interest to act as one of the justices, and their proceedings would be void, and their certificate would be no protection, unless the jury found that the creditor by his attorney at the time the justices were selected, agreed that he should act, or waived all objections to him; *that* it must have been a waiver of the objection of interest; *that* unless they found such waiver to have been made, their verdict should be for the plaintiff to the amount of the execution and costs and fees of service, with interest on the same against all the obligors; and the principal would be further liable for a sum equal to the interest on the same at the rate of twenty per cent.

The jury returned a verdict for the amount of the execution, costs and interest.

H. C. Lowell, for defendants.

The instructions were wrong on both branches of the case. 1. The laws of this State do not require that the justice shall be free from all possible objection from relationship or pecuniary interest as an indispensable qualification to their competency. Being selected by the parties themselves, and without objection, proceeding in their presence and administering the oath, there is an implied waiver of all objection of this nature. This objection is like to that which has been made to *jurors*, and the statutes should receive a similar construction. *Clement* v. *Wyman*, 31 Maine, 56. If this position is correct, the adjudication of the justices and their certificate constituted a perfect defence to this action. 6 Maine, 307; 30 Maine, 347; 32 Maine, 310; 6 Bar. N. Y. R. 589; 4 Denio, 73.

2. But if the statute provisions do apply to justices selected by the parties, and the objection was not waived, then the Judge should have instructed the jury (if either party *requested* that the *jury* may assess the damages) that the plaintiff was entitled to *nominal* damages only, "the real and actual damage and no more", and none being proved the action could not be maintained. Statute of August 11, 1848, c. 85, § 2, p. 284; *Baker* v. *Carlton*, 32 Maine, 335; *Bard* v. *Wood*, 30 Maine, 156; *Sanborn* v. *Keazer*, 30 Maine, 457; *Remick* v. *Brown*, 32 Maine, 458.

H. W. Paine, for plaintiff.

1. When a statute authorizes proceedings before any tribunal, it is implied that the tribunal shall be disinterested. *Pearce* v. *Atwood*, 13 Mass. 324.

2. As one of the justices had a direct pecuniary interest and is one of the defendants, the proceeding was *coram non judice*.

Therefore no oath has been administered within the intent of § 2, c. 85, statute of 1848.

Howard, J. — The statute of 1848, c. 85, was intended to provide for poor debtor's relief which prior legislation had

failed to furnish. And it has been repeatedly held, since the passage of that Act, that when a debtor, having given bond to obtain his release from arrest on mesne process, or on execution, or warrant of distress for taxes, has taken the prescribed oath before two justices of the peace and of the quorum, the damages in a suit upon the bond, are to be assessed by the Court or jury, according to the provisions of that Act, (§ 2,) although the magistrates had no jurisdiction for the purposes of the disclosure intended. In such cases, "the amount assessed shall be the real and actual damage and no more." *Bard* v. *Wood*, 30 Maine, 155; *Baker* v. *Carleton*, 32 Maine, 335; *Hathaway* v. *Stone*, 33 Maine, 500, and other cases not reported.

This construction of the statute is conformable to the language of the Act, and, as it is believed, consonant with the will of the legislature. Though, perhaps, the construction might have been different, without doing very great violence to the terms of the Act, or to what might be assumed as the intention of the legislators; yet, the construction given has been acted upon by judicial tribunals, and parties, and known as a part of the present law of the State, and we do not think it advisable to change it, if we had the disposition and the power, for any reasons of public policy, or private right, which have been suggested, or which now occur to us.

The debtor, in this case, had taken the oath prescribed by law, before magistrates competent to administer it, though incompetent to take his disclosure, so as to save a breach of his bond, and as there was no imputation of fraud, he was entitled to have the damages assessed under the Act of 1848, c. 85, § 2. *Exceptions sustained, verdict set aside, and the action to stand for trial.*

TENNEY, APPLETON, HATHAWAY and CUTTING, J. J., concurred.

COUNTY OF SAGADAHOC.

Moses & al. *versus* Norton & al.

The mother of defendants was in the occupation of the plaintiffs' house, at an agreed yearly rent, and the defendants, by parol, promised to pay the rent so long as she should occupy it; *Held*, that this was but a collateral promise and therefore void.

On Facts agreed.

Assumpsit, to recover rent for the house occupied by defendants' mother.

On and previous to September 9, 1848, the defendants' mother was occupying a house of the plaintiffs', at the rent of $60 per annum. The plaintiffs, being solicitous about their rent, named the matter to defendants on that day. They then verbally promised to pay the rent during the time she should occupy the house. She continued till September 9, 1851.

During that time the mother paid $20, and one of defendants, $70 towards the rent. One only of the defendants contested this suit.

It was stipulated, that if Zachariah C. Norton, one of defendants, was liable for said rent, the defendants should be defaulted, if not, the plaintiffs to become nonsuit.

Randall and *Booker*, for plaintiffs.

The statute of frauds is not applicable to this promise. On the part of defendants, it is an original undertaking. *Perley* v. *Spring*, 12 Mass. 297; *Brown & al.* v. *Atwood*, 7 Greenl. 356.

It is immaterial, that the mother had occupied the house previously and part of it afterwards; the plaintiffs refused to let her have it longer, but agreed to let it to defendants.

Clapp and *Baker*, for defendant Z. C. Norton.

This being but a parol promise to pay the debt of another

and not in writing, was void. R. S. c. 136, § 1, ¶ 2; Chitty on Con., (5th ed.,) 512; *Blake* v. *Parlin*, 22 Maine, 395; *Loomis* v. *Newhall*, 15 Pick. 159; *Cahill* v. *Bigelow*, 18 Pick. 369.

If the defendant had been lessee of the plaintiffs, no recovery against him could be had upon a special verbal agreement to pay rent. R. S. c. 136, § 1, ¶ 4; *Blake* v. *Parlin*, 22 Maine, 395.

Appleton, J. — From the facts as agreed upon by the parties, there can be no question but that the plaintiffs might have successfully maintained an action against Mrs. Norton, the mother of the defendants, for the rent of the premises belonging to them, during her occupation of the same. She had entered their house under an agreed rent of sixty dollars a year and was occupying the same at the time of the promises of the defendants, which are relied upon to sustain this suit. That lease was then in full force, and there is no evidence whatever of its termination. Mrs. Norton was in no way relieved from her liability to the plaintiffs, and by continuing to occupy it she still remained liable. It is difficult to perceive what defence she could have made to any suit brought to recover the rent due.

Mrs. Norton must be regarded as the principal debtor and the liability of the defendants as collateral thereto, and consequently as within the statute of frauds, R. S. c. 136, § 1, which requires the promise "to answer for the debt, default or misdoings of another to be in writing.

In *Blake* v. *Parlin*, 22 Maine, 397, the son of the defendant leased the house of the plaintiff, and it appeared that while he was moving in the same, the plaintiff called on her and told her they should not go in unless she would be accountable for the rent, and that she verbally promised the same should be paid. But this being a parol promise to pay the debt of another, and not in writing, was held void under the statute. In *Thomas* v. *Williams*, 10 B. & C. 664, Lord Tenterden, C. J., held that a promise to pay the accruing

rent of the tenant was "nothing more than a promise to pay money that would become due from a third person," and was "within the words of the statute, and the mischief intended to be remedied thereby." The test in all cases under the statute is, whether the party promising is an original debtor or not. The defendants can only be regarded as guarantors. *Tileston* v. *Nettleton*, 6 Pick. 509; *Tomlinson* v. *Gill*, 6 Ad. & El. 564; *Barber* v. *Fox*, 1 Stark. 270.

Plaintiff nonsuit.

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

COUNTY OF SOMERSET.

(*) HOWE, *in equity, versus* JOSEPH RUSSELL AND JOHN K. RUSSELL.

In cases of exceptions to a master's report on a bill in equity, it belongs to the excepting party to open and close.

It is unusual to allow an amendment to the defendant's answer to a bill of equity.

Such an amendment will not be allowed, if it introduce a new ground of defence, existing and known to the defendant, when his answer was filed.

When the bill, answer and proof, each shows that a deed of conveyance, though absolute in its form, was intended merely to secure a debt or to indemnify against liabilities, it will, in equity, be treated as a mortgage.

A party claiming to hold land under a sale for the payment of state or county taxes, must, in equity as well as at law, prove the facts necessary to establish its validity.

The net avails of timber, taken by a third person, from land under mortgage, must be appropriated toward the extinction of the mortgage, if such taking was with the approbation of the mortgager and of the mortgagee, upon an understanding that such third person should so appropriate the avails.

This rule of appropriation is not affected by the existence of a prior outstanding mortgage upon the land, if the prior mortgagee make no claim that the appropriation be made upon his mortgage.

A master in chancery, commissioned to ascertain the amount due upon an outstanding mortgage of land, has no jurisdiction to adjudicate upon the titles to the estate mortgaged.

Howe *v.* Russell.

The adjudication of a master in chancery, upon facts submitted to him, is presumed to be correct.

In order that such an adjudication should be set aside or reconsidered, for an alleged mistake or an abuse of authority, it must be clearly shown that such wrong existed, and that equity requires its correction.

A master in chancery is not bound to report the evidence upon which his determination was founded.

Errors of computation by a master in chancery may be corrected by the Court, without a recommitment, at any time before the confirmation of his report.

The grantor and the grantee of land by a deed in form of a *warranty*, but by legal intendment merely an equitable mortgage, may, after the discharge of the mortgage, be compelled in equity to release the estate to a person who had derived under the grantor a title legally subordinated only to such mortgage.

BILL IN EQUITY, heard upon bill, answer and proof, and coming up on exceptions to the master's report.

Upon inquiry made, the Court ruled that, in such cases, the opening belongs to the excepting party.

The material parts of the case appear to have been as follows:—

Joseph Russell, in 1835, mortgaged to Edward Smith a large tract of forest land, to secure his promissory notes, which have not yet been given up or canceled; on which about seven thousand dollars appears to be due.

Afterwards in 1838, he conveyed the same land, together with a farm, on which he then and has ever since resided, to Osgood Sawyer, by a deed in form of a warranty. This deed was intended for security to Sawyer for debts and liabilities as surety and otherwise.

On a former hearing of this suit, the Court decided that the deed to Sawyer must be deemed and treated as a mortgage, and appointed a master to ascertain the amount due upon it.

For several successive years prior to 1844, the forest land was sold for the payment of public taxes, and was conveyed by the purchasers to John K. Russell, one of the defendants, the son of Joseph Russell, the other defendant.

About the years 1844 and 1845, John K. Russell took a large quantity of timber from the forest land. This he did,

with the consent and at the desire of Joseph Russell, and of Sawyer.

Out of the net avails of the timber, John K. Russell furnished to Sawyer money enough to pay the debt and nearly enough to discharge the liabilities, for which the land had been mortgaged to Sawyer, and for meeting the residue of those liabilities Sawyer took from J. K. Russell personal security, and thereupon conveyed to him the farm in 1845.

On the same day (the title under the mortgage made to Edward Smith appearing to be much incumbered by the claims arising under the tax sales,) one Warren, the assignee of that mortgage, transferred it with the mortgage-notes to John K. Russell, for $800. This trade was negotiated wholly by Joseph Russell, and nothing was allowed to Warren, or claimed by him, for the timber taken from the land.

In 1847, this plaintiff, having, in the name of Francis B. Blanchard, recovered a judgment against Joseph Russell, upon a debt due prior to the said conveyance from Joseph Russell to Sawyer, levied the execution and set off upon it to Blanchard the said farm in two pieces, one of which contained about three acres, and Blanchard soon afterwards released and quitclaimed the same to the plaintiff.

The plaintiff, finding his *record title* under the levy, clouded by the warranty deed from Joseph Russell to Sawyer, and by the deed from Sawyer to John K. Russell, both made before his levy, brings this bill against Joseph Russell and John K. Russell, alleging *that* the conveyance from Joseph Russell to Sawyer was made fraudulently with a design, on the part of the grantee as well as of the grantor, to defraud the creditors of Joseph Russell; *that* John K. Russell was well knowing and contributing to that design; and *that* the stumpage of the timber taken from the forest land by John K. Russell, by the suggestion and consent of Sawyer and of Joseph Russell, was more than enough to pay and discharge the mortgage from Joseph Russell to Sawyer, and did in fact pay it. So that the deed from Joseph Russell to Sawyer, being in fraud of creditors, was void; and if not void, it was

but a mortgage, which having been fully paid, has become inoperative.

Wherefore the plaintiff prays that the defendants may be decreed to release and quitclaim to him the land upon which he had levied, and for further relief.

Joseph Russell, in his answer, denies any fraudulent intent in the conveyance to Sawyer; asserts that that conveyance was made to secure Sawyer from liabilities assumed for him, and that he has not been able to discharge said liabilities. He also alleges that he had no title to the three acre piece of land, when set off to Blanchard.

John K. Russell, in his answer, denies all knowledge of, or participation in, any fraudulent design in the conveyance from Joseph Russell to Sawyer, or of Sawyer to himself; asserts that he purchased Sawyer's rights in good faith, and paid for them of his own means; that he purchased in the tax titles to the forest land, having been advised and believing the same to be valid, and considered the timber which he took therefrom to be his own, though he has since heard the validity of that title questioned; that by purchase from Warren he became assignee of the notes and mortgage given to Edward Smith, and that all the stumpage of the timber was insufficient to pay the amount due on that mortgage.

He also alleges that when the Blanchard execution was levied, the three acre piece did not belong to Joseph Russell; that it was a part of the Bray farm, which Bray had conveyed to one Jewett by a mortgage, which this defendant understands to have been foreclosed; that Jewett conveyed it to one Pearson by whom it was sold and conveyed to this defendant. Some other facts pertaining to the title of the three acre piece are stated in the opinion of the Court. The deposition of Pearson shows that Joseph Russell had the right to redeem the Bray farm from Jewett; and that the mortgage has not been foreclosed; and that he purchased the mortgage from Jewett and conveyed to John K. Russell the rights which he took by the deed from Jewett.

The report of the master was, in substance, *that* after

allowing for the yearly rents and profits of the farm, the amount necessary to discharge the Sawyer mortgage would be $1193,13 ; that the profits received by John K. Russell from the timber land mortgaged to Sawyer was $2000, more than the amount paid to the assignee of the Edward Smith mortgage, and to redeem the tax title ; *that* thereupon the defendants contended before him, that no part of this sum should be applied to the Sawyer mortgage, as the timber belonged to John K. Russell under the tax titles, and offered evidence in support of those titles ; *that* this evidence was excluded, the master considering it out of his province to determine upon titles to the real estate ; *that* the defendants offered to prove that the rights of Joseph Russell, when he mortgaged the land to Sawyer, extended only to one sixteenth of the forest tract ; *that* this evidence, for the same reason, and because contradictory to his deed was rejected ; *that* the profits from the timber land ought to be applied, and was by him applied to the Sawyer mortgage, and that therefore nothing remained due upon said mortgage.

The defendants resist the acceptance of the report, and contend that no decree can rightfully be grounded upon it, and they present exceptions, seven in number, which are noticed in the opinion of the Court.

They also move for leave to file amended answers which shall state that prior to Sept. 1837, Joseph Russell had conveyed to sundry persons, by deeds before that time recorded, all his interest in the forest lands on which John K. Russell lumbered, excepting one sixteenth part, and that he acquired no title thereto afterwards, said facts having been omitted in the answers, because deemed immaterial.

J. S. Abbott, for the defendants.

There are three acres of the land to which the plaintiff took no rights by his levy, the execution debtor having never owned it. As to that piece, therefore, no decree can be passed.

The farm passed prior to the plaintiff's levy, by the mort-

gage to Sawyer, which has been assigned to John K. Russell, and is yet unpaid and outstanding. The money and security furnished by J. K. Russell to Sawyer, were not in discharge of the mortgage, but were the consideration for which J. K. Russell purchased the land.

There was no propriety in the master's appropriating that money and security to discharge the Sawyer mortgage. To the whole of the timber John K. Russell was entitled as his own property. The land from which he took the timber was his own. He bought it of those who had purchased at the auction sales for taxes. The titles under these sales were valid. The bill itself alleges, that the land was redeemed from two tax sales by Joseph Russell through the agency of John K. Russell. This is an admission of the validity of the taxes and of the sale. But the money paid by John K. Russell, was not to redeem but to purchase for himself the tax titles. These titles are spoken of several times in the answers, as valid titles, and no exception having been taken to them, their validity cannot now be controverted. If not legal and valid, let the plaintiff show the defects.

Again, the timber, if not held by the tax titles, was to be accounted for, not upon the Sawyer mortgage, but upon the earlier mortgage given to Edward Smith. Of that mortgage, and of the debt secured by it, John K. Russell became the purchaser or assignee. To himself then, and to himself alone, was he to account for the timber; to the amount, [over $7000,] due upon that mortgage; but the timber was not of half that value. There was error then in the appropriation of any of that fund to the Sawyer mortgage.

Nor can it be maintained that John K. Russell became party to any arrangement with Sawyer, by which he was bound, in any way, to account to him for the timber. He had no license, no permit, from Sawyer to take the timber, and never agreed to account to him for it.

It was his own money that he advanced to Sawyer, and it was to buy the land of Sawyer, whose title to it was under a warranty deed, though the Court has since decided that it

could operate only as a mortgage. But viewed as a mortgage it is outstanding and in force, and it covers the very land for which the plaintiff is contending.

The counsel then undertook to show that the master's estimation of the rents and profits of the farm was highly erroneous, and also to show that some large errors had been made in his other computations.

Wherefore he submits that the report should be set aside, and another master appointed; or at least that the case should be recommitted with instructions.

W. Fessenden, for the plaintiff.

The motion for leave to file amended answers, is substantially a motion to open the case anew. It is opposed to the practice of all courts of equity, and is without precedent. *Hughes* v. *Bloomer*, 9 Paige, 269.

The object is, confessedly, to introduce a technical and unconscientious defence, to wit, a tax title.

The Court will not open the case for this purpose. *Hartson* v. *Davenport*, 2 Barbour's Ch. Rep. 77.

The case should not be opened for production of testimony, not unknown before publication of testimony. *Robinson* v. *Simpson*, 26 Maine, 11.

The report of the master as to matters of fact will be considered as conclusive. It is like the verdict of a jury. His estimation of the rents and profits cannot be considered as erroneous by this Court, for the Court has not the evidence before it upon which that estimation was based. So also with regard to the amount of the debt due from Joseph Russell to O. Sawyer. *Mason* v. *Crosby & al.* 3 W. & M. 258.

The master acted rightly in rejecting the evidence offered to prove the validity of the tax titles. This evidence should have been offered to the Court, and published with the other testimony in the case. A master is not bound to report the evidence introduced at the hearing before him. Would the Court allow the master to adjudge as to the validity of the tax titles, when his judgment would be conclusive?

The evidence offered as to the extent of Joseph Russell's interest in the wild lands was properly excluded by the master, for this was in direct contradiction to the allegations in the bill admitted in the answers.

Is any thing due on the mortgage to Sawyer, of whom John K. Russell is the assignee. We say that mortgage has been paid by the rents and profits, and by the timber, cut upon the wild land which are a part of the mortgaged premises. It was cut by John K. Russell as agent of Sawyer the *then* mortgagee, or by the permission of Sawyer, and with his knowledge and consent.

If not acting as *agent*, but only by *consent* of Sawyer, the mortgagee, Sawyer must account for the timber so taken. The principle of equity is this, that if the mortgagee, having the power and right to allow strangers to take profit from the mortgaged premises; if he does so allow them, he does it at his own risk, and it is as if he did it personally; and he is bound to account to the mortgager on the mortgage debt for all value so taken.

Whether Sawyer received the profits or not, he must account for them. But he did actually receive them to the extent of the mortgage debt. *All* J. K. Russell's means were derived from the profits of this timber. These profits were paid over (in part) by J. K. Russell to Sawyer, on September 4, 1845, when Sawyer gave him the deed.

The Court will not presume that J. K. Russell was a trespasser when he went upon the land. All the circumstances show he did it with the consent of Sawyer. If not, he was a trespasser, for the tax titles were not valid. He so confesses in his answer, nor does he offer any proof of their legal execution.

If it is said that Sawyer had no right to receive stumpage, being only owner of an equity of redemption, we say Warren, the holder of the first mortgage, did not claim this stumpage, and so long as he makes no claim, it is the property of the assignee of the mortgager, Sawyer.

Warren is not bound to account for the proceeds. The

cutting was without his knowledge or consent. He has, subsequently, parted with all his interest to J. K. Russell, but this gives J. K. Russell no right to the past stumpage. Warren conveyed to him no right of action. Nothing is said in the assignment with regard to past trespasses.

Might not Sawyer have maintained an action against J. K. Russell for the value of the stumpage? If he had done so, would not the amount recovered by him be applied to extinguish Joseph Russell's mortgage? Why then should it not be so applied when voluntarily paid by J. K. Russell to Sawyer? Why then should it not be so applied, even though it had not been paid over to Sawyer, if the timber was taken with his knowledge and consent?

Sawyer then must account for this timber. If so, the mortgage debt is paid.

It follows then that the land upon which the plaintiff levied is relieved from every sustainable incumbrance. Still, by means of the deed, in form a *warranty*, which, previous to the levy, Joseph Russell gave to Sawyer, there is an *apparent* title, a cloud, which the defendants ought to remove. This they should do by executing to him a release of the land. We therefore submit that the Court will decree that such a release be given.

Howard, J.—The defendant Joseph Russell, mortgaged timber land, in 1835, to secure the payment of his notes described in the mortgage, and which are still outstanding. Afterward, in 1838, he conveyed by deed of warranty, the same land together with a farm to Sawyer. We have determined at a former hearing of this case, that the deed last named, though absolute in its terms, constituted a mortgage to the grantee to secure him for sums due, and liabilities assumed for the grantor. It appears, and it is admitted in the argument for the defendants, that the *farm* embraced the two parcels of land claimed by the plaintiff under a levy in 1847. John K. Russell, son of Joseph Russell before mentioned and co-defendant, operated upon the timber land by the request and

intercession of Sawyer, who "urged him to make an effort to redeem," and with the knowledge and approbation of Joseph Russell, and with the implied assent, or without any objection of others, who might be supposed to have been interested as prior mortgagees, or their assignees. The net avails of those operations far exceeded the amount of the indebtedness and liabilities of Joseph Russell, which were secured by his mortgage to Sawyer. Upon receiving a portion of those avails of the lumber from John K. Russell, and his obligation to discharge the remaining liabilities of the father, Sawyer conveyed the *farm* to the son, on Sept. 4, 1845; the grantee having full knowledge of the nature of the title of the grantor, as mortgagee.

The case has been submitted to a master to ascertain the amount due upon this mortgage; and he has reported that it has been wholly paid, and that there is nothing due and secured upon the farm levied upon, and claimed by the plaintiff.

The defendants now "move to amend the answers by stating, that prior to Sept. 1837, Joseph Russell had conveyed to sundry persons, by deeds before that time duly recorded, all his interest in the timber lands, on which John K. Russell lumbered, as set forth in the bill, excepting one sixteenth, and that afterwards he acquired no title thereto, said facts having been omitted because not supposed material." The motion is not supported by evidence of the facts alleged, or by affidavit.

The practice of amending answers is not generally allowable in proceedings in equity in this country or in England. A supplemental answer, though allowable in some cases, will not be allowed to correct an alleged mistake, or supply an omission, upon motion, and where it is not made evident that a mistake exists, or that there has been in fact such omission of material facts. *Wells* v. *Wood*, 10 Ves. 401; *Verney* v. *Macnamara*, 1 Bro. Ch. R. 419; Story's Eq. Pl. §§ 896, 905; *Bowen* v. *Cross*, 4 Johns. Ch. 375; *Hughes* v. *Bloomer*, 9 Paige, 269. To allow the amendment proposed, would be

admitting a new ground of defence, existing and known to the defendants when their answers were filed, and proof taken, and which they did not omit to present and rely upon through accident or surprise. The motion is, therefore, denied.

The defendants, in their answers, do not appear to rely on titles to the timber lands derived from sales for taxes; and as those sales and the titles springing from them, as now assumed in argument, are not supported by evidence, they cannot be regarded as valid. It does not appear that any estate passed to the purchasers, or their assignees, through titles originating in sales for taxes.

On September 4, 1845, the day on which John K. Russell received the conveyance from Sawyer, he took an assignment of the first mortgage of Joseph Russell of the timber lands from Warren, a prior assignee. This transfer was negotiated wholly by the father, and the amount paid by the son did not exceed one eighth of the sum apparently due upon the mortgage. In this sale or transfer, neither Warren, nor his assignors, claimed or required the defendants or Sawyer to account for the previous operations upon the lands. Under that conveyance the defendants cannot legally or equitably retain the avails of those operations, and divert them from the purpose first intended. It is manifest that they were procured in order to redeem the last mortgage; and they were so appropriated in part at least. Having been derived from the land for that purpose, by the assent of all interested, it is but simple justice to the levying creditor, that the appropriation should not be changed, so as to affect his rights injuriously.

Although it may not be necessary, in this case, to determine the relative rights of the defendants, in respect to the estate, derived from the assignment of the original mortgage by Warren, yet it is not quite apparent that there is a subsisting incumbrance by reason of that mortgage, if it has been purchased by the avails of the operations upon the timber lands, by John K. Russell, by the procurement of his father.

The defendants contend that the second tract described in

the levy, containing three acres, was not the property of the debtor Joseph Russell. It appears however that he was in possession of it, as a part of the *farm*, that he conveyed it to Sawyer, in mortgage, as such, and that Sawyer conveyed the *farm* to John K. Russell, as the same farm conveyed to him by Joseph Russell. The deed from Pearson to John K. Russell, of July 15, 1845, embraces the "Bray lot," containing thirty acres, including this tract of three acres, but it appears that Pearson was, at most, tenant in mortgage only, and that the equity of redemption was in Joseph Russell, by whose request this deed was made to his son. The avails of the lumbering operations referred to, were sufficient to enable John K. Russell to discharge this mortgage, and the mortgage to Sawyer; and he in fact did pay to Pearson about two thirds of the mortgage debt with such avails, directly. And if that mortgage is not fully discharged, which cannot be admitted, still we hold that the defendants are estopped to claim that the *three acres* were not a part of the farm, and subject to the levy. R. S. c. 94, § 1. Equity demands that they should convey to the owner of the farm, all claim of title through the mortgage of Pearson, to that tract. For this will be just to the creditor of Joseph Russell, forced to seek payment by levy, and will work no injustice, or hardship upon either of the defendants.

But they except to the master's report; and the *first* and *third* exceptions are based upon the fact that the master refused to receive evidence of title to the lands described in the bill. The answer to these objections is, that the question of title was not submitted to the master, and he had no jurisdiction, or authority to adjudicate upon that subject.

The second exception is, that the master appropriated the net avails of timber taken by the mortgagee, or by his authority, from some of the lands embraced in the mortgage, to the discharge of the mortgage debt. The course of the master in this respect, was authorized and required by his appointment, and is unexceptionable.

The report of a master in chancery, upon facts submitted

to him will be presumed, *prima facie*, to be true, and will not be reconsidered, or set aside, for an alleged mistake or abuse of authority, unless it be clearly shown, and the correction be required in equity. The burden is on the excepting party, to establish the mistake or misconduct alleged. *Da Costa* v. *Da Costa*, 3 P. Wms. 140, note. It is a sufficient answer to the fourth, fifth and sixth exceptions, that no such mistakes, as are alleged, have been shown. The evidence before the master, on the question of rents and profits, is not stated, nor was it required to be reported by him, and cannot be considered by the Court. But if it were reported, his conclusions of fact upon the evidence will be upheld until impeached.

The seventh exception refers to a supposed error in the computation by the master, of the sum due upon the mortgage, when he regarded it as paid and discharged. But the error assumed, if it existed, would not be material, as the amount of rents and profits would far exceed the sum due upon the mortgage after correcting the alleged mistake. For such an error the report should not be set aside or re-committed. Errors in computation not affecting the result materially, may be corrected at any time, before or after confirmation of the report. 2 Madd. Ch. Pr. 507; *Mason* v. *Crosby*, 3 W. & M. 258. The master's report is accepted and confirmed.

The mortgage to Sawyer having been paid, the title of the plaintiff is relieved from incumbrance, and is complete. It has not been deemed necessary, for the disposition of this case, to determine that the conveyance of Joseph Russell to Sawyer was fraudulent, as against creditors of the grantor. It is sufficient for the plaintiff that the conveyance has been proved to have been a mortgage, and that its payment has been established. He is entitled under his prayer for general relief, to a decree, that the conveyance from Joseph Russell to Osgood Sawyer, described in the bill, was a mortgage; that the same has been fully paid; and that the defendants release and convey to the plaintiff by deed duly executed, all right, title, interest and claim to the farm described in the bill, and in the levy under which the plaintiff holds, with covenants of

warranty against all claims of all persons, claiming by, through or under them, or either of them. And it is ordered and decreed accordingly with costs for the plaintiff.

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

(*) STATE *versus* SYMONDS.

It is by the mandate of the *statute*, and not by order of the *Court*, that grand jurors are drawn, summoned and returned.

If, in the trial of causes, there be not present a competent number of *traverse* jurors, the statute gives authority to the Court to issue venires for enlarging the number.

But in case of a deficiency in the number of *grand* jurors, the Court has no such authority.

Persons added to the grand jury by virtue of a venire, issued by order of the Court in term time, are not legally members of such jury.

If, on motion in writing, in the nature of a plea in abatement, it appear that, in finding a bill of indictment there could not have been a concurrence of so many as twelve lawful grand jurors, the accused cannot lawfully be required to plead to the indictment, or be put upon trial.

Such an objection to the indictment is not too late, though not taken till the arraignment of the prisoner.

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

At a Court held in May, 1853, by adjournment from the March Term, 1852, a bill of indictment was presented to the Court, certified by D. S., as foreman, charging that the defendant had in his possession, at one time, ten counterfeit and forged bank bills, each of the denomination of three dollars, purporting to be signed in behalf of the President, Directors and Company of the Medomak Bank, and to have been issued by said Bank, he at the same time well knowing the same to be forged and counterfeit, and intending to utter and pass the same as true, &c.

The defendant being arraigned, and having had the indictment read to him, replied in writing, *that* he ought not to be held to answer to the indictment, because it was not found by

any twelve grand jurors, lawfully selected, empaneled and sworn; *that* prior to the term of the Court, held in October, 1852, *venires* were duly issued for the drawing of thirteen grand jurors; *that* pursuant to said *venires* that number of persons, [naming them] were duly selected, to continue in that office for the term of one year; *that* they appeared before the Court at said term, and were then and there duly sworn and empaneled as the grand jury for one year; *that* at the term, by adjournment, in May, 1852, when the indictment was found and returned, eleven only of those grand jurors were present; *that* at that term three other and different persons, [naming them] were associated with the said eleven grand jurors; and *that* it was by a pretended grand jury, thus constituted, that the indictment was found and returned. Wherefore he prayed judgment of the indictment, and moved that the same be quashed.

To this motion, presented in the nature of a plea in abatement, the prosecuting officer made replication in substance, *that* at the said term in May, two of the original grand jurors were absent, the one having left the State for a residence in Australia, and the other having removed and taken up his residence in another county of the State; *that* thereupon the Court issued a new *venire* for the drawing of three other grand jurors, who having been duly appointed under that *venire*, appeared in Court, and were duly sworn and, with the said eleven, were empaneled as the grand jury; and *that* it was by the grand jury, thus duly and lawfully constituted that the indictment was found and returned.

The statements of the motion and of the replication, not being in conflict, the defendant was directed to answer over to the indictment, and he thereupon pleaded that he was not guilty.

A trial was then had, and a verdict was returned against him. Whereupon he moved that judgment be arrested, for the reasons already presented in his motion above stated.

The motion was overruled. To that overruling he excepted.

Stewart, County Attorney, for the State.

At common law, both grand and traverse jurors were summoned by order of the Court. If there were no statute, it is therefore plain that the formation of the grand jury was a legal one.

The statute, whose exact language is so much relied on by the defendant, was but directory. 5 Sm. & Marshall, Mississippi, 654; 2 Cush. 149.

Suppose a grand jury duly constituted of fifteen, and four of them die, must the county be without any administration of criminal law?

By the law, a grand juror may be challenged. Suppose the challenge reduce the number to less than twelve. 2 Pick. 563; 9 Mass. 109.

After an indictment has been read, the mode of constituting the grand jury is not open to inquiry. The defendant by his counsel was present in Court during the proceedings of the grand jury, and took no exceptions. A party having opportunity to object and not choosing to object, waives the right. 15 Mass. 205; 5 Greenl. 333; 3 Greenl. 215; 4 Wend. 675; 1 Pick. 43, and note; 5 Mass. 435

J. S. Abbott and *Leavitt*, for the defendant.

Howard, J. — Every indictment must be found by a grand jury legally selected, and duly constituted, and competent for the purpose. Such jury must be composed of not less than twelve, nor more than twenty three, "good and lawful men;" and the concurrence of twelve, at least, of the panel, is necessary to the finding of an indictment. These are doctrines of the common law, which we have adopted in criminal proceedings. Our constitution requires that "the Legislature shall provide by law a suitable and impartial mode of selecting juries, and their usual number and unanimity, in indictments and convictions shall be held indispensable." Art. 1, § 7. The Legislature has prescribed the qualifications of jurors, and the mode of selecting and returning them, in chapter 135 of the Revised Statutes. It is made the imper-

ative duty of the clerks of the Courts, in the respective counties, to issue *venires* to the constables of towns, forty days before the second Monday of September, annually, directing them to cause the required number of grand jurors to be drawn, in towns specified, in the manner prescribed by statute, §§ 10 – 14; Act of 1842, c. 246, § 18. In performing these duties the clerk is an officer of the law, and acts under the mandate of the statute, and not by directions or authority of the Court, as one of its officers. So, grand juries, which are instituted as accessories to the criminal jurisdiction of the Court, are not drawn, summoned, or returned, by authority of the Court, or, of any of its officers acting in that relation.

The Legislature has required that grand juries shall be selected and returned in the same manner as juries for trial; and in respect to the latter, has authorized the Court to complete the panel, when a sufficient number of the jurors duly drawn and summoned, cannot be obtained for the trial of a cause, by causing jurors to be returned from the by-standers, or from the county at large; and in term time, to issue *venires* for as many as may be wanted. But in regard to the former, it has conferred no power upon the Court, to complete a deficient panel, by causing jurors to be returned *de talibus circumstantibus*, or in any other manner. The whole subject is within the control of the Legislature; they may give to the Court the same power, as to both juries, to complete a deficient panel, or withhold it; but unless it be given, it cannot be lawfully exercised.

In some of the States the Courts have legislative authority for ordering grand jurors to be returned from the by-standers. Burr's trial, 1, 37; where such jurors were returned, in the Circuit Court of the United States, *de talibus circumstantibus*, under the State laws of Virginia. The laws of Alabama and Mississippi, it is understood, authorize similar proceedings. In Massachusetts, in case of a deficiency of grand jurors in any Court, writs of *venire facias* may be issued by order of Court,

to cause such further number as may be required, to be returned forthwith, as grand jurors. R. S. Mass. c. 136, § 4.

It is admitted, and it also appears by the record, that, at the term when the indictment, in this case was found, the grand jury, which was empaneled at the preceding term to serve for a year, and then consisted of thirteen, had been reduced to eleven members. To supply the deficiency, three other persons were drawn and returned on a writ of *venire facias*, which issued during the term, by order of Court. These persons were sworn, and charged as grand jurors, and added to the panel; and acted in finding this bill. But as their selection for the purpose, was not in conformity to laws of this State, they constituted no part of a legal grand jury. Consequently, the indictment could not have been found by at least twelve lawful jurors, and is void and erroneous at common law; and in the spirit and language of an Act of Parliament, (11 H. 4,) should be "revoked and forever holden for none." 2 Hale, 155; Hawk. b. 2, c. 25, § 16; 3 Inst. 32; 4 Black. Com. 302; 1 Chitty's Crim. Law, 306; *Commonwealth* v. *Smith*, 9 Mass. 107; *Low's* case, 4 Maine, 439.

Upon the authority of the case last cited, the objection, that the indictment was found by less than twelve grand jurors, taken on motion in writing, in the nature of a plea in abatement, at the arraignment of the prisoner, was in season, and available. The remarks of the learned Judge, in *Commonwealth* v. *Smith*, that "objections to the personal qualifications of jurors, or to the legality of the returns, are to be made before the indictment is found," cannot be received as law, to their full extent. *Commonwealth* v. *Parker*, 2 Pick. 563; *Low's* case, 4 Maine, 448, 449; 1 Chitty's Crim. Law, 307.

Judgment arrested.

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

YOUNG *versus* YOUNG.

The lessee of a farm, by parol, where the rent is payable yearly, must have three months notice to determine his tenancy.

A conveyance of the estate, by the landlord, will not impair the right secured by the provisions of the statute to a *tenant at will.*

Nor will the commission of *waste* terminate his tenancy.

An estate at will, existing under the statutes of this State, gives to the tenant rights for a period *after* a written notice to quit, of equal validity with those acquired under a written lease for a *like period.*

And until such tenancy is terminated, trespass *quare clausum* cannot be maintained by the owner against him.

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

TRESPASS *quare clausum.*

The writ contained but one count, for breaking and entering the plaintiff's close, Aug. 31, 1852, and carrying away 50 loads of manure of the value of $100.

The defendant pleaded the general issue, and filed a brief statement, that he occupied the premises and had so done for three years under one Philander Coburn, and entered and took the manure which was his own, as he had a right to do.

The defendant had occupied the premises since Oct. 1848, without any written lease, under Philander Coburn, the owner, with whom the rent had been settled up to and for the year 1851; and he commenced labor on the farm in the spring of 1852, in the same manner he had done the previous years. The rent was paid at the end of the year.

On July 24, 1852, Coburn sold and deeded the farm to the plaintiff, "reserving all crops growing on the same, excepting hay and grass."

On the day mentioned in the plaintiff's writ, and about that time, the defendant hauled away sundry loads of manure from the barn yard of said farm and put it upon his own land, though forbidden by the plaintiff.

On the facts, the Court were to render such judgment as the law might require.

J. S. Abbott, for the plaintiff, contended, —

1. That the tenancy expired by limitation according to the

evidence in the case, and was not renewed for the year 1852.

2. The lease having expired, the defendant was liable in an action of trespass for removing the manure. *Lassell* v. *Reed*, 6 Maine, 222.

3. If defendant was tenant at will after 1851, it was determined by the conveyance of Coburn to plaintiff on July 24, 1852, and even if he had any right to remove the manure, such right would only remain a reasonable time, which reasonable time expired prior to Aug. 31, 1852, the time of the alleged trespass.

4. The deed of Coburn to plaintiff, conveyed the manure as part of the realty. *Kittredge* v. *Woods*, 3 N. H. 503.

5. Whether the tenancy was ended or not the defendant is liable. For if not ended, *it was waste* to remove the manure, and *the tenant committing waste, is at once liable to the landlord or his grantee in an action of trespass quare clausum. Daniels* v. *Pond*, 21 Pick. 367.

In the case just cited, the principles involved in the case at bar, are fully and ably discussed, and several adjudged cases considered.

Webster, for the defendant, relied upon these positions; —

1. That he was tenant at will under Coburn, and at the time of the alleged trespass his tenancy had not been terminated. He had commenced the year in which the land was sold to plaintiff, the same as former years and three fourths of the year had passed when the sale was made. He was then entitled to three months notice to quit. R. S. c. 95, § 19.

2. As he had at no time neglected to pay his rent, by the terms of his tenancy, nothing was due July 24, 1852. 12 Maine, 478; 25 Maine, 283, and he was then entitled to three months notice.

3. Nor can the sale from Coburn to plaintiff deprive the defendant of any rights he would have had, if he had occupied under a written lease. Where the rent is paid when due, the sale does not terminate the tenancy until three months have expired, and when he does not pay, the tenancy is not

terminated till thirty days notice to quit. In this case, no notice of any kind was given.

4. But if the tenancy at will was terminated by the sale, the respondent still remained in possession with the assent of plaintiff, and he was then a tenant by sufferance. 16 Mass. 1; 17 Mass. 282. In such case the action of trespass will not lie against him. 14 Pick. 525; 25 Maine, 287.

5. If the defendant be not guilty of breaking and entering, the plaintiff cannot recover for carrying away the manure. There is but one count in the writ, and the substantial charge, is the breaking and entering, and the other allegations are but aggravations of that charge, and if the substantive charge fail of proof, plaintiff cannot recover for the aggravation. 4 Pick; 239. 3 T. R. 279.

6. But if the sale of the land terminated the tenancy, defendant is after that entitled to a reasonable time in which to take off all those things, that he would have been authorized to take off during the continuance of his term, had he known when it would have terminated. 19 Maine, 252; 13 Maine, 209; 24 Maine, 242; 17 Mass. 282; Co. Lit. 56, a.

7. That the reservation in the deed under which plaintiff claims, authorized or licensed the respondent to enter, and that having license to enter, whatever he might do after his entry would not render him liable in trespass *quare clausum.*

Shepley, C. J. — The defendant appears to have been in possession of the farm as a tenant without any written lease, from October 21, 1848, to the time of the alleged trespass upon it, on August 31, 1852. That tenancy could not have terminated shortly before the time of the trespass alleged; and the landlord could not therefore have entered without notice, on the ground of its termination at that time.

While Coburn was owner he allowed the defendant to continue his tenancy as in former years, not only making no objections but approving of his doing so.

By virtue of the statute, c. 91, § 30, the tenancy, which by the common law would have been from year to year, became

one at will. It does not appear, that the defendant had neglected to pay the rent according to agreement, or that his rent was payable before the close of the year, and in such cases the tenant by statute c. 95, § 19, is entitled to three months notice to terminate his tenancy. By his conveyance from Coburn the plaintiff became the owner of the farm, subject to the rights of the tenant, which being secured to him by the provisions of the statute could not be destroyed by the conveyance.

It is insisted, that the acts of the defendant amounted to waste, and that his estate was thereby determined; and the case, *Daniels* v. *Pond*, 21 Pick. 367, is relied upon as authority for the position. A tenancy at will, by the common law, would be determined by the commission of waste by the tenant. The case cited, and the cases upon which it rests, have reference to such a tenancy at will.

An estate at will existing by the statutes of this State, gives to the tenant rights for a period, after a written notice to quit, of equal validity with those acquired under a written lease for a like period. Such rights would not be destroyed by the commission of waste by the tenant; and the landlord might be left for redress to his action on the case in nature of waste. The only count in the declaration is trespass *quare clausum*. The plaintiff failing in his proof of that cannot recover for taking the manure, which was only an aggravation of the trespass alleged. *Plaintiff nonsuit.*

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

MACE *versus* HEALD AND TRUSTEES.

Whether a person is chargable as trustee, must be determined by the facts, existing at the time of the service of the trustee process.

A mortgagee of personal property is not chargable as trustee of the mortgager, when he has no other possession of the property mortgaged.

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

THE substance of the disclosure sufficiently appears in the opinion of the Court. On the disclosure the supposed trustees were charged by the presiding Judge, and they excepted.

Foster, for plaintiff.

J. S. Abbott, for trustee.

SHEPLEY, C. J. — White and Norris, who have been summoned as the trustees of Heald, received from the firms of Heald and Brown and Heald and Eldridge a conveyance in mortgage of certain personal property to secure to them the payment of what might be due to them for supplies furnished for cutting and hauling logs. Heald was a partner in both firms. The mortgage was duly recorded. Heald also conveyed to White and Norris certain lands and received from them a written contract for their re-conveyance upon payment of the amount due from him and from the two firms, of which he was a member. The disclosure made by Norris for himself and White states, that no part of the personal property came to their possession before service of the writ was made upon them excepting two horses and twelve oxen valued at $652. After the service and before the disclosure they appear to have received other portions of the personal property.

Whether they are to be charged as trustees must depend upon the state of facts existing at the time, when service was made upon them. They had not then received from the personal property sufficient to pay the amount due to them. They cannot be charged as trustees for any of the personal property conveyed to them in mortgage, of which they had then no possession. The record of the mortgage is equivalent to actual possession for the preservation of their title, but not to make them accountable for the property as trustees. *Pierce* v. *Haines and trustee*, 35 Maine, 57.

They cannot be charged on account of the real estate conveyed to them. All fraud is denied in the owners; and there

is no sufficient proof of it disclosed to authorize the Court to charge them as fraudulent grantees, or purchasers.

Exceptions sustained and trustees discharged.

RICE, APPLETON and CUTTING, J. J., concurred.

PATTEE *versus* LOWE, *Adm'r.*

By R. S. c. 109, § 28, "no action shall be brought against an administrator, after the estate is represented insolvent, unless for a demand which is entitled to a preference, and not affected by insolvency of the estate; or unless the assets should prove more than sufficient to pay all claims allowed by the commissioners."

Proofs of *waste* and *mal-administration* are not competent to sustain an action under either of those exceptions.

To maintain an action on a claim disallowed by the commissioners on an insolvent estate, the creditor must give notice of his appeal at the probate office, *after* the return of the report of the commissioners and commence his action within three months from such return.

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

ASSUMPSIT, to recover an account due from Asa Pattee the defendant's intestate. The writ is dated March 14, 1850. The defendant pleaded the general issue, with a brief statement of the statute of limitations, and of proceedings in insolvency in the settlement of the estate of Pattee.

The plaintiff produced evidence of defendant's appointment, of the decree of insolvency, of the commission to Ingalls and Burr, appointed commissioners on the estate, bearing date June 5, 1849, returnable in six months, of the certificate of the oaths taken by said commissioners, that of Ingalls, dated Oct. 4, 1849, and that of Burr, dated Oct. 6, 1849, of the Probate Court in the county of Somerset being held on the first Tuesday of each month, and that it was held on Dec. 4, 1849, of the commissioners' report upon the claims against said estate, recorded in the office of the Register of Probate, with a minute in the margin of the record "filed December 12, 1849."

It also appeared, that the plaintiff's demand was presented

to the commissioners for adjudication at their hearing had Oct. 6, 1849, and was by them disallowed; and that on December 18, 1849, he gave the notice required by law of an appeal from their decision.

On this presentation of the plaintiff's case, the presiding Judge ruled, that the action could not be sustained, as an appeal from the commissioners, not being seasonably commenced.

The plaintiff then requested the Judge to rule, that the proceedings in insolvency, being defective as to the time of the return of the commissioners, and as to the time of their taking the oath, as appeared from the copies produced, were no bar to the maintenance of this action, which request was declined.

The plaintiff then offered to prove, that the estate was not *actually* insolvent, but that the assets were more than sufficient to pay all the debts allowed and all outstanding against said estate, and offered the inventory returned, and the defendant's account returned and allowed, together with the records of the Probate Office pertaining to the settlement of the estate, which were admitted, and show that the estate was insolvent. He then offered to prove by parol, *waste* on the part of the defendant in administering the assets of said estate, and negligence or fraud in selling the real estate, and in not opposing the allowance of illegal and improper claims, and in incurring unnecessary and extravagant expenses in the administration. All which parol proof, the Court refused to receive.

And thereupon, a nonsuit was entered, and the plaintiff excepted to the rulings of the Judge.

Webster, for the plaintiff, contended, that the commissioners of insolvency, having only six months from June 5, 1849, in which to perform their duties, and not having returned their commission within that time, their doings were of no avail. It was as though they had never acted under it. Besides they made a return on Dec. 12, seven days after the session of the Court for December, filed it in the Register's office, where it

is recorded without being presented or reported to the Judge or any decree passed upon it. This report was not brought to the attention of the Probate Judge until July 6, 1852.

If either party fails of following the directions of the statute, he loses the statute benefit intended for him. If both fail they are remitted to their common law rights.

The proceedings in the Probate Court, not being according to the course of the common law, may be impeached by plea and proof as they cannot be reversed on error. The Judge erred, therefore, in rejecting the proof offered.

J. S. Abbott, for defendant, maintained, —

1. This action must fail, because it was not commenced within three months after Dec. 12, 1849, the time of the return of the commissioners' report. R. S. c. 109, § § 17, 18, 20.

2. It was no valid objection, that their report was not returned until after the expiration of six months. No claim was proved after that time. Section 12 is *directory*, and a short delay after the expiration of the period of six months cannot vitiate the proceedings of the commissioners.

3. The commissioners were under oath, as appears by plaintiff's showing, during all their proceedings in receiving and acting upon claims. Their return, showing that they had given the required notice, is under oath. It is not necessary that they should have been sworn before giving notice. But if otherwise, it is not proved that they were not sworn previously to giving notice; and, further, this plaintiff cannot, in this action, take any advantage of such defect, if it be a defect.

4. The record evidence, offered by plaintiff, shows that the estate is actually insolvent, and the proposed oral proof is inadmissible. If any such facts, as suggested, exist, (as they do not,) the proper place for investigating them, is in the Probate Court.

HOWARD, J. — The plaintiff proved that the estate of the defendant's intestate was duly decreed insolvent; that commissioners of insolvency were appointed, to receive and examine claims against the estate, who accepted the trust, and

acted under the commission; that at a time and place appointed by them, creditors to the estate presented and proved their claims, and that his claim was then presented and disallowed by the commissioners; and that they undertook to return to the Judge of Probate a list of all claims laid before them, with the sums allowed, in pursuance of the provisions of the statute, on December 12, 1849. The plaintiff being dissatisfied with the disallowance of his claim, appealed from the decision of the commissioners, and gave notice in writing of his appeal, at the Probate Office, on the 18th of the same month. On March 14, 1850, he brought this suit to determine his claim, at common law.

If the proceedings under the commission of insolvency were conformable to law and valid, this action not having been commenced within three months after the report of the commissioners was returned, was not seasonably brought, and cannot be sustained. R. S. c. 109, § 20.

But if those proceedings were defective, as alleged by the plaintiff, then there is no evidence that a report of the commissioners was returned before notice of the appeal claimed was given. Notice before the return of the commissioners is not in compliance with the requirements of the statute, but premature and inoperative. Subsequent notice is made a prerequisite to the maintenance of the action. R. S. c. 109, § § 17, 18; *Goff* v. *Kellogg*, 18 Pick. 256.

By the statute referred to, § 28, no action shall be brought against an administrator, after the estate is represented insolvent, unless for a demand which is entitled to a preference, and not affected by insolvency of the estate; or unless the assets should prove more than sufficient to pay all claims allowed by the commissioners. The proof offered did not bring the plaintiff's case within the exceptions, and it was not competent in this action, as tending to prove waste and mal-administration, and it was, therefore, properly rejected.

Exceptions overruled, and nonsuit confirmed.

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

Gray & *ux. versus* Hutchins.

Before the enactment of R. S., a disseizin of the owner of land could only be effected, by one holding it *adversely* to his title.

The owner of lands in possession of another, before the R. S., when such possession was not *adverse*, might make an effectual conveyance of the land.

If one enters and occupies land, under a bond from the owner to convey upon certain payments being made, he cannot set up such possession as adverse.

Where the tenant claims title to land by *adverse possession*, evidence how the land was run out and monuments established, when he entered upon it under a contract with the owners, is immaterial, and may rightfully be excluded.

The grantor cannot by his testimony limit the effect of his deed.

Exceptions. Tenney, J. presiding.

Writ of Entry, for a part of lot No. 15, in Madison, tried on the issue of *Nul disseizin.*

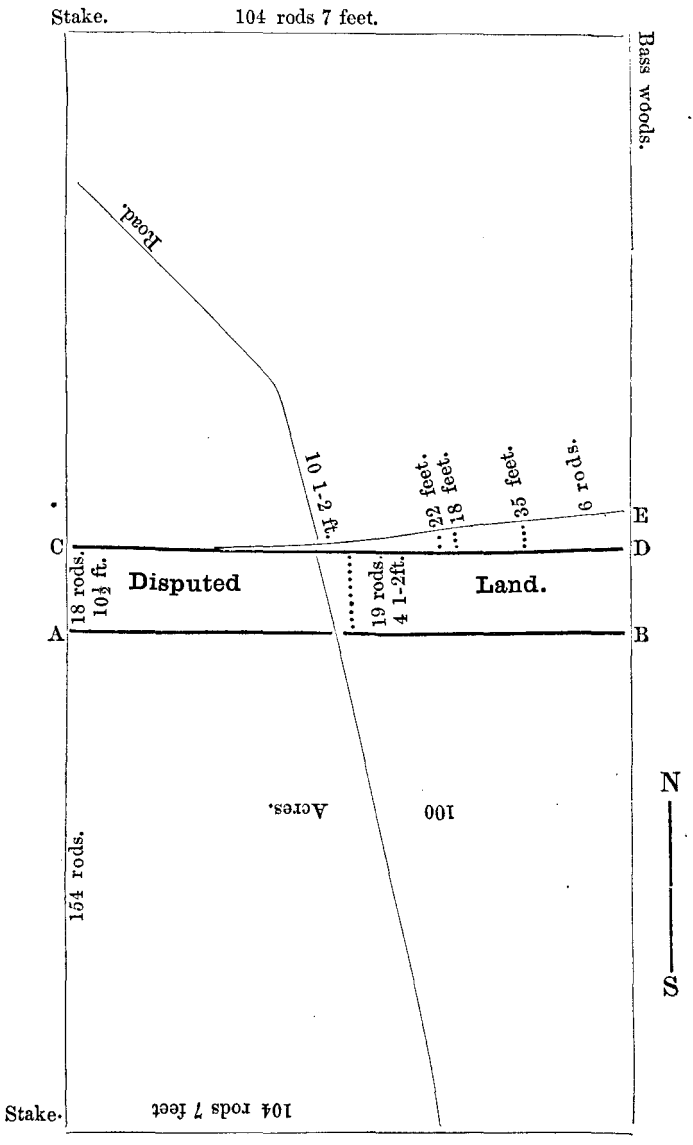
The date of plaintiff's writ is Nov. 7, 1850.

The demandant claimed title, by intermediate deeds of a similar tenor, through one from John G. Neil to Laban Lincoln, dated and recorded in November, 1813, which described the following tract, "sixty acres of land lying in Madison in the county of Somerset, on the north end of lot No. 15, being all the residue and remainder of said lot after one hundred acres are measured off from the south end of said lot, be the same more or less."

The tenant introduced a deed from John G. Neil to James Neil, dated and recorded in the early part of 1814, describing the following tract "situate in said Madison, being one hundred acres on the south end of lot No. 15, and all the land in said lot except so much as I *deed* to Laban Lincoln, it being part of the land deeded to me by Moses Barnard." Also a deed from said James to Washington Rowell in 1842, covering a part of the disputed territory, and a deed from said Rowell to tenant, made in 1848, of the same parcel.

The diagram will more clearly show the tract in dispute.

Gray *v.* Hutchins.



The 100 acres by measure, described in the deed to James Neil, extends northerly to the line A. B., but the tenant claimed that it extended to a fence C. E, at the north-west corner of his land, there being a stake at C. as originally run.

The tenant also introduced testimony tending to show that he had had the premises in possession for such a length of time as to have acquired an absolute title, and proved by one Jediah Hayden, that James Neil forty years since cut down trees on the south part of lot 15, as far north as the fence now stands, dividing said lot, and that Neil and those claiming under him have occupied up to the same bounds ever since his acquaintance with it. He also proved by John McLaughlin a similar occupation.

He also read the deposition of John G. Neil, subject to objection, to the effect, that this lot belonged to one Moses Barnard, who requested him to run off and survey to James Neil 100 acres from the south part of lot 15, and that he did so on April 20, 1807, with the assistance of Timothy Brown and Reuben Kincaid as chairmen, and that Barnard gave James Neil a bond for a deed. The witness bought all of Barnard's rights in Madison, and in 1814, conveyed to said James the same parcel of land of No. 15, by him surveyed in 1807. The remainder of the lot he intended to convey to Lincoln.

The tenant then offered the deposition of Timothy Brown, which was objected to and excluded by the Judge. The deponent stated, that he was employed by John G. Neil in 1807, to assist in running off 100 acres from the south end of the lot to James Neil, and described the manner of running it out and the location of the monuments.

The tenant offered James Neil as a witness, but he was excluded on the ground of interest, it appearing that he had a suit pending in Court for an alleged trespass on the premises, against one of the demandants, and there was another similar suit against him.

The demandant proved by Washington Rowell, that not earlier than 1832, and not later than 1838, when one Scribner lived on the part of the lot now occupied by the demandant, James Neil stated "all he bought was 100 acres of the south end of the whole lot, and that was all he could hold, excepting that he agreed to pass deeds with Scribner, fixing the line upon *that* fence." He did not say where the true

line would be, excepting that 100 acres would not go to that fence, (the fence to which the tenant claims.)

The tenant contended, that if either of the grantors through whom demandant claims was disseized at the time of his conveyance, all being prior to the R. S., the title of demandant would fail, they pretending to no other title than a paper one, none of them having exercised any acts of ownership over the premises, all of them, for aught appearing, having acquiesced in the adverse possession of James Neil.

The Court did not so instruct the jury, but said to them *that* if they believed James Neil did not hold the land in dispute adversely to the true owner previous to the year 1832, he gained no title by his occupancy, and it was for the jury to consider whether said Neil understandingly disclaimed title in the disputed land to Washington Rowell, and whether Rowell had stated the conversation with Neil correctly; and if they believed Rowell's testimony, considered in connection with all the other evidence in the case, they would determine whether said Neil did hold the premises in dispute adversely to the true owner, and if he did not hold them adversely up to the year 1832, the previous possession of said James Neil would be qualified, so that it would not amount to a dissiezin of the true owner; but if said James Neil had held adversely to the true owner for more than twenty years before the the year 1832, or for twenty years together before the date of the writ, a title would be acquired by said Neil by disseizin, but if Neil did not so hold, but in submission to the true owner, then the rights would pass by the respective deeds in the same manner as if Neil had not been in possession; and on the other hand if Niel had held adversely to the true owner during his occupation, he having acquired thereby a title, it was immaterial whether any rights passed by the deeds referred to, under which the demandant claims.

As to the deposition of John G. Neil, the Judge remarked to the jury, that the facts therein stated could not limit the effect of his deed to Laban Lincoln, made afterwards, and on that point they would disregard it.

At the close of the charge, the Judge read to the jury, R. S. c. 147, § 11, that they might understand what was necessary to constitute a disseizin, and copied the words of the section read, and placed it in the hands of the jury on their retirement, after having explained the possession required to amount to a disseizin.

The verdict was for demandant, and the tenant excepted to the rulings, instructions, directions and acts of the Judge.

Leavitt and *Webster*, for tenant.

J. S. Abbott, for demandant.

HATHAWAY, J. — The title, by deed, to the land in dispute is clearly in the demandants. The question is whether or not the tenant and those under whom he claims, had acquired a title by possession.

The possession of James Neil according to the testimony of J. G. Neil commenced in submission to Barnard's title and so continued until January 29, 1814. The deposition of Brown, stating how the land was run out and marked in 1807, could not affect the title of the owner at that time or of those acquiring title from him, because there was clearly no disseizin prior to 1814. The testimony of Brown therefore could not affect the rights of the parties and might, for that reason, be properly excluded.

Those rights must depend upon the question whether or not James Neil held the demanded premises adversely, claiming title twenty years after he received his deed in 1814. The testimony of Rowell had a tendency to satisfy a jury that Neil, in 1832 or 1833, did not claim to own more than one hundred acres, although he had more in possession. The deposition of Spencer, said to have the same tendency, from the description of it, seems to have been properly admitted. (No copy of it was furnished the Court.)

The rulings of the Judge, who presided at the trial, appear to have been correct and the exceptions are overruled.

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

MALBON *versus* SOUTHARD.

The consideration of a negotiable promissory note, cannot be inquired into, in the hands of an innocent indorsee, for value.

A negotiable note, transferred before it became payable by delivery only, may be indorsed by the administratrix of the payee after his death, with the same effect, as if done personally by the payee.

Where one, not otherwise a party to a note, puts his name upon the back before it is delivered to the payee, at the request of the maker, he thereby becomes an original promissor.

And *such relation* is not changed or varied, although he adds to his name the words "responsible without demand or notice."

ON FACTS AGREED.

ASSUMPSIT, on a note of the following tenor: —

"Gardiner, Sept. 6, 1850. — For value received I promise to pay to the order of Levi Higgins the sum of one thousand dollars, in twelve months from date, at the Gardiner Bank, in Gardiner, interest after six months. "Charles Baker."

The consideration of the note was for a quantity of lumber lying in Kennebec river at Richmond, which the payee refused to sell to Baker on his own responsibility, and Baker thereupon procured the defendant to put his name on the back of said note, which he did, before it was delivered to the payee. On the next day subsequent to the date of the note, the defendant also added to his name "responsible without demand or notice."

In October, 1850, Levi Higgins sold the note to plaintiff for value, but omitted to indorse it through carelessness.

In January, 1851, Higgins died, and Charlotte Higgins was appointed administratrix on his estate, and she indorsed the note as such in May, 1851.

When the note became due, payment was demanded at the bank, and being refused was properly protested.

On these facts, if the action was not maintainable a nonsuit was to be entered, otherwise the defendant to be defaulted, unless he may legally introduce evidence to show that the payee in said note misrepresented the value, quality and quan-

tity of the lumber which was the consideration of the note; in that case the action to stand for trial.

D. D. Stewart, for the plaintiff, to the point that the defendant was chargeable as an original promisor, cited, 11 Mass. 436; 19 Pick. 260; 24 Pick. 64; 31 Maine, 536. And that the administratrix had power to indorse the note, Story on Prom. Notes, § § 120, 123.

J. S. Abbott, for defendant.

1st. The contract is a guaranty and is not negotiable. *True* v. *Fuller*, 21 Pick. 140; *Springer* v. *Hutchinson*, 19 Maine, 359.

2d. The misrepresentations of the payee, proposed to be proved, show fraud in the inception of the note, and this fraud would constitute a good defence, unless the holder can show that he came fairly by the note and without any knowledge of the fraud. *Aldrich* v. *Warren*, 16 Maine, 465.

Howard, J. — The note in this case was negotiable, and was transferred before it became payable, by the payee to the plaintiff, by delivery, and for value. The indorsement by the administratrix of the payee, after his death, would have the same effect upon the negotiability of the note, as if made by him.

Upon the death of the holder, the right of transfer of negotiable paper vests in his personal representative, as well as the power to indorse, and perfect the negotiation of such paper previously transferred by him without indorsement. *Rawlinson* v. *Stone*, 3 Wils. 1; same case, cited as *Robinson* v. *Stone*, 2 Stra. 1260; Chitty on Bills, 201, (11th ed.) 237; Story on Prom. Notes, § § 120, 123.

There is no evidence that the plaintiff was apprised of any matter tending to discredit the note, or which would constitute a defence to any portion of it. He must, therefore, be regarded as an innocent indorsee, and *bona fide* holder for value, and the supposed defence is not available, as against him.

By placing his name upon the back of the note, when not

otherwise a party to it, before it was delivered to the payee, and by request of the maker, he became an original promisor; unless the addition of the words "responsible without demand or notice," change the character and legal import of his indorsement. It is not perceived that they can have that effect. For, without the addition of those words he became responsible, without demand or notice, by presumption of law, and with it, the responsibility was expressed, in part, but not changed. *Colburn* v. *Averill*, 30 Maine, 310; *Irish* v. *Cutter*, 31 Maine, 536; Story on Prom. Notes, § 58, and cases cited by the author, and by the plaintiff. The liability of the defendant is, therefore, that of a joint and several promisor.

Defendant defaulted.

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

IRELAND *versus* TODD.

A party will not be bound by a contract, entered into on his behalf, by *his attorney at law*, without previous authority or subsequent ratification.

Thus when an attorney at law received a mortgage on real estate, and obtained possession of the mortgaged premises, but before it was foreclosed, the money due thereon was paid, without deducting the rents and profits, and the attorney gave an obligation in the name of the mortgagee to repay that amount, when ascertained by referees agreed upon; in an action on the award; — *Held*, that the mortgagee was not bound by the contract.

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

ASSUMPSIT. The writ contained three counts. 1. For money had and received. 2. On an agreement to refer and award. 3. On the award.

The plaintiff introduced in evidence, a receipt of the following tenor: — "Bangor, April 20, 1849. Received of Coburn Ireland $261,33, being amount due on his notes and mortgage to Chas. H. Todd, after deducting $50, given up, and the same is paid for redeeming the property from said mortgage and to discharge his debt to said Todd; and I agree

to pay back to him whatever sums shall be fixed upon as the true value of the rents and profits of the farm in said mortgage, over and above the value of the improvements which have been made thereon by the tenant in possesion, since the occupation thereof under the writ of possession, issued on the mortgage; said sum to be determined by Jacob Fish and Walter Haines, and in case they cannot agree, they may choose a third person and the decision of a majority is to be.

"Charles H. Todd, By Geo. B. Moody his Att'y."

The plaintiff also put in a letter to said Fish, signed like the above receipt.

The attorney of the plaintiff testified, that, at his request, he assisted him to settle with Moody about the mortgage, and that he paid the sum specified in the receipt as the full amount of the mortgage, making no allowance for rents and profits, and that the mortgage was discharged. The agreement was made in consideration of the plaintiff's paying the whole, as they could not agree upon the rents and profits. They went to the mortgaged premises in Chester, and the witness carried a letter from Moody to the tenant. Moody selected Fish, the plaintiff selected Haines, and as they could not agree, those two selected Andrew J. Heald, and those referees made an award in writing, which the witness brought away, and was produced, and in these words:—

"Chester, April 23, 1849.

"The undersigned having been appointed by Coburn Ireland, mortgager, and Charles H. Todd, mortgagee, through Geo. B. Moody, his attorney, to appraise and determine the value of the rents and profits, over the improvements of the Todd farm, so called, in said Chester, for the two seasons past, during which the said mortgagee has been in possession for conditions broken, award and determine that the said Todd shall pay the said Ireland the sum of one hundred and thirty-one dollars.

"Jacob Fish,
"Walter Haines,
"Andrew J. Heald,
} Appraisers."

This award, on his return, he showed to Moody, and he detained it until the trial. The witness gave the letter of Moody to the tenant on the farm, and he acted as attorney for defendant before the referees.

The plaintiff also put in the deposition of said Moody, in which he said he received from defendant the mortgage referred to, and after commenced a suit or suits in relation thereto, but had had no correspondence with him since the mortgage was given, to his recollection, and did not know where he was. He signed the paper introduced, and afterwards paid the plaintiff $100, being all, in his opinion, and more than could legally or equitably, be exacted of said Todd.

The $100 was paid in consequence of giving that paper. His name was under the action for defendant in this suit, and he had also employed counsel in the case. It also appeared the mortgagee had taken possession of the mortgaged premises. The case was hereupon taken from the jury and submitted to the full Court, with the agreement that upon so much of the testimony as was legally admissible, they might render judgment for the plaintiff or defendant as the law and the evidence may require.

Coburn, for plaintiff.

1. In these proceedings Moody acted as the agent of the defendant. He had at the time, the possession of the mortgage and the execution recovered on the mortgage notes. He had no personal interest in these papers. The defendant lived out of the State. This must be sufficient to establish a *prima facie* case of authority.

2. The defendant has received the money of plaintiff which he ought not to retain. The rents and profits are due. He has actually the sum of $31 in his hands. If the award is not binding, it may still be evidence of the sum retained in his hands.

3. The defendant has waived any objection to the proceedings by a part payment of the sum awarded.

4. That the defendant is liable for waste, I refer to 4 Kent's Com. 167, and cases there cited.

J. S. Abbott, for defendant.

1. No authority is proved in Moody to bind Todd, as claimed in this suit.

2. The paper signed by Fish and others is not binding or valid as an award, nor is it legal evidence of an appraisal. No notice was given of the time and place of hearing. No appearance by defendant nor by any one for him *authorized to appear*. No publication of the award by referees to the defendant. The appraisers do not appear, by their return, to have kept within the limits prescribed to them, and in fact transcended their authority, as shown by Fish's letter, which was received *without objection*.

There is no ground to consider doings valid as an appraisal; they don't show any result; don't show amount for rents and profits, as compared with the mortgagee's improvements.

3. Nothing is equitably due. The amount in the appraisers' certificate, required to be paid, is $131 00

Paid by Moody, 100 00

31 00

Ireland did not pay the am't due on the mortgage by $50 00

Ireland *equitably* should pay back 19 00

4. By the terms of the agreement of April 20, 1849, and the subsequent proceedings, nothing is due to the plaintiff. Defendant was to pay "the amount of rents and profits."

The appraisers determined the rents and profits to be $100, damage to house $25, damage by cutting timber $6,00 and the $100, for the rents and profits has been paid.

J. Baker, in reply, contended that all the items in the award, were legitimately within the scope of rents and profits. The submission authorizes the referees to decide the rents and profits over and above the *improvements*. This merely required them to go into the management of the estate good or bad. Had he bettered it or made it worse? The affirmative included the negative, and they were so commingled that they could not be separated. The referees simply found the *improvements* a negative quantity, which being transposed

from the defendant's side to the plaintiff's becomes plus. 1 Hilliard on Mort. 161; *Weston* v. *Stuart*, 11 Maine, 326.

Plaintiff evidently has a right of action for this waste in some form, and the Court will lean to the support of this action to avoid litigation and promote justice.

But every item is within the legal term of rents and profits. Damages to house, means only wear and tear, not destruction or strip; *use* of farm, that is, the land separate from buildings; damage cutting timber $6. The appraisers made three items of what they might have united in one. The question was, how much benefit the defendant received from the estate. — Answer, $25, from house, &c.; $100, from farm; $6, from timber.

The timber certainly is within rents and profits, and should be applied to the payment of the mortgage. 1 Hilliard on Mort. 161.

Howard, J. — The evidence does not support the count in the declaration for money had and received. The amount assumed to have accrued as rents and profits, if it could be regarded as money in the hands of the defendant, under the circumstances, had been paid to the plaintiff before the commencement of this action.

The defendant was not a party to the agreement of April 20, 1849, though it purports to have been executed in his name, by Moody, as his attorney. No authority, however, has been shown by which the attorney could impose upon him the obligations of such a contract; nor is there any proof that it has been ratified by the defendant. Consequently, he is not bound by the agreement, or the supposed award resulting from it, and may legally repudiate both.

Upon the evidence submitted, the plaintiff is not entitled to judgment on either count, and according to the agreement, a nonsuit must be entered.

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

SKOWHEGAN BANK *versus* BAKER *& al.*

Upon a promissory note, the owner can maintain no action in the name of another, without his express or implied consent.

Where a note is made payable to, but not discounted by a bank, and it has no interest in it whatever, an action thereon commenced in its name and prosecuted without its authority, cannot be sustained.

Whether an action on such a note, could be maintained in the name of the bank, even with its assent, *quere*.

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

ASSUMPSIT, on a promissory note, payable to plaintiffs or order at the bank.

At the term the action was entered, the defendants caused notice to be entered on the docket, that the plaintiffs' appearance was called for. The counsel in answer to the call, stated that he received the note from a person claiming to be the lawful holder of the same, and was by him directed to bring the suit. His appearance was allowed.

At a subsequent term, without waiving the call, the defendant pleaded the general issue which was joined.

The note was introduced, and defendants then showed by the cashier of said bank, that the note in suit was never discounted by the bank, and they claimed no interest in it.

The defendants also called the counsel for the plaintiffs, by whom it appeared, that he received the note of Abel Nutting, who claimed to be the owner, and directed the commencement of the suit, who also informed him that he received the note for value of one Hill. It was also testified by him that he had received no directions or authority from said bank or any of its officers in relation to the note.

Upon this evidence, the Court were to draw such inferences as a jury might, and render judgment by nonsuit or otherwise.

Leavitt, for plaintiffs.

J. S. Abbott, for defendants.

1. The note sued was never discounted by the bank, and was never offered for discount. There has never been any

contract or agreement, express or implied, between these parties. Nor has there been any transaction out of which any implied promise could arise.

Hence this action, which is founded upon contract, cannot be maintained.

2. There has been no waiver of the call for plaintiffs' appearance; and the facts show no authority to commence this action in the plaintiffs' name. *Prescott* v. *Brinley & al.* 6 Cush. 233; *Adams Bank* v. *Jones & al.* 16 Pick. 574.

APPLETON, J. — The note in suit was made to be discounted at the Skowhegan Bank. The evidence conclusively shows that it never was discounted there, and that the bank has no interest direct or indirect in the result of this action. It never authorized its commencement and does not now sanction its further prosecution. The right of the attorney, assuming to act for the plaintiffs, to appear, was seasonably contested, and no authority from the bank was shown. In a case like the present the law is well settled, that no action can be maintained without an express or implied assent on the part of the plaintiffs. *Adams Bank* v. *Jones*, 16 Pick. 574. As the note was made to be discounted at the Skowhegan Bank and as the surety signed with the expectation that it would be so discounted, it is by no means certain that the action could be maintained with their assent, as they have no interest in the demand. *Prescott* v. *Brinley & al.* 6 Cush. 234. *Plaintiffs nonsuit.*

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

LANG *versus* WHITNEY.

The property in a judgment, recovered by a guardian in the name of his ward, rests in the ward.

And the guardian has no *lien* thereon for advances made in its recovery.

Nor can he maintain any action after the death of his ward against an officer, for the money collected on *such* judgment.

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

Case, against defendant, as late sheriff of Somerset county, for neglect to pay over money collected on an execution. The writ was dated Aug. 31, 1853. Defendant pleaded the general issue, and filed a brief statement, of payment of the sum collected to an administrator of the real owner of the judgment and execution.

The plaintiff, in August, 1850, was appointed guardian of Abigail Badger, and gave the required bond. Abigail was possessed of a contract with one Jonathan Badger & al., about which a dispute arose, and the matter was submitted to referees, by the plaintiff and the other parties to the contract, and bonds were interchanged to abide by the award. A report was made in favor of the plaintiff as such guardian, and he subsequently commenced a suit on the bond and recovered judgment, as guardian, for the amount allowed by the referees.

On Feb. 11, 1852, execution was issued on that judgment, and put into the hands of defendant, then sheriff, who on March 31, 1852, collected the same.

On April 8, 1852, the plaintiff demanded of the defendant, the money by him collected on this execution.

In procuring the judgment, the plaintiff had expended large sums of his own money, in payment of witnesses and counsel besides his own personal expenses and time spent in preparing for trial, for which he had no remuneration.

Abigail Badger died in May, 1852, and one James B. Dascomb was appointed administrator on her estate June 1, 1852.

On Oct. 13, 1852, the defendant paid over the money collected on this execution, to said administrator, excepting the costs which were paid to the attorney in that suit.

The plaintiff settled an account with the Judge of Probate, in which he was allowed for his expenditures in this suit.

In the inventory, returned by the administrator of Abigail, no mention was made of this judgment, or of the money in the hands of the defendant. [Objections were made to the

admissibility of some of the evidence which it became necessary to notice.]

The Court were to render such judgment upon the evidence as the law requires.

D. D. Stewart, for plaintiff.

1. The plaintiff gave his bond to the defendants in the execution, to abide by the award of the referees and perform it. He gave it describing himself as guardian. He received the defendants' bond to the same effect. It was made to him as guardian and so described him. But although he was described as guardian, it is clear upon the authorities that he bound himself *personally*. He could not bind his ward by any deed or contract he might execute, nor the estate of his ward. *Jones* v. *Brewer*, 1 Pick. 317; *Davis* v. *French*, 20 Maine, 21; *Thatcher* v. *Dinsmore*, 5 Mass. 299; *Foster* v. *Fuller*, 6 Mass. 58; *Sumner* v. *Williams & al.* 8 Mass. 162; *Whiting* v. *Dewey*, 15 Pick. 428.

The plaintiff had authority to submit the claims of his ward to arbitration. *Weston* v. *Stuart*, 2 Fairf. 326.

It is clear, therefore, that the bond given by Badger and Newhall to the plaintiff, to abide by and perform the award of the referees, was not the property of his ward nor had she any right, title or interest in it.

2. But if the description of the plaintiff as guardian in the arbitration bond should not be treated as surplusage, and if the bond be considered as belonging to the estate of the ward, still, the moment judgment was obtained on it by the guardian, whether in his own name or in that of the ward by him, is immaterial, he being a party to the record, it became *a debt due to him* and *was assets in his hands for which he was responsible* to the estate of his ward. *Talmage* v. *Chapel & al.* 16 Mass. 71; *Bonafous* v. *Walker*, 2 D. & E. 128; *Pierce* v. *Irish*, 31 Maine, 260.

The execution issued on such judgment, therefore, being merely the *fruit of the law*, must be considered as the property of the plaintiff; was rightfully placed by him in the

hands of the defendant, and the money collected on it by the defendant was rightfully demanded of him by the plaintiff, and upon his refusal to pay a right of action vested in the plaintiff which this suit is brought to enforce.

3. This action should be maintained because plaintiff expended in good faith, and necessarily, a large amount of money in collecting the debts of his ward which he was bound by law to do, and common justice, not to say common sense, would require that he should be made whole. This is all he asks in the present suit. But the *statute* would seem to settle this question. By § 21 of c. 110 of the R. S. the guardian is required to sue for all debts due his ward; by § 20, he is required to pay all debts due from his ward, and by § 15, he is required to give bond that among other things, he will, "at the expiration of his trust, pay and deliver over all moneys and property which, *on a final and just settlement of his accounts*, shall appear to be remaining in his hands." Here is a direct authority to him to retain enough from the estate of the ward to make himself whole. No other sensible construction can be put upon the words of the statute. Does it come to this, then, that because the defendant wrongfully refused to pay to the plaintiff the money collected on the execution when demanded, he is to be deprived of his just rights, rights secured to him by statute? Can the administrator now step forward, avail himself of the defendant's wrongful refusal, and take possession of funds rightfully belonging to the plaintiff and which, but for that wrongful refusal of the defendant, would now be in his hands? It is very clear that if the defendant can defend this action successfully by showing that he has paid this money over to the administrator, if such a defence can be allowed to be set up by him, then the plaintiff is without remedy. If the money is rightfully in the hands of the administrator, he can only pay it out in the manner and for the purposes authorized by the statute.

4. *The rights of the administrator could only commence when those of the guardian terminated. Those rights did*

not extend to any other or larger part of this money than actually belonged to the estate he represented. They could not by possibility embrace the whole sum, because the plaintiff was justly entitled to retain enough of it to reimburse him for the sums he had paid out in obtaining the judgment and execution. *The balance only belonged to the estate.* The defendant claims, that he has paid over this whole sum to the administrator. But it is entirely clear that the administrator could never be entitled to receive the whole of it, he might not be entitled to any part of it. That question could only be determined when the guardian's account should be settled. The defendant therefore paid over the money in his own wrong, and such payment furnishes no defence to this suit.

5. But it is denied that a judgment recovered by the guardian and which has become assets in his hands and for which he is responsible upon his bond, is in fact or law a chose in action of the party deceased. The rights of the guardian have intervened to so much at least as will reimburse him for his services and money expended as guardian, *and the only claim which the ward when in life* or his heirs *or creditors could set up to the proceeds of such judgment*, or to the assets in the hands of the guardian, would be the balance remaining upon a just settlement of his account, with the Judge of Probate. The administrator succeeds to the rights of the deceased and can have no greater or other rights as against the guardian than the ward had. It follows that he could only claim *such balance* as might remain in the guardian's hands, and could only reach *that* through the intervention of the Judge of Probate. It is clear that he could claim no *specific fund* growing out of a *particular debt* collected by the guardian, as in this case he has attempted, but only a *general balance* due from the guardian. Any such judgment and execution therefore, as in the present case, would not be a *chose in action* of the party deceased, but assets in the hands of the guardian.

J. S. Abbott, for defendant, made a written argument,

which embraced the various points in the case, but which have become immaterial from the view taken of it by the Court. So far as it bore upon the point on which the case turned, he maintained, that if the plaintiff has any legal or equitable claim it is not *in rem*, against this particular fund. He has, by no law, any lien upon this money, and he must prove and collect his demand, in the same way as the other creditors of the estate of said Abigail.

It would be an anomaly to allow the creditor of the estate of said Abigail to maintain an action against a debtor to that estate. It is believed, that the proposition is too absurd to require or admit of argument to overthrow it.

SHEPLEY, C. J. — By the report, these, among other facts, are presented. The plaintiff as guardian of Abigail Badger, agreed with Jonathan Badger and Henry C. Newhall, to refer a claim, which his ward had against them. Badger and Newhall executed a bond to the plaintiff, as guardian, and he one to them, conditioned to abide and perform the award of the referees. An award was made finding a certain sum due to the ward, which Badger and Newhall refused to pay. The plaintiff commenced a suit on the bond taken to himself in the name of his ward, suing by her guardian, and a judgment was recovered in her name for the amount found to be due to her by the award. Upon an execution issued on that judgment, the defendant, as sheriff, collected the amount of it, and a demand for the money was made by the plaintiff upon him.

It will not be necessary to notice many of the points made by the counsel of the respective parties. It may be proper to state, that Abigail Badger died, and that James B. Dascomb has since been appointed her administrator, to whom, upon an indemnity given, the defendant has paid the money collected, excepting the costs, which were paid to the attorney having a lien upon them.

The judgment, for satisfaction of which the money was collected, having been recovered in the name of the plaintiff's

ward, and not, as it might have been, in his own name, the property in it was vested in the ward, not in her guardian. He could not be considered as the real and she the nominal party, for the original cause of action was hers. If the judgment had been recovered in his name, the beneficial interest in it would have been in the ward, and her guardian would have been obliged to credit her in his account as guardian with the whole amount of it; and have sought an allowance in the Court of Probate for the time and money expended in its recovery. He has not become the owner of any part of that judgment by reason of the money by him advanced to recover it; nor does the law give him a lien upon it on account of such advances. Having no legal or equitable interest in the money collected he cannot maintain this suit.

Plaintiff nonsuit.

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

COUNTY OF KENNEBEC.

(*) SNOW *versus* CUNNINGHAM.

From an attachment of a vessel on the stocks and of "the spars belonging to the same," it will not be considered that the spars were a part of the vessel.

Articles attached on writ, which are liable to perish or waste or be greatly reduced in value by keeping, or which cannot be kept without great expense, may be restored to the debtor, upon his giving bond to account for the value, ascertained by an appraisal.

When such articles are attached on a writ, and are subsequently attached, *together with additional articles*, by the same officer, upon a writ in favor of another creditor, such additional articles, before they can be restored to the debtor, must be appraised and bonded separately from those attached on the first writ.

If the officer restore such additional articles to the debtor on bond, without having caused them to be thus separately appraised and bonded, it is an official misfeasance, making him liable to account to the last attaching creditor for their value, if needed for the payment of his execution.

On Facts agreed.

Case against the sheriff for the default of his deputy, Barker, in neglecting to levy the plaintiff's execution upon the property of one Laiton, which had been attached by Barker upon the writ.

Barker had attached a vessel upon the stocks, by virtue of a writ in favor of one Huston against Laiton. He subsequently attached the same vessel on nine other writs.

Upon the eleventh writ placed in his hands he attached the vessel, subject to the former attachments, and also attached "a lot of rigging on board the vessel and the spars belonging to said vessel, this being the first attachment made upon the rigging and spars." He then, upon three other writs, attached the vessel, rigging and spars.

He then attached, upon the *plaintiff's* writ, the vessel, subject to fourteen prior attachments, and also "a lot of rigging on board said vessel and the spars belonging to the same vessel, subject to four prior attachments of said rigging and spars."

The plaintiff recovered judgment and seasonably delivered his execution to Barker to be levied on the property attached.

Upon that execution, Barker made return as follows: —

"Lincoln ss. Nov. 9th, 1849. By virtue of the within execution I have this day demanded of Charles C. Laiton, Moses Call, Nathaniel Bryant and Henry C. Lowell the payment of the within execution, as said Call, Bryant and Lowell are bondsmen for said C. C. Laiton for the property attached on the original writ on which the within execution was issued. I therefore return the within execution in no part satisfied. "E. W. Barker, *Deputy Sheriff.*"

This suit is brought against the sheriff for the neglect of the deputy to satisfy the plaintiff's execution out of the property attached.

The first attachment upon the vessel was made March 28, 1848, on the writ as above stated in favor of Huston. Upon that writ the officer made return of that attachment under

that date, and also, under date of June 27, 1848, returned as follows: —

"By virtue of this writ I have herewith returned the bond accompanying this writ, said bond having been taken pursuant to the provisions of the 53d, 54th, 55th, 56th and 57th sections of chapter 114 of the Revised Statutes, and also a certificate of my doings as provided in section 58 of said chapter. "E. W. Barker, *Deputy Sheriff.*"

Barker also, with said writ, returned the bond above referred to, together with his own official certificate that Laiton, the debtor on the —— day of June, 1848, being defendant in the suits on which the "vessel with the spars, &c.," were attached, made application to have the vessel appraised; and that after certain preliminary proceedings, (which are described,) an appraisement of said vessel, spars, &c. was made at the sum of $12000, whereof the debtor gave the requisite bond, and that he delivered the "vessel, spars, &c." to the debtor, all pursuant to R. S., c. 114.

The bond recited the appraisal of the "vessel, spars, &c." at $12000, and that the "vessel, spars, &c.," had been delivered by the officer to the debtor, and was conditioned to pay to the officer the $12000, or satisfy the judgments which might "be recovered in the suits in which the vessel and spars were attached," if seasonably demanded, &c.

If upon the foregoing facts the Court should be of opinion that the plaintiff has maintained his action, the defendant is to be defaulted, and the plaintiff is to have judgment, damages to be assessed by the Court on hearing; otherwise the plaintiff is to become nonsuit.

Paine, for the plaintiff.

The officer's return shows, that he attached on the plaintiff's writ the vessel subject to fourteen, and the rigging and spars subject to four prior attachments.

The plaintiff having recovered judgment and seasonably placed his execution in the hands of the deputy, has made a *prima facie* case. This case must be repelled by the de-

fendant. To accomplish that, he relies upon the facts in relation to the appraisement and delivery to the debtor of the property attached. But the defence fails :—

1st. Because the rigging attached is in no way accounted for. No reason is offered why the plaintiff's execution was not levied upon that. That property is not mentioned either in Laiton's application for an appraisal, nor in the appraisal itself, nor in the bond.

2d. Because the spars were not appraised in a separate proceeding. R. S. c. 114, § 58, requires the officer to return the bond with a certificate of his doings with the writ on which the first attachment was made. But the first attachment of the *spars* was made on the eleventh writ. The bond and certificate are returned with the writ in favor of Huston, upon which the *vessel* was first attached; not that on which the spars and rigging were attached.

Section 55 authorizes the creditor to choose one of the appraisers. The creditors were those and those only who attached the property, that is, the *spars*.

3d. Because the two kinds of property in which different sets of creditors were interested, were commingled in the appraisal. And if this be allowable, the attachment law is defeated. Such a course would give full pay to one, and that too out of property which he had not attached. There were two classes of creditors. By one of these classes the vessel alone had been attached. By the other the vessel and spars. These classes might not agree in the appointment of an appraiser. There must therefore be two sets of appraisers, and two bonds were necessary.

Bradbury, for the defendant.

1. The vessel and spars were taken from the officer by virtue of R. S. c. 114, § § 53, 54, 55, 56, 57. It is not pretended by the opposing counsel that any single step in the statute requirements, preliminary to the surrender of the vessel to the debtor, was deficient or irregular. The appraisers adjudged the property to be liable to waste and to be greatly

depreciated in value. Their adjudication is conclusive of that fact. *Crocker* v. *Baker*, 18 Pick. 407. On giving the bond, therefore, the officer was bound to deliver the property to the debtor. It was therefore impossible, that the officer should levy the plaintiff's execution upon it, and he cannot be charged for not keeping what the law took from his possession.

2. The attachment of the vessel included the spars. Both in the officer's return and in the appraisal, they are described as "belonging to said vessel." They were in her, and if "belonging" to her, they were a part of her. There is nothing to show that the spars appraised were not on board and in their appropriate places. They were a necessary appurtenant passing with the vessel. *Farrar* v. *Stackpole*, 6 Maine, 164.

It was not the *hull* of the vessel, but the vessel that was attached, and the addition of the word spars is mere surplusage.

The lien law, (R. S., c. 125, § 25,) regards the materials when fitted for the vessel as a part of the vessel. It provides that "any person who shall perform labor or furnish materials, for or on account of any vessel, building or standing on the stocks, shall have a lien on such vessel."

The design of the law is to protect those who furnish the materials or labor. To do this the lien must extend to the materials when fitted and prepared for the vessel; they then become a part of her; otherwise the man who labors on the spars and fits them for the vessel would have no lien for his labor, if they were not put in their place within four days of the launching, for the lien is on "the vessel" *eo nomine.*

By the admission of the plaintiff, the spars are a part of the vessel. The plaintiff claims as a lien creditor on this vessel, and as he makes claim to the spars, and the lien is on the vessel, he consequently includes the spars as a part of the vessel.

The appraisal therefore properly included the spars with the vessel.

3. But whether so or not, *the appraisal of the vessel is still valid.* The fact that a few spars were included with it,

and increased its value, could not vitiate the appraisal. Nor can the plaintiff take advantage of it. He is not injured by augmenting the appraised value of the vessel, and therefore, of the bond, in which he has his remedy therefor. As to the spars, if not properly appraised, he could have no lien on them, and no preference as a lien creditor.

4. *The impropriety, if it was one, of including the spars in the appraisal, was the act of the appraisers, and not of the officer, and he is not to be prejudiced by it.* He performed his duty; furnished them with a proper schedule, and possessed no power to force the appraisers to conform to his views. They determined that the spars "belonging to the vessel," did belong to it, and constitute a part of it, and the officer was bound by their decision.

Nor does the case show that any spars were appraised that were not at the time actually on board, and in their proper places. Nothing is to be presumed in order to vitiate proceedings under the authority of law, and fair upon the face of them.

Paine, in reply.

The officer made a discrimination in the sorts of property which he attached. Some of the creditors were content to rely on the vessel alone. Others, among whom was the plaintiff, required the rigging and the spars to be attached in addition to the vessel.

Suppose the bond to be paid, how will the funds be distributed? The plaintiff has no remedy on the bond.

The defendant therefore has shown no legal disposition of the property attached by us.

HOWARD, J. — The plaintiff's attachment was numbered fifteen, and was subject to fourteen prior attachments of a vessel upon the stocks, and to four previous attachments upon "a lot of rigging on board said vessel, and the spars belonging to the same."

The vessel and spars were appraised under the provisions of the R. S. c. 114, § § 53, 56, and delivered to the debtor, on

his giving to the attaching officer a bond, conformable to section 57, of the same chapter. The bond and his certificate were returned by the officer, with the writ on which the *vessel* was first attached. Section 58.

It does not appear that the spars or rigging were fitted or attached to the vessel, though intended for her use. They were not, therefore, embraced in either of the first ten attachments, which were of the *vessel*, only, *eo nomine*. They might have been appraised and disposed of under process numbered eleven, on which they were first returned as attached, but could not, properly, have been appropriated in that manner, under the first attachment of the *vessel*. Delivering them to the debtor, under such appraisal and proceedings, furnishes no protection to the officer. He is accountable for the spars, precisely as if no appraisal had been attempted. For the rigging, which was not appraised, he is accountable in a like manner.

A creditor's remedy under his attachment of the vessel, is by suit upon the bond taken by the officer from the debtor, and not by action against the officer. The proceedings under the statute referred to, when correct, are conclusive, and they constitute a justification to the officer, and exempt him from liability for the property attached, and disposed of under the appraisal.

The action is, therefore, maintained, for default of the officer in failing to appropriate the *spars* and *rigging* to the satisfaction of the plaintiff's judgment, in the order of his attachment. But, by the agreement, he is to have judgment for such damages, only, as shall be assessed by the Court, on hearing. *Defendant defaulted.*

Hearing in damages.

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

(*) Doe *versus* Scribner.

It is a general principle in the law of evidence, that copies are inadmissible to prove the contents of deeds.

The exception made by the 34th Rule of the Court to that principle, does not authorize the introduction of office copies, except in actions "touching the realty."

To show that a debtor obtained a discharge of the debt fraudulently, *original deeds* of conveyance made by him about the same time are admissible in evidence. But, for such a purpose, copies are not admissible, unless the originals are lost.

In a verdict, which was prepared by the jury, there was an accidental omission to insert the amount of damage which they had agreed upon. *Held*, that in taking the verdict, it was rightful in the Court to authorize the jury to insert the amount, though, after sealing it up, they had separated for the night by leave of the Court.

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

Assumpsit, upon a promissory note made to the plaintiff.

The defendant relied on a release of the cause of action, contained in an instrument under seal, purporting to be an assignment by him for the benefit of his creditors, bearing date Nov. 16, 1850, and executed by the plaintiff and others. The plaintiff insisted that this assignment was void by reason of fraud on the part of the defendant, and because it required of the creditors, who should become parties thereto, a release of "all manner of actions, demands, and claims whatsoever, against the said Scribner," and not a simple release of debts.

To establish the charge of fraud, the plaintiff offered to read office copies of sundry deeds conveying real estate, purporting to be excuted by the defendant to third persons, previous to the 16th of Nov. 1850, without offering any proof of diligence to produce the originals. To the introduction of these copies as evidence, the defendant objected; but the Judge overruled the objection and the copies were read. The plaintiff also introduced witnesses whose testimony tended to establish the fraud.

On Friday evening, the Judge, after charging the jury, instructed them to retire, seal up their verdict, and bring it into Court the next morning. In the morning, (the jury,

having in the meanwhile agreed, and sealed up their verdict and separated,) they came into Court, and delivered to the clerk their sealed verdict, which was for the plaintiff, generally, but contained no assessment of damages. On inquiry by the Judge, the foreman stated that the jury had computed and agreed upon the damages on a separate paper. The Judge then directed the foreman to insert the amount of damages in the verdict. Whereupon, (the defendant objecting,) the Judge ordered the verdict so amended to be accepted, affirmed and recorded.

To the aforesaid ruling and order of the Judge the defendant excepted.

The counsel submitted the point as to the admissibility of the office copies without argument.

They then discussed the question, of the validity of the release. Upon this question however, the Court found it unnecessary to give an opinion.

Paine, for the plaintiff.

Bradbury, for the defendant.

HOWARD, J. — On general principles of the law of evidence, copies are inadmissible in proof of the contents of deeds. Under the 34th Rule of this Court, office copies from the registry of deeds may be read in evidence, without proof of their execution, only in actions touching the realty, and in tracing titles, and "where the party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs." *Kent* v. *Weld*, 11 Maine, 459; *Woodman* v. *Coolbroth*, 7 Maine, 181; *Hutchinson* v. *Chadbourne*, 35 Maine, 189.

Damages, it appears, had been duly assessed by the jury before they separated, but were not inserted in the verdict, as first presented. Inserting the amount thus ascertained, and which constituted an element of the finding, by direction of the presiding Justice, was an authorized amendment of the verdict before it was accepted or affirmed. It was but reducing it to form, in order to render it available and effective.

Blake v. *Blossom*, 15 Maine, 394; *Root* v. *Sherwood*, 6 Johns. 68; *Blackley* v. *Sheldon*, 7 Johns. 32; *Snell* v. *Bangor Steam Navigation Co.* 30 Maine, 337.

But as the office copies of deeds were inadmissible for the purposes for which they were offered and received, the exceptions are sustained.

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

ALLEN & BROWN *versus* LITTLE, *Executor.*

In deeds conveying land, covenants of seizin and against incumbrances are, by the general law, covenants *in presenti*, unassignable, not running with the land.

But, by a statutory provision, such covenants may pass to the grantee's assignee, with a right, in his own name, to maintain suit for the breach of them.

After a grantee of land has conveyed his estate he can maintain no suit upon such covenants, unless he had, previously to his conveyance, been damnified.

After a conveyance of his estate by one of the joint grantees of land, he cannot, unless previously damnified, join with his co-grantee in a suit against their grantor on his covenants.

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

COVENANT BROKEN. Writ dated in 1851.

The defendant's testator, in 1837, conveyed land by deed jointly to Allen, Brown and Rackley, with covenants of seizin, against incumbrances and for quiet enjoyment.

The plaintiffs introduced evidence tending to show *that*, prior to the giving of that deed, an earlier proprietor of the land had granted a right to flow the land by means of a mill-dam; and *that* under such grant a stone dam was erected in the fall of 1841, by which the land was flowed and damaged, which is the eviction for which this suit is brought.

But, *before such flowing and damage*, viz. on February 13, 1840, Brown, by his warranty deed, conveyed his one third part of the land. Rackley is dead, as is alleged in the plain-

tiffs' declaration, having sold and conveyed his interest in April, 1841.

There was very much of other testimony. It related to points not necessary here to be presented.

In a list of numerous requested instructions to the jury, were the following: —

1. That the covenants of a deed are a contract, which may be enforced, either jointly or severally, and cannot be in both modes at the same time.

2. That if the jury find that there has been a division of these lots, between the grantees, or that there is a separate occupation, then this action, in the name of two, cannot be maintained.

3. That the death of Rackley, as set out in the writ, is by operation of law, a severance of the contract, and this action, in the name of two, cannot be maintained.

11. That for any injury that accrued during the time that Brown owned, the action should be brought either in the joint names of Benjamin Allen, Benjamin Rackley and Solomon Brown, or in the name of each one separately; that the action must be either joint or several, and that the present action cannot be maintained.

12. That the measure of damages in this suit, is the damage that accrued while Brown owned; and if they should be satisfied that no damage was sustained during that time, that the action is not maintained.

13. That the covenant, the breach of which, is relied upon to maintain this action, is one that runs with the land, and that the defendant would be liable to the present owners, for a breach thereof, during their ownership.

These requested instructions were not given. The verdict was for the plaintiffs, and the defendant excepted.

The defendant also filed and urged a motion for a new trial.

Lancaster & Baker, for the defendant.

The action is not maintainable. It has the wrong plaintiffs.

It should have been in the name of the owners at the time of the eviction.

There is no disagreement among the witnesses as to the fact, that no damage was done by the flowing, until the stone dam was built. This was in 1841. But Brown, one of these plaintiffs, had conveyed away all his title before that time.

The writ contains three counts, and is dated March 10, 1851; the first is upon the covenants of warranty, and against incumbrances conjoined; the second, upon the covenant against incumbrances; the third, upon the covenant for quiet enjoyment. There is not, in terms, any such covenant in the deed, as the third count is predicated upon, and the first count is imperfect; but assuming, for the purpose of this argument, that the first and third counts might be considered as substantially upon the covenant of warranty, then the plaintiffs' evidence would be pertinent and would show a breach of this covenant, but not until after Solomon Brown and Benjamin Rackley had parted with all their interest in the land flowed; for the new stone dam could not have flowed to injure the meadow, before the summer of 1842, for it was not built until the fall of 1841. But before that time Brown and Rackley had both parted with all their interest.

Now, when Brown conveyed his part of the land flowed, he transferred all his interest in this covenant to his grantees, and it being a covenant that runs with the land, the owners at the time of the eviction alone could maintain an action for the breach of it. The Court then, so far as the first and third counts are concerned, should have instructed the jury that the action could not be maintained. *Joel Wheeler* v. *Wm. D. Sohier, executor*, 3 Cush. 219; *Fairbrother* v. *Griffin*, 1 Fairf. 91; 2 Cruise's Dig. Title 32, Deed, c. 25, § 51, note 1, and the cases there cited; *Sprague* v. *Baker*, 17 Mass. 586.

It is believed that this case cannot be distinguished from the one in the third Cush., here cited, and that it is clear, upon the authorities cited above, that no action could be main-

tained upon the first and third counts, until after an eviction or ouster, and the eviction or disturbance not having occurred, till long after Brown conveyed away his part of the land, it follows irresistibly that he should not have joined in this action. The defendant contends that the action can no more be maintained on the second count, than upon either of the others, for by the operation of the statute of 1835, c. 705, Brown's interest in the covenant against incumbrances, was transferred by his deed of 1840, and gave to his grantees after eviction a right of action for all the damage they had sustained from a breach of it; so that at the time of the eviction the said grantees being then the owners of the land flowed, had a perfect remedy for all the damage that had been sustained on this covenant, as well as on the covenant of warranty. It was manifestly the object of the above statute, to place the covenants of warranty and against incumbrances, upon the same footing. By the force of this statute Brown's interest in all the covenants, in Little's deed, passed out of him and vested in his grantees, as early as Feb. 13, 1840. This view is strengthened by the 17th section of c. 115, of the Revised Statutes, which provides, that in case Brown's grantees had brought this action, he would not have been permitted to give any release that would bar or in any way affect their right to recover. See also *Prescott* v. *Hobbs*, 30 Maine, 345. The Court then should have instructed the jury that the action could not be maintained on this count.

May, for the plaintiff.

1. The first requested instruction was rightly withheld, because it presented a mere abstract question of law, in no way arising from the facts in the case. There was no pretence that joint and several suits were pending at the same time, unless this one action is both a joint and several suit. This is a joint action in the name of two, out of three joint covenantees, the third being dead before the commencement of the suit. It is no part of the duty of a Judge to charge the jury upon mere abstract questions not arising in the cause

on trial. *Merrill* v. *Inhabitants of Hampden*, 26 Maine, 234.

2. The second requested instruction was rightly withheld. The same reasons apply to this as to the first request. There was no evidence of any such state of facts as the request presupposes, but if there were, the law is against such instruction. What has the manner of occupation to do with the right of the grantees to recover damages for a breach of covenant, which occurred at the execution of the deed? Nor could any subsequent division or conveyances among the grantees affect their right to recover.

3. The law is opposed to the third request. Nothing is better settled than that, upon the death of one of any number of covenantees, the action for a breach may be maintained in the name of the survivors, and must be so brought, and such survivors hold the share of the deceased in trust, (as is said in the books,) for his legal representatives, and the defendant ought not to be subjected to two suits for one and the same entire cause or thing. Chitty's Pl. vol. 1, p. 6, and cases there cited; Gould's Pl. c. 4, § § 58 and 61, p. 200 and 202.

The 11th request has already been considered under the preceding heads, and I trust it has been shown that the covenant being joint, the action should have been brought in the name of the surviving covenantees, and that the injury to the plaintiffs was an entire injury, and accrued at the time of the execution of the deed.

This 12th request supposes, that if none of the consequences arising from the incumbrance were realised while Brown owned, the action could not be maintained, as if the actual existence of a right to flow the plaintiff's lands was not an incumbrance for which an action might be maintained, though such right was not actually enforced before suit was brought. This must be an error. In actions where the incumbrance is only an inchoate right of dower, which may never be enforced, as the wife may die before her husband, a recovery may be had, *a fortiori* in a case like this, where the right is abso-

lute and unconditional, one would think an action might be maintained. *Donnell* v. *Thompson*, 10 Maine, 170.

13. The Judge was requested to instruct the jury, that the covenant relied on was one that runs with the land, and that the defendant would be liable for a breach thereof to the present owners during their ownership.

The covenant relied on was that against incumbrances, and the whole case shows, that the issue was solely with reference to that. Such a covenant does not run with the land. *Heath & al.* v. *Whidden*, 24 Maine, 383; *Clark* v. *Swift*, 3 Metc. 392.

HOWARD, J. — General covenants of warranty, in a deed of lands, are prospective, and run with the estate; and consequently, vest in assignees and descend to heirs. But covenants of seizin, and those against incumbrances, are personal covenants *in præsenti*, which do not run with the land, and are not assignable by the general law. Yet, by the statute law of this State, they pass to the assignee of the grantee, and he may maintain an action for their breach, in his own name, against the grantor, provided he will release the grantee from his covenants. Stat. of 1835, c. 183; R. S. c. 115, § § 16, 17; *Prescott* v. *Hobbs*, 30 Maine, 345; *Stowell* v. *Bennett*, 34 Maine, 422.

Tenants in common may join in actions on contracts relating to the estate; but when there has been a severance of the estate, and the legal interest is several, each must sue separately for his damages for breach of the covenants which run with the estate. By operation of the statutes referred to, the covenants of seizin, and freedom from incumbrance, run with the land, and are available to separate assignees in severalty, *pro tanto*. For all covenants which run with the land are, in legal effect, several, although in terms, they are joint only. Co. Lit. 385, a; Sheppard's Touchstone, 198, 199; Rawle on Covenants for Title, 303; *White* v. *Whitney*, 3 Met. 87; 1 Chitty's Pl. 6.

The covenants in the deed of the testator were made to the

plaintiffs and Rackley, deceased. Brown, one of the plaintiffs, conveyed his interest in the land, "by a warranty deed," more than ten years before the commencement of this action. As by the laws of this State, all the covenants concerning title run with the land, he, as an intermediate covenantee, cannot maintain an action against a prior covenantor, until he has suffered damage. If there has been a breach of the covenants, his assignee may maintain an action against the first covenantor, to recover damages, but that gives no right of action to any intermediate covenantee, unless he is damnified. Rawle on Covenants for Title, 304; *Booth* v. *Starr*, 1 Conn. 244; *Withy* v. *Mumford*, 5 Cowen, 137; *Fairbrother* v. *Griffin*, 10 Maine, 96; *Wheeler* v. *Sohier*, 3 Cush. 219.

There is no evidence that Brown has suffered any damage by reason of the alleged breach of covenants, jointly with the other plaintiff, or separately, and he, at least, has no cause of action.

It follows, that this suit, in the name of Allen and Brown, cannot be maintained, even if the former has a right of action. But as the case is presented here, we can only sustain the motion and the exceptions.

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

(*) Stevens *versus* McNamara and wife.

A purchase of land, for value, made by the advice and assistance of a third person, will have no effect to estop such third person from setting up a title subsequently acquired by him.

A sale of land by the town collector for the payment of delinquent taxes will convey no title, unless the requisite preliminary proceedings be proved.

Ordinarily, in the absence of evidence to the contrary, the continuance of the life of an individual to the common age of man, is a presumption of law.

But after an absence from his home or place of residence, seven years, without intelligence respecting him, the presumption of life will cease.

These presumptions, however, may be repelled by proofs.

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

Writ of entry for two pieces of land adjoining each other, and thus making one lot, in Chelsea. The demandant purchased one of the parts in 1823, and conveyed it to his son, Jonathan Stevens, in 1825.

In 1827 he purchased the other part. In 1842 the whole lot was sold by the town collector to one Dutton for the payment of taxes upon it. Dutton, within the time allowed to the owner to redeem the land from the tax sale, conveyed the land to Patience Hart, one of the tenants, and the wife of the other. She paid her own money for it, enough to redeem the land. And in procuring that conveyance, she acted under the advice and with the assistance of the demandant, and in his presence.

This portion of the land he now claims, upon the ground that the tax sale was not a legal one, and therefore did not pass the title.

The other portion of the land he claims to hold by inheritance from his son Jonathan, who, as he alleges, has deceased. To prove that Jonathan was dead, he introduced testimony by which he attempted to show that Jonathan had been long absent, and had not been heard of for seven years before the bringing of the suit. That testimony is sufficiently adverted to in the opinion of the Court.

The case was here withdrawn from the jury, the parties agreeing that if the Court should be of opinion upon so much of the evidence as is legally admissible, that the demandant has sustained his action, the tenants shall be defaulted; otherwise the plaintiff shall become nonsuit.

The Court to draw the inferences a jury might draw.

Paine, for the demandant.

Lancaster & Baker, for the tenants.

Howard, J. — The demandant acquired title to a portion of the premises demanded, in 1823, and conveyed it to his son, Jonathan Stevens, in 1825. The remaining portion was conveyed to the demandant, in 1827; and subsequently, in

1842, the whole was sold for taxes by a collector, and conveyed by him to the purchaser. In 1845, a daughter of the demandant, who is now one of the tenants, and wife of the other, paid the money to the purchaser, in amount sufficient, as it would seem, to redeem the estate from the sale for taxes, and took a deed of the premises to herself. This was done by the request of the demandant, in his presence, and under his direction.

As to that portion of the estate, which was owned by the demandant, when the sale for taxes took place, he is estopped by his own acts, *in pais*, to set up a title in himself as existing when the conveyance was made, by which the tenants now claim. He is concluded upon the principle that one shall not knowingly and designedly induce another to purchase an estate for a valuable consideration of a third party, and then set up a prior and better title in himself to defeat the title of the purchaser. This principle of equity, it is held, has been adopted at law, and the cases cited from English and American decisions, in *Copeland* v. *Copeland*, 28 Maine, 539, 540, appear to sustain the doctrine. *Rangely* v. *Spring*, 28 Maine, 135, opinion of WHITMAN, C. J.

But the estoppel cannot apply to the title which the demandant claims to have acquired *since* the conveyance to his daughter. To that portion of the estate owned by Jonathan Stevens, when sold for taxes, that sale conveyed no title as against the owner, the proceedings necessary to support the sale not having been shown to be legal. To that portion the demandant now asserts title, as father and sole heir to Jonathan Stevens. The death of the latter, since 1843, has not been shown, but it is contended that it must be presumed from facts appearing in evidence. Ordinarily, in the absence of evidence to the contrary, the continuance of the life of an individual to the common age of man, will be assumed by presumption of law. The burden of proof lies upon the party alleging the death of the person; but, after an absence from his home or place of residence, seven years, without intelligence respecting him, the presumption of life will cease,

and it will be incumbent on the other party asserting it, to prove that the person was living within that time. 2 Stark. Ev. 365; 1 Greenl. Ev. § 41, and cases cited.

But the demandant cannot invoke this principle to his aid; for, upon a careful examination of the testimony, it does not appear that Jonathan Stevens had been absent from Hallowell, in this State, seven years, before the commencement of this action, and whether his residence be regarded as there, or in Philadelphia, is immaterial. Hiram B. Stevens testified that Jonathan, after an absence of fourteen years, went to Hallowell in November, 1843, about the ninth day of the month, and staid there "near a week, but can't say just how long." Winter testified that Jonathan staid "when last here five or six days in 1843." Benjamin Stevens, a brother of Jonathan, testified that "he was in Hallowell in November, 1843, and staid about a month." The writ of the demandant is dated November 18, 1850. It is not proved, therefore, and we cannot assume, that Jonathan Stevens had been absent from Hallowell, the residence of his father, brothers and sister, and his home formerly, at least seven years before this suit was commenced; and we cannot lawfully presume that he was not then living. Consequently, the demandant's claim to that portion of the premises which was conveyed by him to Jonathan Stevens, is not maintained. As he must stand upon his own title, and that proving insufficient to support his action, he must become nonsuit, according to the agreement.

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

(*) FRANKLIN BANK *versus* COOPER, *Executor.*

Prior to the expiration of a corporation charter, it is competent for the Legislature to provide that actions may, after the charter has expired, be commenced and prosecuted in the name of the corporation for the benefit of the former stockholders.

A special Act extended the existence of a corporation during a limited period, for the collecting of its debts, and authorized its trustees to institute such

actions in its name, at any time within that period, and to prosecute the same to final judgment. — *Held*, that such actions, *commenced* within the allowed period, may be *prosecuted* after it has expired.

The official bond, given by a bank cashier, with the condition required by the statute for his doings, and with condition for additional acts, though invalid as a statute bond, is valid at the common law, if such conditions require no immoral or unlawful act.

The official bond of a bank cashier, does not become valid as a contract until accepted. Though the law provides, that in no case shall such a bond be signed by a director, yet such a bond, *signed* by one as surety while he was a director, will be valid against him, *if* it was not *accepted* until after he had ceased to be a director.

The declarations of a corporation *director* respecting past transactions, are not admissible as evidence against the corporation.

The declarations of a trustee, in whom is vested the legal interest, though acting wholly for the benefit of another, are admissible, though they may affect not his own interest, but only the interest of the *cestui que trust*.

It is a fair presumption that one, becoming a surety, does it upon a belief that the principal parties are conducting in the usual course of business, subjecting him only to the ordinary risks attending it.

To accept a surety known to be acting upon a belief, that there are no unusual circumstances by which his risk will be materially increased, while the party, thus accepting knows that there are such circumstances, and withholds the knowledge of them from the surety, though having a suitable opportunity to communicate them, is a legal fraud, which discharges the surety.

The bond of a bank cashier, framed to cover past as well as future delinquencies, will be invalid against a surety, if his name was procured at the desire of the directors, they knowing that past defalcations existed, of which he was ignorant, and withholding the knowledge from him, though with a suitable opportunity to communicate it.

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

Action of Debt, brought Sept. 13, 1850, upon the official bond of Hiram Stevens, who had been for many years the plaintiffs' cashier.

It was dated Oct. 1, 1847, and was signed by the defendant's testator as one of the sureties. When presented in Court the following words were found indorsed upon it, viz. — "Approved by vote of directors October 11, 1847, J. Otis, President."

Its condition was that "whereas said Stevens has been appointed cashier, &c., now if he shall during his continuance

in office as cashier, truly and faithfully perform and discharge the duties of cashier, and shall, when he vacates the office, a true and faithful account make, and all notes, drafts, moneys and all and every property of every name and nature shall truly and faithfully render and deliver to the directors of said bank, *and shall account for all notes, drafts and moneys, drafts, notes and property heretofore entrusted to his hands and possession, as cashier of said bank, since he has held the said office,*" then the bond is to be void.

By rule of Court, the action was referred, for the purpose of ascertaining "whether any deficiency or defalcation in the accounts of the cashier, or in any of his acts and doings, as cashier, for which his sureties are responsible, exists or has taken place; and if so, the amount thereof, and how and when the same occurred," which amount should be the measure of damages in this suit, subject to the opinion of the Court; provided that in other respects the suit is maintainable.

The award of the referees was in substance, *that* "a deficiency or defalcation exists in the cashier's accounts, for which the sureties on his bond are responsible; *that* it occurred between the first day of Jan. 1844 and the first day of Oct. 1847, and, *that* the plaintiffs recover on the bond in suit $5822,71."

The defendant contended that no suit upon this bond could be maintained, without proof that it had been accepted by the directors. Thereupon, to prove such acceptance, the plaintiffs called Joseph Eaton. Being sworn on the *voire dire*, he testified that he was one of the directors of the bank in 1844, 1845, and up to Oct. 1846; and that he was one of the trustees to close up the affairs of the bank and to prosecute this action.

The defendant then offered to prove by Alpheus Lyon, *that* he, the said Lyon, was one of the Bank Commissioners of the State; *that*, during the years 1844, 1845, 1846 and 1847, the affairs of the Franklin Bank were conducted with great looseness and irregularity; *that* the cashier was negligent; *that*

from the manner in which the books were kept and the business transacted, it was impossible to ascertain the condition of the bank at any time during those years, and whether the cashier was a defaulter or not; *that* he notified the directors and among others Eaton, of this state of things, and requested him to have it corrected; and *that* Eaton promised it should be done.

The Judge ruled that such testimony, if received, would not show a disqualification of Eaton as a witness for the plaintiffs. Eaton was then sworn in chief, and testified *that*, being in the bank about the middle of Oct. 1847, he saw there the bond now in suit for the first time; *that* it then had upon it the same indorsement which it now has; *that* Otis, the president, and two other of the directors were present; and *that* the bond was left with the president.

The Judge ruled that this was sufficient evidence of the acceptance of the bond. The plaintiffs then stopped.

Several grounds of defence were presented.

1. That the bond was void, because not conformable to the statute prescribing the form of cashier's bonds.

[*Mem.* — The R. S. c. 77, § 24, provides that cashiers, before they enter upon the duties of their office, shall give bond, conditioned for the faithful performance of the duties of the office.]

2. That the bond was not binding upon the defendant's testator, because he was one of the directors of the bank at the time of its execution.

[*Mem.* — The R. S. c. 77, § 24, provides that "in no case shall the bond, given by the cashier, be signed by any of the directors."]

It was admitted that the testator was elected a director at the annual meetings in 1844, 1845 and 1846, and that the annual meeting for 1847 was on October 5. The bond was dated October 1, 1847.

3. That the plaintiffs had ceased to be a corporation, its charter having expired.

[*Mem.* — The charter was granted in 1832 and was to con-

tinue in force until October 1, 1847. But by a general Act all banks were to "continue corporate for and during two years from the time when their charters shall respectively expire, for the sole purpose of collecting their debts, &c., and capable to prosecute and defend suits at law, and to choose directors for the purposes aforesaid and for closing their concerns.

By a special Act of June 9, 1849, c. 196, § 1, the Franklin Bank was to "continue in its corporate capacity for two years from the first day of October, 1849, for the sole purpose of collecting the debts due to the corporation; and the stockholders were authorized to choose three persons as trustees of the corporation, with power to prosecute and defend, in the name of the bank, any suits at law or in equity."

The same Act, § 2, provides that the trustees so chosen, shall have power to receive all demands belonging to said bank, in trust for the use of the stockholders, and to prosecute to final judgment, execution and satisfaction, any claim or demand which may be pending in the name of said corporation, and to institute suits in the name thereof any time during said two years and to prosecute the same to final judgment, execution and satisfaction."]

4. That the bond was not obligatory, because the plaintiffs had neglected, in some previous years, to take a bond from the cashier, as required by the statute, and the defendant called upon the plaintiffs to produce any bonds taken by them for 1844, or 1845 and 1846; but none were produced.

5. That the defalcations, as shown by the award of the referees, all existed prior to the date of the bond, and were well known to the president and some of the directors at the time when the bond was executed, but were not communicated to the testator. Upon this point the defendant offered to prove, by Mr. Lyon, the facts above recited, and that he communicated to Mr. Otis, the president, and to Mr. Young, another of the directors, the gross mismanagement and irregularity which prevailed in the bank, and the cashier's want of competency. This evidence was rejected.

The defendant called M. O. Mitchell, who stated that his wife was a stockholder in the bank, and that, for that reason, he was unwilling to testify. He was, however, required to, and testified *that* he attended a meeting of the stockholders, the first Monday of October, 1847, and a special meeting also in the spring of 1848, and other meetings also; *that* he saw the bond in suit at *some* of these meetings; *that* there were conversations at these meetings about the condition of the bank; *that* he thought it was in October, 1847, when he, at said meeting, inquired of the president why they had not taken bonds of the cashier in former years; *that* the president (Otis) replied that they thought all things were going right, and did not know of any trouble until lately; *that* they had now got a bond to cover all deficiencies; *that* when they found there was a deficiency they threatend to sue the cashier (or might use the words prosecute him,) and required him to get Cooper, the testator, to sign a bond with him; *that* he (Otis) drew up the bond, and told Stevens if he got Cooper on it, it would be satisfactory; that he, (Cooper,) was left off from the board of directors to enable Stevens to get him on the bond; and *that* Stevens took the bond after he had drawn it, and got it signed. The witness also testified that the testator was not present at these meetings or conversations.

The defendant also offered to prove, by the testimony of Wm. Stevens, 2d., one of the co-sureties on the bond, but who was released by *defendant,* that said Otis, being president of the bank, and one of the trustees prosecuting this action, in the autumn of 1849, made to him statements similar to those made to said Mitchell, but these statements, not appearing to have reference to any declarations of Otis at any meeting of the stockholders or directors, were rejected.

If the excluded testimony offered by the defendant was admissible; or if the testimony of Mitchell would have any legal effect upon the case, the action is to stand for trial. But if such rejected testimony was inadmissible, and if the testimony of Mitchell would have no legal effect upon the case, the Court is to render judgment on nonsuit or default,

on such of the testimony as was admissible, having power to draw inferences as a jury might.

F. Allen and *H. W. Paine*, for the plaintiffs.

1. One of the defences set up is that the bond is not in the form prescribed by the statute. But there is no form prescribed. The statute only requires that the cashier shall give bond, conditioned for the faithful performance of his duties. It does not prohibit the insertion of other conditions. A bank might fear a defalcation, and be unable to show under which of several bonds it occurred; or it might distrust the skill of the cashier. There is no rule of policy, which forbids their guarding against such dangers.

2. Another defence is that the testator was a director when he signed the bond. The ordinary presumption is that an instrument is signed the day of its date. But as to this bond, the presumption is that it was not signed till the testator ceased to be a director; otherwise the parties violated the law.

Mitchell says Otis told him they left off Cooper so that he might sign the bond; which is strong proof that he was left off before he signed.

The law undoubtedly was intended to prevent the sureties from passing upon their own sufficiency.

The date of a bond is not essential. It would be good without a date. A bond becomes operative from its *delivery* or *acceptance*. 6 Mass. 219; 9 Mass. 310; 8 Mass. 338; 12 Mass. 456. The word "signed," in the statute is not a controlling word. If it be, it must be construed to mean "executed," which includes the delivery.

But if not good as a statute bond, it is valid at the common law. *Morse* v. *Hodgdon*, 6 Mass. 314; *Clapp* v. *Cofran*, 7 Mass. 98; *Freeman* v. *Davis*, 7 Mass. 200; *Chandler* v. *Smith*, 14 Mass. 313; *Worcester Bank* v. *Reed*, 9 Mass. 267.

That a cashier's bond is retrospective, does not vitiate it. *Dedham Bank* v. *Chickering*, 7 Pick. 335–340; *Johnson* v. *Frankfort Bank*, 23 Maine, 322.

As the statute does not forbid such a bond, so the common law allows it, for it required nothing unlawful. 3 Humph. (Missouri,) 176.

3. Another defence is that the plaintiff corporation is no longer in existence.

But all this matter is obviated by the Act of 1844. That gives to the trustees power to prosecute the suit in the name of the corporation. The defendant's construction of that Act would annul it.

4. To the defendant's pretence of fraud in the directors' concealment from him of knowledge which they had of previous defalcation, we reply that it is not shown that the testator had not the same knowledge. The presumption is that he had, for he was a director. It is quite possible he would sign though he did have the knowledge, relying on the ability of the cashier to respond.

But the directors were not bound to impart the information. It is enough that they are not shown to have practiced any deception. It is sufficient to say, however, that no fraud was proved.

Evans, for the defendant.

The statute allows nothing to be secured by a cashier's bond except his faithfulness. The law requires bank cashiers to renew their bonds annually. R. S. c. 77, § 24. The office is but an annual one. The bond was but a cashier's annual bond. This appears by its recital, "whereas Hiram Stevens has been appointed cashier," and the condition refers to that appointment. This bond was given in pursuance of law and was undoubtedly understood by the surety to be a statute bond, prospective only in its character and intent.

WHITMAN, C. J., in *Frankfort Bank* v. *Johnson*, 23 Maine, 325, says, "and moreover the Legislature when they required the renewal of the bonds annually, cannot well be believed to have contemplated that the bondsmen of each year should be holden responsible for the fidelity of cashiers, except for the year for which the bonds were taken."

The recital in the bond, controls and gives meaning to the condition. *Liverpool Water Works* v. *Atkinson*, 6 East, 510; Burge on Suretyship, 71, 72, and cases cited in the text.

As GROSE, J., says, in 6 East, 511, — "For any man called upon as a surety to subscribe to the obligation, would naturally understand on reading the condition, that he was only to answer for his principal for 12 months." — We say, no one in reading this bond and knowing the law of the State as to renewals, would understand it in any other light than as a *statute, prospective* bond.

The retrospective clause, interpolated into this bond, does not carry back beyond the time of the new appointment, the liability of the surety.

Its language will be satisfied by such limitation of the liability.

"The extent of the liability to be incurred, must be expressed by the surety, or *necessarily* comprised in the terms used in the obligation or contract."

"It is to be *construed strictly* — that is, the obligation is not to be extended to any other subject, to any other person, or *to any other period of time* than is expressed, or *necessarily* included in it." Burge on Sur. c. 3, p. 40. The guaranty as to past business was inoperative.

The bond is not valid against defendant's testator, having been obtained by fraud.

It was well known to the president, and to the active directors, Eaton and Young, that the cashier was and had been for some years, negligent and incompetent; that the affairs of the bank were in great disorder and confusion; that a defalcation existed for a large amount; that this defalcation occurred during a period of time, when by their own neglect, and for which they were liable, no security had been taken for the fidelity of the cashier.

All this they concealed from the surety, and such concealment *is fraud.*

Cooper, the testator, had a right to suppose that every thing

discovered or known by his associates, had been communicated to him.

It was their duty so to have communicated. "*Uberrima fides,*" is required of co-partners, associates, co-trustees, &c. &c.

It was the duty of the *three* directors to whom the state of the bank was known, to have taken measures for the removal of the cashier; to dismiss him instantly.

By consenting to retain him, they grossly deceived the surety.

The cashier was made the instrument of the president and directors, under a threat of prosecution, of entrapping Cooper, who was designedly dropped from the board, for the purpose.

All this was in bad faith, there can be no stronger case of "*suppressio veri,*" no clearer one of a deliberate purpose to deceive.

It has been held, and properly, that the retaining a cashier in office, *after a knowedge of his deficiencies*, does not exempt his surety for *previous* defaults, within the limits of the bond. *State Bank* v. *Chetwood*, 3 Halst. 28; *Taylor* v. *Bank of Kentucky*, 2 J. J. Marsh. 568.

For *subsequent* defaults, it seems that it would be an excuse of the surety.

Why? Undoubtedly, because it would be fraudulent toward the surety.

How much greater the fraud, knowing the deficiency, to obtain by concealment of the truth, under such a bond as this, indemnity for their own neglects? "Fraud by the creditor in relation to the obligation of the surety, or by the debtor with the knowledge or assent of the creditor, will discharge the surety," &c. Burge on Sure. 218.

Thus in maritime policies, "if the party had no intention to enter, and would not have entered into the contract, if the fraud had not been practised; surety discharged. *Ib.* 219.

Tindal, C. J., in *Stone* v. *Compton*, 5 Bing. N. C. p. 142, says: —

"The principle to be drawn from the cases, we take to be this — that if, with the knowledge or assent of the creditor,

any material part of the transaction with the debtor is misrepresented to the surety, the misrepresentation being such, that but for it, the surety would not have become such or his liability would have been less, the security so given is voidable at law on the ground of fraud." Cited in Burge, p. 219.

Again, on p. 220 — "The preceding definition comprehends the fraud — which consists in the representation of that which is false, and that which consists in the suppression of what is true." &c.

The case of *Pidcock* v. *Bishop*, 3 B. & C. 605, and S. C. 6 Dow. and Ryl. 505, cited in the text of Burge, 225, is strongly in point, as "*suppressio veri*," amounting to fraud. q. v. The bond, then, even viewed as a common law bond, could be of no validity as against the surety.

The bond is dated October 1, 1847, signed by surety that day. Cooper was then a director of the bank, and could not be accepted as surety. R. S. c. 77, § 24. As to him the bond was void.

This action cannot be maintained, the charter of the bank having expired before it was commenced.

The Act of June 9th, 1849, c. 196, prolonged the "corporate capacity" of the bank for one single purpose, and one only, "*for the sole purpose of collecting the debts due to the corporation.*"

A bond for official fidelity, is, in no sense, "*a debt due to the corporation.*" At all events, when the extended time had expired the suit could be no further prosecuted.

The stockholders had no power, and could confer none upon trustees, other than is expressed in the Act, viz. to collect debts, and to distribute proceeds to the stockholders. *Reed* v. *Frankfort Bank*, 23 Maine, 321; *Whitman* v. *Cox*, 26 Maine, 339.

The testimony of Stevens should have been admitted to prove the circumstances under which the bond was procured, as stated by Otis.

Shepley, C. J. — This suit was commenced on September

13, 1850, upon a bond made to the bank by Hiram Stevens as principal, and the defendant's testator and others, as his sureties, to secure his faithful performance of the duties of cashier, and other duties.

1. Whether the action can be maintained may depend upon a construction of the Act approved on June 9, 1849, c. 196. By the first section the corporate capacity of the bank is continued for two years from the first day of October then next, for the sole purpose of collecting the debts due to the corporation. The stockholders are authorized to choose three persons as trustees who are empowered to prosecute and defend in the name of the bank any suits at law or in equity. By the second section the trustees are authorized to prosecute to final judgment, execution and satisfaction, any claim or demand (meaning any action) which may be pending, in the name of said corporation; " and to institute suits in the name thereof any time during said two years, and to prosecute the same to final judgment, execution and satisfaction."

Although the corporation ceased to exist on the first day of October, 1851, the Legislature might authorize the trustees to prosecute suits then pending for the benefit of the former corporation, in that or any other name. The trustees, by the provision of the Act, might commence suits at any time prior to and on the last day of the two years. Was it the intention, that all suits should then abate, and that the debtors should then be absolved from all liability to pay, and that the former stockholders should be deprived of all benefit to be derived from existing debts?

A construction producing such results would be at variance with the general policy and purpose of the law, which provides, that on the dissolution of any corporation all its real and personal estate shall be vested in the individuals, who may be stockholders at the time. c. 76, § 28. It should not be adopted, if the language may fairly receive a different construction. So far from difficulty is the construction, which would avoid such consequences, that it requires no more than to permit the language used to operate according to its literal

meaning. The trustees are expressly authorized to prosecute actions commenced within two years "to final judgment, execution and satisfaction." There is no limitation of the time within which this is to be done. There was no occasion for it; the purpose being to allow sufficient time to accomplish the object. It is only by implication that any limitation of that time can be made, and if one be so made it may extend to the day after the suit has been properly commenced.

If the purpose had been no more than to continue the charter for two years for the collection of debts within that time, this would have been fully accomplished without the careful insertion and repetition of language authorizing the prosecution of suits to final judgment and satisfaction. A construction which would limit that power to the two years would give no effect to the language conferring it.

Any inconsistency between the provisions of the first and second sections of the Act, unless such limitation of the power to prosecute be admitted, is not perceived. By the first section the corporation is continued for two years for the sole purpose of collecting its debts. By the second section the trustees are authorized to use its name after that time to prosecute pending suits.

As by the general Act respecting corporations all their property at the time of their dissolution is vested in the individuals composing their stockholders, it is said, that the trustees in this case must after the two years be deprived of all power and interest in the debts then due. The second section of the Act of 1849, declares, that the trustees shall have power to receive all demands belonging to said bank, in trust, for the use of the stockholders; and the provisions of the statute, c. 76, § 28, are thereby so far varied as to permit them to exercise the power thus conferred. Although no time is fixed for the execution of that trust, and for a distribution of the moneys collected, there can be no difficulty in causing it to be executed so soon as the stockholders become entitled to have it done.

Nor will any party defendant, should he be successful in his

defence, necessarily lose his costs. Although the trustees are not personally liable, the Court may on motion stay proceedings until security be given for their payment. *Freeman* v. *Cram*, 13 Maine, 255.

Nor will it be necessary, that accounts filed in set-off should be disallowed. They would constitute a part of the suit to be prosecuted.

It is no valid objection to a literal construction of the Act, that no provision was made to enable creditors of the bank to prosecute suits against it after the expiration of its charter. It was only leaving them in the condition of all other creditors of corporations, which have been dissolved. No such provision has been or can well be made after the dissolution of a corporation.

2. It is alleged, that the bond was not valid because it was not made in conformity to the provisions of the statute.

The statute, c. 77, § 24, prescribes no form. It only requires, that a cashier should give a bond conditioned for the faithful performance of his duties. The condition of this bond does require more. A bond with a condition differing from that required by a statute is not necessarily void. It will be good, not as a bond by the statute, but as a contract at common law, if the condition does not require the performance of any immoral or unlawful act. There was nothing wrong or unlawful in requiring the cashier to account for property entrusted to him in former years as cashier.

If the language used will permit it, the bond should receive a construction, that will make the sureties liable only for official acts or neglects subsequent to its execution. Hence it has been decided, that a bond with a condition, that the principal has accounted and will account, binds the sureties for an account only from the time the official term commenced, for which they became his sureties. *Armstrong* v. *United States*, 1 Peters' C. C. R. 46; *United States* v. *Brown*, Gilpin, 155.

The language used in the condition of this bond will not allow a construction, which would thus limit the liability of

the sureties. After providing for the faithful performance of his duties and for his accounting for all property entrusted to him during his continuance in office, the condition contains this clause: — "And shall account for all notes, drafts and money, drafts, notes and property heretofore entrusted to his hands and possession as cashier of said bank since he has held the said office of cashier of said bank." No person about to become surety upon reading the condition could fail to understand, that he would become liable for an account by the cashier of all property entrusted to him since he had been cashier as well as for his future faithfulness. If he voluntarily became a surety on a bond containing such a provision, he cannot by any legal construction be relieved from the obligation thus assumed.

3. The bond is alleged to be void because the testator became a surety upon it, while he was a director of the bank, in violation of the provisions of the statute, c. 77, § 24. It bears date on October 1; the testator ceased to be a director on October 5. The bond appears to have been approved on October 11. It did not become a valid contract until accepted. The bank did not violate any law, by receiving the testator at that time as a surety.

4. The declarations of a director of a corporation respecting its past transactions have been held to be inadmissible as testimony. *Polleys* v. *Insurance Co.* 14 Maine, 141. The declarations stated in the testimony of Mitchell, would rather appear to have been in a meeting for business when the bond in suit was under consideration and accepted. The meeting for the choice of officers appears to have been holden that year on October 5. Although the bond bears date before that time, it must be presumed to have been executed after the choice of officers, and it appears to have been executed before those declarations were made.

The testimony offered and excluded of William Stevens, 2d., respecting similar declarations, made by Mr. Otis in the autumn of 1849, would not be admissible as stating the declarations of an officer of the corporation. But at that

time Mr. Otis had become one of the trustees, holding the legal interest in all the assets of the corporation, and using the corporate name, only to enforce the claims of the trustees to recover in this and other suits, and his declarations, being a trustee and a party having a legal interest in the bond, would be admissible.

5. It is alleged, that the signature of the testator to the bond was procured by fraud. It is not alleged to consist in any fraudulent or positive act, but in withholding from him the knowledge, that there was an existing deficiency in the accounts of the cashier.

The testimony of Alpheus Lyon, as offered and excluded, would not, had it been received, have proved, that the directors who received the bond, knew that there was an existing deficiency in the accounts of the cashier. It would only prove irregularity and neglect in keeping his accounts in past time. The condition of the bond did not make the testator liable for such neglects. His responsibility for the past years was limited to an account for all property.

The testimony of Mitchell, as reported, states, that the president of the bank, in a meeting of the stockholders, informed him, "that when they found there was a deficiency, they threatened to sue the cashier; or might use the words prosecute him, and required him to get Cooper, the testator, to sign a bond with him."

There will not be found an entire agreement in the decided cases and books of authority, respecting the effect of a concealment or an omission to communicate facts known to the party seeking security, and unknown to the party about to become a surety. In some codes of law, and in some decisions, the conclusion is arrived at from a consideration, whether the facts omitted to be stated were intrinsic or extrinsic to the contract. And in others whether the person about to become a surety sought information of the party having the knowledge and seeking the security.

A few cases only will be noticed. In the case of *Pidcock* v. *Bishop*, 3 B. & C. 605, the defendant, at the request of Thomas

Tickell, made a guaranty to the plaintiffs for pig iron to be delivered to Tickell. The plaintiffs without the knowledge of defendant had agreed with Tickell, that he should pay them ten shillings per ton more than the market price, to be applied to the payment of an old debt due from Tickell to one of them. The Court decided, that the withholding of the knowledge of that agreement was a fraud upon the defendant and that his contract was not binding.

In Maltby's case, as stated by Lord ELDON in the case of *Smith* v. *Bank of Scotland*, 1 Dow. Parl. Rep. 294, a deficit existed in the accounts of a clerk of the Fishmonger's Company, and a person became surety without a knowledge that he was a defaulter. Lord ELDON was of opinion that by a concealment of that fact the surety was discharged.

In the case of *Stone* v. *Compton*, 5 Bing. N. C. 142, the defendant became surety for Coxe & Chambers for £2600. Part of that sum was not advanced but retained in payment of an old debt. It was insisted, that the doctrine respecting concealment was applicable only to cases of guaranty, but the Court observed, that it could see no sound legal distinction arising from the form of the security; that the mere fact that part was to be deducted in payment of an old debt without any communication of that fact to the surety would not be sufficient to release him; for the plaintiffs were not to be made responsible for a want of communication between the principal and surety. The surety was relieved because a deed was read to him containing a recital that the old debt had been paid.

The fact, that part of the money loaned was to be applied to the payment of an existing debt, could not be regarded as a matter unusual in the ordinary course of business. Money is known to be as frequently borrowed to pay existing debts as to make new purchases.

A question respecting the validity of a surety's contract was elaborately argued and much considered in the case of *Etting* v. *The Bank of the United States*, 11 Wheat. 59. The Court having been equally divided no opinion was expressed.

The judgment in the Circuit Court was affirmed. By the instructions there given the surety would not be discharged by an omission to make known to him, that the cashier had fraudulently appropriated funds of the bank to his own use, unless he made inquiry with reference to his becoming surety.

In that case the plaintiff in error was not about to become a surety on the official bond of the cashier, but a surety for him for a debt due from him to the bank; and the true question was, whether the bank was obliged to make known to the surety in what manner the principal became indebted to it. It may be further observed, that it does not appear, whether the officers of the bank had opportunity to make those facts known to the surety.

It is not readily perceived how a person desirous of obtaining security can be considered to be guilty of a fraud in law by omitting to make known facts even of an important character affecting the risk of the surety, when it does not appear, that he had an opportunity to do so. On the contrary when he does know such facts and has reason to believe, that they are not known to the proposed surety, if information be sought from him, or if he have a suitable opportunity, and the facts are of such a character, that they are not found in the usual course of that kind of business, and are such as to materially increase the risk, it is not perceived, that it is not a duty to make them known.

In the commentaries upon equity jurisprudence, the rule is not stated with the qualification, that there may be an omission to state such facts, unless the surety makes inquiry. Nor does it even require that the party taking the security, should have a suitable opportunity to make the communication. The rule is thus stated: — "If a party taking a guaranty from a surety, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under his false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure." 1 Story's Com. Eq. § 215.

It is generally admitted, that an omission to communicate

circumstances materially affecting the risk known to one party and unknown to the other, will destroy the validity of the contract, whenever the party having the knowledge is bound to communicate it. The difficulty consists in arriving at a correct conclusion under what circumstances one is so bound. He is so bound when his relations are such, that the other party is entitled to repose any particular confidence in him, and when inquiries are made of him respecting the suretyship. Is he not equally bound when he has a suitable opportunity to make them known?

There can be no doubt, that the fact that there was known to be an existing deficiency in the accounts of the cashier if communicated to the testator might have had an important influence on his conduct. No doubt that the risk assumed would be materially increased thereby. One, who becomes surety for another, must ordinarily be presumed to do so upon the belief, that the transaction between the principal parties is one occuring in the usual course of business of that description, subjecting him only to the ordinary risks attending it; and the party to whom he becomes a surety must be presumed to know, that such will be his understanding and that he will act upon it, unless he is informed, that there are some extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief, that there are no unusual circumstances, by which his risk will be materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract.

This position although not found to be stated in terms, will in effect be found sustained by the opinions and reasonings of many sound judicial minds.

If a jury in this case, should be satisfied, that the legally constituted agents or officers of the bank knew, that the cashier was a defaulter and that there was a deficiency in his accounts then existing, and that he was required to obtain the testator to become his surety for that existing deficiency with

out making that fact known to the testator, having a suitable opportunity to do so, it might be their duty to find a verdict for the defendant. As the report of the case provides, that "if the testimony of Mitchell would have any legal effect upon the case, the action is to stand for trial," and as that testimony may possibly have such an effect, the case is to be submitted to the consideration of a jury.

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

(*) BARNETT, *in error*, *versus* THE STATE.

A judgment against the accused under the statute of 1851, c. 11, § 11, is reversible for error, if neither the complaint nor the judgment shows, that the liquors were intended for sale in the city, town or place where they were kept or deposited.

The rule that a writ of error will not lie where an appeal might have been taken, does not apply to criminal suits.

WRIT OF ERROR.

In July, 1851, under the statute, c. 211, of that year, three voters of the city of Gardiner made written complaint to the Judge of the Police Court, against Barnett, the plaintiff in error, alleging on oath, that they have reason to believe and do believe, that William Barnett of said city of Gardiner in said county, now has and *keeps spirituous or intoxicating liquors intended for sale*, deposited in the building occupied by him and Michael Hayden and Mrs. Ganey, in the portion thereof occupied by them respectively, in which buildings the said defendant keeps a shop or store, situated on Water street, in said city, and occupied by him, said Wm. Barnett, partly for a shop or store as aforesaid, as also by the said Hayden and Ganey, (said Barnett not being appointed by the mayor and aldermen of said city of Gardiner as the agent thereof, to sell therein, spirits, wines, or other intoxicating liquors;) whereby said liquors have become forfeited to be destroyed, and said Wm. Barnett has forfeited the sum of twenty dollars, to the use of said city and costs of prosecution.

A warrant having been issued on that complaint, Barnett appeared before the Judge, and pleaded that he was not guilty of the charge of having kept or having deposited any liquor as described in said complaint, for sale, and making no claim to the spirituous liquors seized, was adjudged guilty, and ordered to pay a fine of twenty dollars and costs of prosecution taxed at $11,44, from which judgment and order the said defendant claimed the right to enter an appeal at any time within twenty-four hours, which was granted; the sum in which he was ordered to recognize being $100, as principal, with sufficient sureties in a like sum. He refused so to recognize, protesting against giving sureties; the Court adjudged liquor forfeited. Barnett not having produced the sureties nor recognized himself as principal, within twenty-four hours after the decision and sentence, his appeal was not allowed and a mittimus for his imprisonment was issued.

It is to reverse that judgment, that this writ of error is brought.

Clay, for the plaintiff in error, presented to the consideration of the Court many parts of the proceedings, which he contended were erroneous.

Among other matters he cited *State* v. *Robinson*, 33 Maine, 564, and *State* v. *Gurney*, 33 Maine, 527, to show the complaint to be totally invalid, because not averring that the liquors were intended for sale, in the *city of Gardiner*.

Vose, *County Att'y*, for the State.

It is a fixed principle that no writ of error can lie, where the party had a right to appeal. 4 Mass. 678; 6 Mass. 4; 9 Mass. 228; 3 Metc. 373.

In this case Barnet had the right of appeal.

Clay, in reply. — That principle of law has many exceptions, and it is never applied to criminal suits. 15 Pick. 234; 12 Met. 9; 33 Maine, 250.

Howard, J. — The plaintiff has brought this writ of error to reverse the judgment of the Police Court for the city of

Gardiner, rendered against him, on a complaint for keeping spirituous and intoxicating liquors, intended for sale, deposited in a building in that city, occupied by him and others; in which it is alleged, he "keeps a shop or store," without being appointed the agent of the city, "to sell therein, spirits, wines or other intoxicating liquors." The proceedings were under the Act of 1851, c. 211, and are, clearly, erroneous in many respects. It does not appear by the record and judgment, that the accused was charged, or found guilty of keeping such liquors, so deposited, as intended for sale in the city of Gardiner, or, indeed, in any town or place in this State; and without enumerating, or considering other objections to the proceedings, apparent upon the record, this is irremediable and fatal. *State* v. *Robinson*, 33 Maine, 564; *State* v. *Gurney*, 33 Maine, 526.

But it was contended at the argument, that error will not lie in this case, because the accused might have appealed from the judgment. Though, by pleading *in nullo est erratum*, it would seem that the government might have been debarred from this argument, yet, as it was addressed to us without objection, and as it involves an important principle, not unfrequently invoked, we think it may subserve the public interest to consider it, on this occasion.

The rule so often stated, upon the highest authorities, that error will not lie where an appeal might have been taken, is now received with many qualifications. The reason for the rule is, that the remedy by appeal is more direct, more convenient, more extensive and complete, and less expensive to the parties, than can be afforded by a writ of error, and therefore, it ought to be pursued. But where a party has lost this right of appeal, in a civil case, without laches, and without having waived it, either expressly or by implication, the remedy by error, may be still open to him. *Brown* v. *Jewell*, 33 Maine, 250; *Monk* v. *Guild*, 3 Met. 372. Although this remedy by appeal, in civil cases, takes away the remedy by a writ of error, by implication, as a general rule, yet, in criminal cases, the reason for the rule ceases, and there it does not

apply. The appellant in such cases, is required to recognize with surety to prosecute his appeal, or stand committed. His remedy by appeal would often be more onerous than that by a writ of error, to reverse an erroneous judgment, and therefore it is, that his right to proceed by error, is not taken away, or impaired, by giving him the right of appeal. *Cooke, petitioner*, 15 Pick. 239; *Thayer* v. *Commonwealth*, 12 Met. 9; Co. Litt. 288, b; 3 Black. Com. 407.

At common law a writ of error lies for mistakes in the proceedings of courts of record, only; but this Court, by statute, has general jurisdiction, and power to issue writs of error to courts of inferior jurisdiction, proceeding according to the course of the common law, though not technically courts of record, to correct errors in their proceedings and judgments. But where the proceedings of such courts are not according to the course of the common law, but are erroneous, the remedy is not by error. R. S. c. 96, §§ 4, 5. In the present case, error lies. *Judgment reversed.*

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

(*) JAMES WILLIAMS, JR. *in scire facias, versus* ANDROSCOGGIN & KENNEBEC RAIL ROAD COMPANY.

A party summoned as trustee, while it is contingent whether he will be indebted to the principal defendant, will be discharged.

The changing of such a contingency into an absolute indebtment, *after the service* upon the trustee, though *before the judgment*, will have no effect to render the trustee chargeable.

A Rail Road Company had contracted to pay, on a specified day of each month, seventy-five per cent. of the work done by their employee in the preceding month, upon a stipulation that the balance should be retained as a forfeiture, if the employee should fail to fulfil his part of the contract; — *Held* that, while the employee's part of the contract remains unfulfilled, the contingent twenty-five per cent. is not attachable by trustee process.

Where, by such contract, the value of the whole month's work is to be estimated and certified after the end of the month, before any payment for it is to be made, *no indebtment* for *any part* of it arises before the month has ex-

pired; and, therefore, *no part* of such value can be secured by summoning the company as trustees before the month has expired.

Upon money in the hands of one adjudged trustee to the principal defendants, interest is taxable against him from the time of demand made upon him.

ON FACTS AGREED.

The plaintiff brought an action against Porter & Benson as principal defendants, and against the Androscoggin and Kennebec Railroad Company as their trustees.

About the same time, several other suits, brought by different plaintiffs, were pending against Porter & Benson and against the Railroad Company as their trustees.

In each and all of these suits the Company made the same disclosure, as follows: —

And now the said trustees come into Court and under oath submit themselves to examination, and say that, prior to the service of the plaintiff's writ on them, the principal defendants had entered into a contract with them for the grading and masonry of the 14th, 15th and 16th sections of their road, a copy of which contract is made part of this disclosure. At the time of the service of the writ upon the trustees, there was due to the principal defendants the sums following, to wit; for work performed in Nov. last, 75 per cent. of which was due from 1st to 10th December, $200,00

For do., do., in December last, 75 per cent of which was due from 1st to 10th January, 1602,42

$1802,42

The engineer's certificate of work done in December, 1848, was made out, January 1st, 1849.

At the time of the disclosure, Porter & Benson had not completed their work under their contract, and the trustees wish to present the question to the Court, whether they can be holden for the twenty-five per cent, reservable under the contract, until the whole work is completed, as in the event of its not being completed, all that should be due to the defendants would be forfeited to the company.

Prior to the service of the plaintiff's writ on them, they

had been summoned as trustees of the same defendants in action James B. Neal against them, which writ was served on them December 2, 1848.

The contract referred to in the disclosure, so far as it may influence this case, was of the following import: —

It specified the quantity and quality of the work to be done for the railroad company upon the three sections of the road, and then provided that payment should be made by the company for the same as follows: —

"The payments within the limits of this contract shall be made as follows: — between the first and tenth day of each month, after the commencement of the work, the said engineer shall estimate the quantity of work done, and give a certificate of the same; and upon the presentation of said certificate to the treasurer of said company, three fourths of the amount then due for work specified in said certificate, shall be paid to the said party of the first part, as aforesaid. Provided, however, that no estimate shall be made, or certificate given, within one month after the commencement of the work; and provided, also, that no certificate for a less sum than five hundred dollars shall be given, except at the discretion of the engineer; (and when the whole of the work hereby contracted for, shall have been accepted agreeably to contract, the balance due shall be paid to the said party of the first part, their heirs, executors, administrators, or assigns,) and the engineer shall be the sole judge of the quality and quantity of all the said work herein specified, and from his decision there shall be no appeal.

"And it is hereby further agreed, that if the said party of the first part shall not, on their part, well and truly perform all the covenants herein contained, said engineer may dismiss them from the work, and in that event, this contract shall become null and void; and any balance for work done on said road, *which would have been due the said party of the first part, shall be forfeited* and become the right and property of the company.

On that disclosure, in one of the several suits above refer-

red to, the District Court adjudged the Rail Road Company to be chargeable as trustees. To that adjudication they excepted, and by agreement all the other suits were continued in the District Court to abide the decision on those exceptions. The adjudication of the District Court was affirmed, after which judgments were rendered in all the suits against Porter and Benson as principal defendants and against the Rail Road Company as their trustees.

The following schedule describes a portion of the suits; there being many others, not necessary to be presented: —

Parties.	Date of Writ.	Date of service on Trustees.	Term of Court at which actn's were entered.	Court in which judgment was rendered.	Amount of Judgment.	Time of rendition.	Date of Execution.
Ja's B. Neal *v.* Porter & al. & Tr.	1848. Dec. 2,	1848. Dec. 2	D. C. April Term 1849.	S. J. C. Oct. T., 1850	$148 36.61 ——184,61	"	Dec. 6, 1850.
Ja's Williams, jr *v.* same.	" 29	Dec. 30 12 M.	"	Dist. Court. Dec. T., 1850.	$48.95 81,79 ——130,74	"	Jan. 3, 1851.
Dan'l Craig *v.* same.	1849. Jan. 1.	1849. Jan'y 1. 7, P. M.	"	S. J. C. May T. 1851.	$374.20 137,45 ——511,65	"	June 6, 1851.

Upon all those judgments executions were issued, and upon them demands were duly made upon the trustees to pay over the funds in their hands. This action is a *scire facias* against the trustees.

For the purposes of this investigation, it is admitted, that since the making of the disclosures, Porter & Benson have completed their contract.

The whole amount of funds in the hands of the trustees, at the time of the service of the writs on them, (if they are to be charged at all,) is less than the judgments recovered in this and other suits against said Porter & Benson and said company as trustees.

Upon these facts the Court is to render such judgment in this suit, as the law requires.

And the parties, upon the facts agreed, wish to present to the Court the question: — " In what order are the plaintiffs

in the actions mentioned in the schedule to participate in the funds disclosed; and whether any of the actions served on the trustees prior to Jan. 1st, 1849, can (under the contract with Porter & Benson with the company) hold any of the sums due for work performed by them in the month of Dec. 1848?"

Bean, for the plaintiff.

The disclosure shows that seventy-five per cent. of the labor performed in the month of November, 1848, due and unpaid at the time the defendants were originally summoned as trustees, amounted to $200. — Add to this the 25 per cent. not included, and we have $266,66, as the full amount due for labor done in November. Applying the same rule, we have $2136,61, as the whole sum due for labor performed in the month of December, so that the whole sum disclosed for November and December is $2403,27.

The amount of the several judgments specified in schedule is $2415,74. So that the amount of all the judgments recovered against the defendants as trustees, only exceeds the amount of funds disclosed by them in the trifling sum of $12,47. Interest has been taxed upon the several sums recovered as damages, from the date of the writs in each case, and it should also be taxed on the sums disclosed by the defendants. They have had the use of the money, which by the terms of their contract, should have been paid in the months of December, 1848, and January, 1849. They still resist payment and should, at least, be charged with interest on the funds admitted to be in their hands, from the time they were demanded on the several executions issued on the judgments specified in the schedule.

Should it be said, that the 25 per cent., which by the terms of the contract was not payable until the completion of the work, could not be held by attachment, because it was liable to be forfeited by non-performance on the part of Porter & Benson, it may be answered, that the case finds that there was no forfeiture, but that the work was completed in pursu-

ance of the contract; and its completion by Porter & Benson, may quite as properly enure to the benefit of their attaching creditors, as that their neglect to complete, should defeat such attachment, or decrease the sum to be holden under the same.

The liability of the defendants as trustees, under their contract with Porter & Benson, is no longer an open question.

It has been judicially settled, that the defendants are liable to the plaintiff as trustees, under the contract. The main question now to be settled is, for what sum are they liable, and how is that sum to be divided and appropriated, as between the different attaching creditors?

It is submitted, that the rights of creditors here are to be determined as in *other* cases of attachment, by their vigilance. They are to hold by priority of attachment, and the funds in the defendents' hands are to be distributed among them upon that principle.

It may be contended, that the estimate of the quantity of work done must have been made by the engineer of the company, before any attachment could hold the proceeds of labor performed. That is to say, that the amount due for labor, done in November, could not be attached until such estimate had been made and a certificate thereof given, providing it was done between the 1st and 10th of December following, according to the contract. If this view were adopted, it could not affect the attachment of the plaintiff in this suit, because the case does not show that any estimate or certificate for work done in the month of November, 1848, was ever made or given. Nor does it show that the whole amount of labor *done* in the month of November was disclosed; nor that *that* was the first month's labor performed. Evidently the sum disclosed was not the whole labor of that month, nor was *that* the first month's under the contract.

The attachment of Neal was first made, and upon the above hypothesis he would hold nothing under it. Being made Dec. 2, 1848, it was too early to hold the funds due for labor done in November, and the attachment in this case having been

made Dec. 30, 1848, would be satisfied out of the earnings of November.

Again, the estimate was not only to be made and a certificate given, but that certificate was to be presented to the treasurer of the company before payment was to be made; and if it were necessary that either of those several acts should have been done, before a valid foreign attachment would lie, it was as essential that there should have been a demand of payment, as that the estimate and certificate should have been made and given; no such demand was ever made, and if material, none of the thirteen attachments enumerated in schedule can hold. And further, if this were a correct position the defendants could not have been charged as trustees *at all*, under their contract.

But I submit that a just and fair construction of that contract, does not lead to any such conclusions. The liability of the company to pay for three-fourths of the labor done while the work was progressing, did not depend upon any condition or contingency, but was absolute.

The neglect or refusal of the engineer to make an estimate or certificate could not defeat the right of Porter & Benson to recover. What they had done, was due them at the price agreed upon, as the labor was performed; and was payable between the first and tenth of each month.

The only effect of the survey was to render the sum fixed and certain, that sum the attaching creditors are to take in the order of their attachments, and the admission of the defendants in the language of their disclosure is, that at the time of service in the original action, the sum of $1802,42 *was due and unpaid.*

The case would seem to come completely within the letter of the Revised Statutes, c. 119, § 67, by which any money or other thing *due* the principal defendant, although *payable*, at a future time is made attachable by trustee process, although the trustee shall not be compelled to make payment or delivery until the time appointed by the contract. The work under the contract in this case was completed on or

before July 4, 1849, and the money became payable long before the commencement of this suit.

H. W. Paine, for the defendants.

By the disclosure $200 was earned in Nov. and $1602,42, in December.

The defendants can be charged for three quarters only of these sums.

1st. Because it was contingent whether the other quarter would ever become due.

2d. Because by the terms of the contract this quarter was to be reserved, to secure the performance of the contract on the part of Porter & Benson.

Neal, who attached December 2, and whose judgment was for $184,61, is entitled to the three quarters of the amount earned in November.

The plaintiff, Williams, has no claim to this fund till the prior attachment is satisfied, and it takes all.

The plaintiff takes no part of the sum earned in December.

1st. Because when he attached, it was contingent whether Porter & Benson would ever be entitled to any pay for that month.

Williams's suit was served on the trustees December 30. At that time Porter & Benson could have maintained no action.

2d. Defendants were by the contract to have the work estimated once a month. If Williams can hold defendants it would be incumbent on them to have the work estimated as often as trustee process was served on them. *Dwinal* v. *Howe*, 30 Maine, 384; *Robinson* v. *Hill*, 3 Metc. 301. Williams, therefore, can have no part of this fund.

Bean, in reply. — If there be an uncertainty as to the amount of the trustees' liability the construction will be more strongly against them. I submit that the labor was done by the month, and that the Rail Road Company might have been sued for it at the end of every half month.

Rice, J. — The defendants were summoned as trustees of

Porter & Benson, in an action which was entered at the April term of the late District Court, Kennebec county, 1849, and disclosed, and upon that disclosure were charged.

In that action judgment was obtained against the principal defendants and it is admitted that all the proceedings, required by the statute, were had, to fix the liability of the trustees.

The indebtedness of the trustees to the principal defendants in the original action was incurred under a contract for executing the grading and masonry on three sections of the Androscoggin and Kennebec Railroad.

That contract contains a provision that "between the first and tenth day of each month, after the commencement of the work, the engineer (employed by the company) shall estimate the quantity of work done, and shall give a certificate of the same; and upon the presentation of said certificate to the treasurer of said company, three fourths of the amount then due for work specified in said certificate, shall be paid to the party of the first part, as aforesaid; provided, however, that no estimate shall be made, or certificate given within one month after the commencement of the work; and provided, also, that no certificate for a less sum than five hundred dollars shall be given, except at the discretion of the engineer, and when the whole work hereby contracted for shall have been accepted agreeably to contract, the balance shall be paid to the said party of the first part."

It was manifestly the intention of the parties, that monthly estimates should be made of the work performed and payment made for three-fourths the amount thereof, on presentation of the engineer's certificate. The amount thus found, was due absolutely, and depended upon no contingency. There was nothing due and payable until the expiration of each month, and whether the one-fourth, which was reserved, should ever become payable, depended upon the contingency of the contract being fully performed, for it was stipulated, that if the parties of the first part should not well and truly perform all their covenants, "any balance for work done on said road,

which would have been due to said party of the first part, shall be forfeited and become the right and property of the company."

The rights of the parties depend upon the condition of things as they existed at the time of the service of the original writ on the trustees, and could not be modified, or changed by subsequent transactions. The fact that the contract was finally completed cannot therefore change the result.

According to the disclosure of the trustees the amount due for work performed in November was two hundred dollars. One hundred and fifty dollars, being three-fourths of that sum was due absolutely, for which the defendants are chargeable.

Neal being the first attaching creditor after this became due and payable, is entitled to hold that amount, his judgment exceeding one hundred and fifty dollars.

In December, the whole amount of work performed, was $1602,42, of which three fourths, or $1201,81½ was due absolutely after the expiration of that month, and for which defendants are also chargeable.

This latter fund must be appropriated to satisfy the judgments of the several parties according to priority of attachment, whose attachments on their original writs were made after the work for December became due and payable. Parties whose attachments were made in December will not be entitled to hold any portion of this fund, such attachments having been made prematurely.

The defendants are liable to pay interest on the amount in their hands for which they are charged, from and after the day on which demand of payment was made upon them.

When the defendants were summoned as trustees by the plaintiff in the original action they had no goods, effects or credits of the principal defendants in their hands or possession, which could be reached by process of foreign attachment.

According to agreement a nonsuit must be entered.

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

Dow *versus* Dow.

Construction of a will.

Whether the word "bequeath" means the same as "devise," when used in a will, is to be determined, by the connexion in which it is found.

The term "dower" has an established meaning and refers exclusively to real estate.

On Facts agreed.

Action of Dower.

The statement of facts alleged a sufficient ground of action, if the construction, given to the will of the testator by the demandant, was correct.

By his will, the testator gave all his personal property to the demandant, and all the rents and profits, and sole management and control of all his real estate (excepting what was therein bequeathed) until his youngest child should arrive at 21 years.

To this clause was added — "It is however distinctly understood, that it is not my wish or intention in any event, to deprive my said wife (demandant) of the right of dower in any of my said estate (except as above excepted) which she would be legally entitled to, were I to die intestate."

He then directed his estate, when his youngest child became of age, to be divided among his children, of whom the tenant was one, *excepting the dower as aforesaid*, and made one specific *bequest* of real estate.

Subsequently the testator made a codicil, by which he revoked and altered his said will so far as to give full force and effect to the several devises and bequests made by his codicil, and so far as the provisions of the will were inconsistent with the provisions of the last instrument.

In another provision, he revoked that part of the will relating to the tenant, and *devised* to him and his heirs, the tract of land described in demandant's writ.

The codicil contained several devises and bequests to demandant, "in *addition* to the provisions made for her, and in

addition to the several *devises*, *bequests* and legacies made and given to her by his said last will."

H. A. Smith, for tenant.

1. The plaintiff having accepted the very liberal provisions made for her in the will of her husband, is not entitled to dower in his lands "unless it appears by the will that the testator plainly so intended. R. S. c. 95, § 13.

The testator expressly excepts from his estate out of which he intends his wife shall be endowed, "what is herein bequeathed." The words "except as above excepted," can only refer to the exception in the former part of the same clause, where he gives to his wife the control and management and rents and profits of all his real estate, "excepting what is herein bequeathed." If the land in which the dower is claimed was so bequeathed, she is barred of her dower in it by the terms of the will.

2. Whatever questions may arise in relation to the plaintiff's right of dower in other lands of the estate under the first will, all uncertainty in regard to the defendant's land in which dower is claimed, is removed by the codicil. By this instrument the defendant's land is brought within the exception in the second clause of the will, and is as much entitled to exemption from dower, as either of the specific devises made in the will.

The devise to defendant purports to convey a perfect title without reservation or incumbrance, and must be construed "to convey all the estate of the devisor therein which he could lawfully devise." R. S. c. 92, § 26.

Stackpole, for demandant.

To bar the demandant's claim of dower, it must appear, on a fair construction of the whole instrument, that such was the intention of the testator. R. S. c. 95, § § 11, 12 & 13. The intention of the testator must be gathered from the language used by *him* in making his *will.*

No devise, bequest or legacy is given to the demandant in lieu of dower. "So far as such provision in favor of the wife is not distinctly expressed to be in lieu of dower, it is

immaterial whether it is liberal or otherwise. In the codicil the devises to demandant are all in addition to those made by the will.

By the use of these expressions, the testator clearly negatives the idea that it was his intention, that any or all the specific devises made to his wife, were made to her "in lieu of dower in his real estate.

The specific devise to the tenant, is made from what, under the provisions of the will, might have been a part of the residuary estate to be distributed according to the terms of the third clause thereof, which is clearly subject to dower. In that specific devise to defendant, nothing is said about its being made discharged of dower, and of course the devise could have no greater effect than a deed of quitclaim, or a grant without covenants of warranty, neither of which, unless joined in by the wife, could operate a conveyance or discharge her claim of dower, directly or by way of estoppel. The provision in R. S. c. 92, § 26, does not enlarge the power of the testator, but simply establishes the rule of construction to be applied to devises.

The question then arises, what is embraced in the words ("except as above excepted") used in the will. This expression follows the provision of the second clause, giving to the plaintiff the control and management of the real estate, until the full age of the youngest child, with the rents and profits, and applies to the appropriation of a certain portion of the rents and profits, to the payment of certain contingent legacies, for which no other specific mode of payment is made by the will. To such an appropriation the language "herein bequeathed" properly applies. The word "bequeathed" is not the proper term by which to pass the title to real estate, and is not considered as having the same import with the word *devise*, in any case, except when it cannot by its connexion in the sentence be applied to personal estate. Here used, it most clearly applies to the *rents and profits* to accrue, and not to the real estate from which the same are to be derived. This construction does not require any change in the

proper meaning of the word "bequeathed," while the application of it to the specific devises of the parts of the real estate would require such a change. That these words have the meaning we attach to them, also appears from the subsequent general recognition of the widow's right of dower by the will.

The testator gives to his wife all the personal property, "except such part thereof as may necessarily be disposed of for the payment of his just debts as aforesaid." And he also gives her, in addition to other devises, &c. dower in all his "estate," (except as above excepted,) that is, with the same exception applied to the real estate disposed of for the payment of debts as is made in regard to personal property so disposed of.

Smith, in reply. The effect of accepting the provisions in the will is given by statute, and not by the testator. The provision for the widow is presumed to be in lieu of dower unless the *contrary* is clearly expressed.

The addition to the provisions in the will referred to in the codicil are explained by the testator to be in addition to the "several devises, bequests and legacies." Dower is neither.

According to plaintiff's reading, the testator desired that his widow should have all the rents and profits of his real estate, not "excepting what is herein *bequeathed*," but excepting what is appropriated to the payment of legacies, &c., making the exceptions apply to rents, &c., and not to real estate. The objection to that reading is that no bequest of the rents and profits is made except to plaintiff; neither are they set apart and appropriated as such to the payment of debts, &c. The testator is made to say that his wife shall have all the rents, &c., except what is herein *bequeathed* for the payment of debts, &c. A bequest is a different thing from a designation or appropriation for such purpose, and there is nothing in the connection to warrant such a perversion of the word. A bequest is a testamentary gift, and for all that I have learned may as well be employed in the trans-

mission of real as personal property. In other parts of the will and codicil the word is used for that purpose. The testator bequeaths a house and land to Mary Marshall Dow; to John Randolph, $500, in addition to land devised and *bequeathed* by the will; to defendant 25 acres of land in lieu of *bequests* which was only of real estate, and throughout the will and codicil the word is used in that sense. The plaintiff is therefore compelled to sustain a forced and unnatural construction of the will by an unwarrantable perversion of the meaning of words.

The opinion of the Court was drawn up by

HOWARD, J. — The demandant is entitled to dower, unless her claim is barred by her acceptance of the provision made for her in the will of her husband. It is provided by the Revised Statutes, (c. 95, § 13,) that where such provision is made, the widow shall elect whether to accept it or claim her dower; but she "shall not be entitled to both, unless it appears by the will, that the testator so intended."

The personal property of the husband was bequeathed to his wife, the demandant; and in the same clause of the will is a further provision for her benefit, in the language following: — "It is also my will and pleasure that my said wife should have the sole management and control, and receive all the rents and profits of all my real estate at the time of my decease, *excepting what is herein bequeathed*, so long as she shall remain my widow, or until our youngest surviving child shall be of lawful age; but in case of her decease or intermarriage before that period, it is my wish that said real estate may be placed under the care and direction of such guardian of my minor children, as may be appointed by the Judge of Probate for the time being. It is, however, to be distinctly understood, that it is not my wish or intention, in any event, to deprive my said wife of the right of dower in any of my said estate, *(except as above excepted,)* which she would be legally entitled to, were I to die intestate." The testator then provided in the next clause of his will, that when the youngest

surviving child should become of age, all his "estate then remaining, excepting the dower as aforesaid, and *that*, at the decease of my said wife, should be equally divided" between the surviving children named, including the tenant, in the same manner as property would be divided by law, among the heirs of an intestate estate.

By a codicil, the testator revoked and altered his will, "so far as to give full force and effect to the several devises and bequests herein mentioned, and so far as the provisions made in my said will may be inconsistent with the provisions made in this codicil." He then revoked the bequests and legacies to the tenant, and one other child, provided in the will, and devised by codicil to the tenant, specifically, the premises in which dower is now demanded; and made additional bequests and devises to his wife, and other alterations in the disposition of his property, not material to the present inquiry.

There is no conflict between the will and codicil in respect to the demandant's claim; they may be construed and stand together. It is apparent that the testator intended, that his widow should not be barred of her claim of dower, in his lands not devised. He used the word *bequeath* in several parts of the will, not in its primary legal acceptation, but as synonymous with *devise*, as is shown by the context, and in that sense it must be interpreted, in giving a construction to the instrument. Wigram on Wills, 11. The terms "dower in any of my said estate, except as above excepted," refer to the exception of the realty devised. The word *dower*, both technically, and in popular acceptation, has reference to real estate exclusively. *Perkins* v. *Little*, 1 Maine, 148; *Brockett* v. *Leighton*, 7 Maine, 383. The definition of dower is the same at common law. But it is also apparent, that he intended that his widow should not be endowed of such portions of his lands as he chose to devise to others, if she accepted the provision made for her in the will. Or, in other words, and within the purview of the statute, in respect to such lands, it does not appear by the will that the testator plainly intended, that his widow should be entitled to dower, after having

elected to accept of such provision as he had made for her in lieu of dower, and she is therefore barred by statute.

The tenant, consequently, holds the premises devised to him, discharged of all claim of dower by the demandant, and a nonsuit must be entered.

(*) William H. Byram *versus* John P. Hunter.

An order for a specified sum, drawn upon an incorporated company, and payable to order, is not deprived of its negotiability by a statement, truly made therein, that it was drawn in compliance of a vote of the company.

The drawer of a draft, having knowledge that the drawee had, under an assertion of a want of the drawer's effects, refused to pay on presentment, waives the proof of legal notice of the dishonor, by promising to the holder, that he would arrange with the drawee, so that the draft should be paid.

In a suit by the indorsee against the drawer, it will avail nothing to the defendant, that the paper does not, on its face, admit that it was drawn for value.

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

Assumpsit.

The Kennebec Log Driving Company are a corporation. They voted "that John P. Hunter be paid two hundred dollars in full for all claims he may have upon the company."

Hunter drew a draft upon the company, as follows; — "Please pay to E. G. Byram or order two hundred dollars, the same being in compliance with a vote of the company." This action is brought upon that draft, the same having been indorsed by the payee to the plaintiff.

The indorser was called as a witness by the plaintiff, and testified that, while the draft was in his possession, he presented it to Abner Coburn, the president of the company, for acceptance and payment; that Coburn, after looking at the account of Hunter on the books of the company, stated that Hunter owed the company, and that therefore he could not pay or accept the draft. The witness further testified that, at his next interview with Hunter, he informed Hunter of Co-

burn's answer; to which Hunter replied, that he would arrange with the company so that the draft should be paid.

On cross-examination, the witness testified that he could not tell how long it was after the draft came into his hands before he presented it to Coburn, but it was the first time he saw him in town; that it was more than two weeks after he presented it to Coburn before he notified Hunter, who was then absent.

The clerk of the company also testified for the plaintiff, that "the reason given for not paying the draft has been that there is a balance due from Hunter to the company."

The plaintiff here stopped; and the defendant's counsel moved for a nonsuit, which motion being denied, a default was entered by consent, with leave to take it off, if in the opinion of the full Court the plaintiff is not entitled to recover on the foregoing testimony.

Danforth & Woods, for the defendant.

1. The action being brought by the indorsee, is not sustainable, for the draft was not a negotiable instrument. It is, in legal intendment, payable out of a particular fund. Suppose the amount voted was less than two hundred dollars, or that the vote was illegal, or had been rescinded before the draft was drawn, it could not be paid. The validity of the draft depended on the validity of the vote. The draft, therefore, does not show, upon its face, that it was absolutely and without qualification to be paid. The credit was given to the vote and not to the drawer. Bailey on Bills, 16, and cases there cited.

2. If the order was not negotiable, there is no evidence of indebtedness by the defendant to the plaintiff. It may have been that the defendant sent by the payee, as his servant, for the money voted him by the company. He certainly intended to have that particular money paid over and no other, and if the money was to have been obtained for his own use, we do not perceive how he could otherwise have worded the order. There are no words in it expressing or tending to show that the defendant had received any value. The form of the

order does not carry a personal credit, but the holder must have relied upon the vote of the company referred to therein, and if drawn for the benefit of the payee, it could at most but operate as an assignment of the claim under that vote. This is a common practice, and is, perhaps, the most reasonable view of the case. *Legro* v. *Staples & trustee*, 16 Maine, 252. In either case it could create no debt against the defendant, which could be recovered in this action.

3. If the instrument is to be deemed a negotiable one, there was no sufficient demand or notice.

4. The case shows nothing which can excuse the want of seasonable demand and notice. The decided cases have as yet recognized but one exception to the rule requiring such demand and notice; and that is an absolute want of effects in the hands of the drawee; an exception which has always been matter of regret to the Courts. *Bickerdike* v. *Bollman*, 1 D. & E. 405. Hence, when the drawer has reasonable expectation that the bill will be accepted, or there is a running account between the drawer and drawee, a presentment and notice has been considered necessary. *Campbell* v. *Pettengill & al.* 7 Maine, 126; Opinion of Ellenborough in *Brown* v. *Maffey*, 15 East, 221; *Rucker & als.* v. *Hiller*, 16 East, 43; *Prideux* v. *Collier*, 2 Starkie, 57.

Now we contend, that the drawer had reasonable expectation, that the order would be accepted. The language of the vote implies this. It was a matter unconnected with other transactions, and the vote was to pay unconditionally, not to allow an account.

Again, it appears from the testimony, that there was an account, between Hunter and the company, at least that is the just inference. And this brings us to another point, that in fact it does not appear but that the drawer had funds in the hands of the company, when the order was drawn, and the burden of proof is upon the plaintiff to show this. Bailey on Bills, Phillips & Sewall's Ed. 303.

The most that can be made out of the testimony is, that there was a balance due from Hunter, when the draft was

presented; and even that is not shown satisfactorily or by competent evidence. Nothing shows that the balance was not the other way when the order was *drawn*; and if the company had effects then, it would be sufficient. Bailey on Bills, 307.

Evans, for the plaintiff.

HOWARD, J. — It is essential to a bill of exchange, that it should be payable in money, absolutely, and without any contingency which would embarrass its circulation. Contingencies as to the amount, the event, the fund, or the person, have been regarded as such embarrassments to the negotiation of bills and notes, as to render them invalid for commercial purposes.

The instrument declared on, in this case, is a draft upon the drawees to pay to the assignor of the plaintiff, or order, two hundred dollars, in compliance with a vote of the company of which they were the directors. It is a request for them to pay a particular sum of money, due from the company to the drawer. It is payable absolutely. Upon its face there is no apparent uncertainty affecting its negotiability, and technically, it may be regarded as a bill of exchange. Chitty on Bills, c. 5, p. 132, 139; Bayley on Bills, c. 1, § 6; Story on Promissory Notes, §§ 22, 25, 26; Story on Bills, § 46.

From the evidence reported, we cannot determine that the defendant had not reasonable expectation that the draft would be duly honored, and he was, consequently, entitled to notice of its presentment and dishonor.

It appears that the bill was presented to the president of the board of directors for acceptance and payment, and that he declined accepting or paying it, alleging that the drawer owed the company. Notice of this was given to the defendant, though, as it would seem, not seasonable, and with full knowledge of the facts, he agreed "to arrange with the company, so that the draft should be paid." This amounts to a waiver of the consequences that might have followed the laches of the holder, in presenting the bill, or giving notice

of its dishonor. Chitty on Bills, c. 10, p. 501, a; Story on Promissory Notes, § 364.

Judgment on the default.

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

FRANKLIN BANK *versus* COOPER, *Executor.*

Where, in a suit upon several distinct indebtments, a set-off claim is allowed by the jury, the law presumes the amount to have been allowed ratably upon each of the indebtments.

A surety upon one of such indebtments, has no right to claim, that such set-off be applied by priority, upon that particular indebtment.

ON FACTS AGREED.

On Jan'y 11, 1849, an action in favor of the plaintiffs was pending against W. & H. Stevens, upon the following notes and drafts, on which said W. & H. Stevens were liable, viz.:

Three notes signed by them as principals, and by the defendant's testator, as surety; —

A draft made by J. O. P. & F. Stevens for $810,28, accepted by W. & H. Stevens, and indorsed to the plaintiffs;

A note made by J. O. P. Stevens for $1200, payable to W. & H. Stevens, and by them indorsed, waiving demand and notice; —

A draft made by J. O. P. & F. Stevens, for $1425, accepted by W. & H. Stevens and indorsed to the plaintiffs; — also,—

A note made by W. & H. Stevens, for $600, negotiated to the plaintiffs.

On the same Jan'y 11, 1849, the plaintiffs held drafts of about $6000, against the firm of C. & G. W. Stevens.

The bark Keoka was placed in the hands of the plaintiffs, upon their written stipulation, that it should be sold, and its avails appropriated as follows; —

1. To discharge said drafts of about $6000, against C. & G. W. Stevens; —

2. to pay Franklin Stevens $1500; —

3. the residue to be applied "on demands which the Franklin Bank, [the plaintiffs.] have against W. & H. Stevens.

The bark was sold, and its avails amounted to $8663,91, making a balance of $1253,64, to be appropriated according to said agreement, towards the said demands in suit against W. & H. Stevens.

For that balance W. & H. Stevens filed their set-off account in said suit and its amount was allowed by the jury, leaving a large judgment against W. & H. Stevens.

That judgment being unsatisfied, the plaintiffs have brought this action against the surety on the three first above mentioned notes, being a part of the demands upon which judgment against W. & H. Stevens was recovered.

Among said demands the one earliest payable was that of $1200, made by J. O. P. Stevens, and indorsed by said W. & H. Stevens. The demands which had the next earliest pay day were the notes now in suit.

The defendant contends that, as his testator was merely a surety, the said balance of $1253,64, should be applied to the notes which he signed, being the three notes now in suit. By agreement of parties, the action was then defaulted, and continued for such judgment as the law, upon said facts shall require.

H. W. Paine, for the plaintiffs.

1. The payment should be applied to the note for $1200, as that note was older and fell due before either of the notes in suit. *Boody* v. *United States*, 1 W. & M. 150; *Hager* v. *Borgent*, 1 Bay. (S. Car.) 497.

2. If this be unsound, it is then contended that the payment shall be applied first to the note for $600, as for this the plaintiffs had no security. *Portland Bank* v. *Brown*, 22 Maine, 295.

3. If neither proposition be sustained, then it is contended that the payment shall be applied *pro rata*, upon all the notes and drafts held by the plaintiffs, on which the judgment was

recovered. *Cumberland Bank* v. *Cunningham*, 24 Pick. 270; *Blackstone Bank* v. *Hill*, 10 Pick. 129.

Evans, for the defendant.

That claim against W. & H. Stevens, which first became payable, was for the debt of J. O. P. Stevens, on which W. & H. Stevens were merely indorsers or guarantors. Where the parties do not appropriate payments, the law will apply them to the proper individual debt of the payer, in preference to his liability for third persons. This, too, is the *justice* of the case. One's property should go to pay his own debts before those of another. The sureties have a right that it should be so applied.

It does not appear that W. & H. Stevens ever were informed of the receipt of these proceeds, or had opportunity to elect how they should be applied. It was not a *payment* in the ordinary mode.

The plaintiffs made no election where to apply it, but by bringing suit against W. & H. Stevens, *on all the demands held by them*, and giving no credit, elected not to allow it on any; and the debtors may now elect. *Portland Bank* v. *Brown*, 22 Maine, 297.

Where money is paid, and no application is made by either of the parties, the law will make such application as it deems just and reasonable. *Robinson* v. *Doolittle*, 12 Vermont, 246.

It is just and reasonable that it should be applied to the *oldest debt* of the party paying, in preference to an older one where he is merely surety.

HOWARD, J. — On January 19, 1849, the plaintiffs received the proceeds of the bark Keoka, to be appropriated according to the terms of their written agreement with C. & G. W. Stevens, dated January 11, 1849. There was a provision in the agreement, that after certain specified payments were made, the remainder was to be applied "on demands the Franklin Bank have against W. & H. Stevens." The bank then had two drafts on W. & H. Stevens, and by them accepted, not then due, and a note of a prior date, signed by

them, payable to their own order on demand, and by them indorsed; also a note over due, on which they were indorsers waiving demand and notice, together with the three notes now in suit.

After the maturity of the drafts, the plaintiffs sued W. & H. Stevens on all of the notes and drafts, in one action, and they filed in set-off, generally, the amount of the remainder thus received by the plaintiffs for their benefit, which was allowed by the jury, in set-off, generally, and judgment was rendered for the plaintiffs for the residue.

The testator was surety on the three notes in suit, but had no connection with any of the other notes mentioned, or with the drafts. The defendant insists, that the remainder of the proceeds of the bark should be applied, exclusively toward the payment of the notes in suit.

The general doctrine of the rights of debtors and creditors, respectively, to appropriate payments, does not appear to be involved in this case. For both debtors and creditors, in the former case, *(Bank* v. *W. & H. Stevens,)* having neglected previously to apply the payment, at the trial the debtors claimed to have it allowed against all of the demands in gross, and it was so appropriated, by consent of the creditors, or by operation of law.

The plaintiffs and the principal had a right to apply the payment to any or to all of the demands, as they preferred, and the defendant, as surety, cannot change their application. He does not appear to have had any legal connection with the fund from which the payment was made, and he has no right to complain of the appropriation.

The application of the payment has, in fact, been made in accordance with the original agreement of the plaintiffs, and the intention of the parties in interest. And it may fairly be deduced from the doctrines of the civil and the common law, on the imputation or appropriation of payments, as a just conclusion in this case, that as the plaintiffs blended their demands in one suit, forming but a single claim against W. & H. Stevens, and as the general payment was set off against

that claim, all the demands were satisfied ratably, and that the notes now in suit were paid in that proportion. Domat's Civil Law, by Strahan, B. 4, T. 1, § 4, Rule 7; 1 Poth. Obl., by Evans, Part 3, c. 1, Art. 7, § 532, Rule 5, n. a; *Devaynes* v. *Noble*, 1 Meriv. 605–607; *Perris* v. *Roberts*, 1 Vernon, 34; *Shaw* v. *Picton*, 4 Barn. & Cress. 715; *Favenc* v. *Bennett*, 11 East, 42; *Pattison* v. *Hull*, 9 Cowen, 762–776, n. b; *Blackstone Bank* v. *Hill*, 10 Pick. 129; *Commercial Bank* v. *Cunningham*, 24 Pick. 276.

The plaintiffs will have judgment upon the notes declared on, deducting the accounts paid, in the mode stated.

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

(*) STATE *versus* SEYMOUR.

That the acts, necessary to constitute the crime of burglary, were committed *in the night time*, is sufficiently stated by an averment in the indictment, that they were committed on a specified day, about the hour of twelve in the night of the same day.

INDICTMENT for burglary, charging that the breaking, entering and stealing were committed on a specified day, "about the hour of twelve in the night of the same day."

After a verdict of guilty, the defendant moved in arrest of judgment, for the reason that it did not appear from the indictment that the acts were committed *in the night time.*

H. W. Paine, in support of the motion.

The bill is drawn with reference, apparently, to § 8, c. 155, R. S.

The verdict of guilty is but a verification of the averments in the bill. If the charge does not necessarily import a crime, there can be no sentence. *State* v. *Godfrey*, 24 Maine, 252.

May it not be true that the defendant broke and entered "*about* the hour of twelve in the night" and equally true, that he did not break and enter in the night time? That is, "during that part of the natural day when the light of the

sun has so far disappeared, that the form of a person could not be distinguished?"

The word "*about*" is defined by Lexicographers to signify "near to" — in point of time, place or number.

How near in point of time must two events occur, that it may with propriety be said that one took place *about* the time the other did? How long before or after the occurrence of one event must another event happen, to make it improper to say they occurred *about* the same time?

The word *about* is one of the loosest and most indefinite in the language. It is used to indicate a want of certainty, to show that the person using it does not intend to be precise.

In *State* v. *Baker*, 34 Maine, 52, it was held that an averment that an offence was committed "about the first day of August" was bad. And though the time was not material, and the proof might apply to a day long before or long after the day stated, it was too indefinite and uncertain.

Suppose defendant had been charged with breaking *about* the hour of eight in the night, would that be sufficient? Yet that case does not in principle differ from this case.

It may be said, that a proper punctuation would remove the difficulty, that a comma after the word "*twelve*" would show, that defendant was charged with breaking in the night about the hour of twelve.

But it will hardly be contended, that when the language of an indictment is ambiguous, it is to be construed most strongly against the accused.

It was held in Massachusetts to be unnecessary to set forth the hour when a burglary was committed, because of the peculiar provisions of their statute, and it is intimated, that it would be necessary to state the hour but for that statute. *Commonwealth* v. *Williams*, 2 Cush. 583.

Does the word "burglariously" cover the supposed defect?

A felonious taking is larceny; but it would not be enough to charge one with a felonious taking, without averring that he *stole*.

Murder is killing with malice aforethought; but to aver that one killed another with malice aforethought, without averring that he murdered him, would not be sufficient.

To allege that one sold ardent spirit against the form of the statute, is not enough. It must be averred that he was not licensed.

Defendant is not liable under § 11, c. 155, because there is no averment that the occupants were put in fear. Nor can the defendant be sentenced for simple larceny, because the number of articles taken is not stated. Hawk. B. 2, c. 25, § 74.

Such a count would be bad in a writ for trespass.

R. C. Vose, County Attorney, contra.

PER CURIAM. — Motion overruled.

(*) DENNISON *& al. versus* BENNER.

Persons summoned as trustees to the principal defendant are parties to the suit.

They are parties adverse to the plaintiff.

A creditor brought two separate suits against different persons. In one of the suits, he summoned trustees. He then proposed in writing to another creditor of the same defendants, that he would discharge his said claims, upon receiving, among other things, "an obligation from the adverse parties to forbear any suit or trouble to him on account of his proceedings against them." — *Held*, that an instrument signed by the defendant in one of said suits, containing, first, a formal receipt in full of all demands, and secondly, an agreement that "neither party" should be entered in the suit against the other defendant and trustees, does not constitute the obligation contemplated in the plaintiffs' written proposal.

ON FACTS AGREED.

The plaintiffs, being merchants in Boston, were creditors of one John Benner, against whom they had a suit pending in which his property is attached, and several persons summoned as his trustees. And they have brought this suit against Washington Benner for fraudulently concealing the property of their debtor, John Benner, and in this suit have attached property

and summoned trustees. One Hanson, of Boston, also had a large debt against Washington Benner, who was unable to pay, because his property was attached in this suit.

Hanson thereupon procured an agreement signed by the plaintiffs as follows. — "We have agreed with Mr. J. B. Hanson to settle our claim against John Benner, and discharge the suit against Washington Benner, upon the payment of five hundred and fifty dollars cash, within thirty days, and an obligation from the adverse parties to forbear any suit or trouble to us on account of proceeding against them. Boston, February 15, 1849."

Hanson then came to Maine, and undertook with Washington Benner to discharge the plaintiffs' claims against the Benners, and gave to Washington Benner the following paper: —

"Received of Washington Benner five hundred and fifty dollars, in full discharge of all claims in favor of J. N. Dennison & Co., and against John Benner of Waldoboro'; and the action now pending in favor of *J. N. Dennison & Co.* v. *John Benner*, in D. C. M. D. Lincoln county, is to be entered neither party, and the action of J. N. Dennison & Co. against Washington Benner, now pending in D. C. M. D. Kennebec county, is to be entered neither party; and I, the said J. B. Hanson of Boston, hereby, in consideration aforesaid, obligate myself to the full performance of the above stipulations. Feb. 20, 1849. "J. B. Hanson."

Hanson, having returned to Boston, proposed to pay the plaintiffs the $550, and to close the business.

The plaintiffs thereupon wrote an order upon their attorney at Waldoboro', as follows: — "Having made an arrangement to compromise our claim on John Benner, on certain conditions, which have been fulfilled, we request you to hand over to said Benner his notes which are in your hands. —

"Yours truly, — J. N. Dennison & Co."

Also an order upon his attorneys at Augusta, as follows: — "Having made an arrangement to discontinue our suit against Washington Benner, on certain conditions which have been fulfilled, we request you therefore to cause said suit to be discharged. "Yours truly, — J. N. Dennison & Co."

The plaintiffs offered these orders to Hanson, who refused to receive them, claiming that as Washington Benner had paid the $550, the notes of John Benner should be delivered for the use of Washington. To this course, the plaintiffs would not assent. Hanson then made a tender to the plaintiffs, of which they gave him a written acknowledgment as follows: —

"Boston, Feb. 28, 1849.

"We acknowledge, that J. B. Hanson on this day tendered us $550; also that he tendered us a paper signed by Washington Benner, of which the following is a copy: —

"February 20, 1849.

Received of J. N. Dennison & Co. one dollar in full of all claims and demands of every description, and the action now pending in the District Court in Lincoln county, *J. N. Dennison & Co.* v. *John Benner & trustees*, is to be entered neither party both as regards principal and trustees, and the action *J. N. Dennison & Co.* v. *myself*, in the District Court, M. D. Kennebec county, is to be entered neither party.

(Signed,) "Washington Benner."

It was agreed by the parties, that if the foregoing facts constitute a defence, the plaintiffs are to become nonsuit; otherwise the action is to stand for trial.

Shepley & Dana, for the plaintiffs.

The paper signed by the plaintiffs, if it is to be treated as a binding contract, was simply a consent to take a part of their debt in discharge of the whole, upon conditions never performed or offered to be performed. In giving up so large a portion of their debt, they wished to be free from all danger or necessity of further litigation or expense. They therefore required "an obligation from the adverse *parties* to forbear any suit or trouble to them."

The only *obligation* that was offered was the informal receipt of Washington Benner, and his agreement that the suit against John Benner and trustees, should be entered "neither party." It does not appear that either John Benner or the trustees were consulted, or that they consented to the ar-

rangement, and nothing prevented them from ignoring the settlement, and obtaining heavy costs against the plaintiffs.

When informed that the money and papers were ready, the plaintiffs expressed a willingness to receive the same as they had agreed, and sent to Hanson their orders upon their attorneys. But when they discovered that, instead of treating with their debtor and discharging *him*, they were called upon to deal with speculators, and to sell John Benner's note without his knowledge or consent, and this too without any offer of the obligations insisted upon in whatever agreement there was, they very properly refused to deal further with this Hanson. If they were bound by *any* agreement, this step demanded by Hanson was no part of it. They took the only safe course. They were bound to no other, and the action should stand for trial.

Morrell, for the defendant.

The paper signed by the plaintiffs constituted Hanson their agent, to settle with the Benners and to discharge their claims. So it was meant. So Hanson understood it, and acted upon it. After Hanson's return to Boston, they recognized his doings in their behalf.

Upon this construction, the only question that arises is, whether the terms imposed in the instrument have been complied with by the defendant.

"Payment" of the sum stipulated for was made within the time mentioned (the 20th February,) and it was agreed, as stated in the paper signed by Hanson of that date, and received and accepted by the "adverse parties," that the suits then pending could be entered neither party. Washington Benner also gave a written "obligation" or release of all claims.

There is no complaint that the suit of Jno. Benner has not been disposed of as agreed, nor that the defendant has not been ready so to dispose of the suit against him.

But it is argued, that the terms of the plaintiffs' agreement required an obligation from "the *adverse parties* to forbear any suit or trouble," and that these terms have never been complied with.

What sort of obligation does the instrument provide for? An obligation in *writing*, under hand and seal? The instrument does not in terms provide for an *obligation in writing*, and the language employed does not necessarily, nor ordinarily imply an agreement in writing. If the plaintiffs will insist upon a literal and strict construction of the instrument, they are entitled to that, but to no more.

But what did the plaintiffs intend? It is reasonable to suppose, that they intended, when the claim was "settled and suit discharged," to have such obligation from the Benners, either verbal or written, as would free them from future trouble. Such indemnity they were fairly entitled to, and they *have got it.*

What did the case require? The plaintiffs had a suit against John Benner on his promissory notes to them. It will not be contended that the plaintiffs, upon the settlement of those notes and the suit founded on them, needed or expected a written obligation from him "to forbear any suit or trouble on account of proceedings against him." By the voluntary settlement of the demand, he had waived all claim for cost and that difficulty would be fully met by the verbal obligation for the arrangement of the suit.

But it is said there were trustees, and "nothing prevented them from claiming cost." The case does not show that the trustees were in a position to claim cost, or were entitled to it, and if they were, the answer is, it is not against the *payment of cost* that the "obligation" was to provide; it was "to forbear any suit or trouble," &c. Moreover the trustees are not "the adverse parties" named in the paper of Feb. 15, who were to give an obligation to forbear. The plaintiffs' proceedings against them were not of such a character as made it necessary to provide for it.

But we are not left in doubt as to what sort of obligation the plaintiffs expected and required. Hanson, having settled and discharged the claim and suit against the defendant, returned to Boston and notified the plaintiffs of his doings. With the *knowledge* of what had been done by Hanson, and in *pur-*

suance thereof, on the 28th of February they write to their attorney in the suit against John Benner, and who had the notes, that "the conditions have been fulfilled," and request him to deliver up the notes. In this note there is a direct recognition of the settlement made by Hanson and of his authority to make it, and an express and unqualified admission that the conditions upon which the claim upon John Benner was to be compromised, had been fulfilled.

Now why is this suit not entered "neither party," according to the agreement made with Hanson?

It is simply owing to some misunderstanding or disagreement between Hanson and the plaintiffs, in no way connected with the defendant, and growing out of matters not involved in, or connected with, the settlement of the claim against John Benner and the discharge of the suit against the defendant.

It seems that Hanson claimed to have the notes delivered for the use of the defendant. But the defendant, in the settlement and discharge, did not make the delivery of the notes a *condition* with the plaintiffs. He gives them an unconditional release, and pays over to their agent the money unconditionally. The defendant never has, and does not, claim that Hanson shall hold the money and release until these notes are delivered for his benefit. The money and the release are unconditionally in the hands of Hanson, who was the plaintiffs' agent, and the defendant claiming nothing from either; why then should not this suit be discontinued?

So far as appears from the terms of the settlement; so far as appears from the statement of facts; and so far as depends upon the defendant's disclaimer here, Hanson acted without the authority, knowledge or assent of the defendant, in what took place between him and the plaintiffs. The defendant had got his discharge, and should not be prejudiced by any acts of Hanson.

But it would seem that Hanson did not refuse to pay over the $550, and deliver the obligation of the defendant to the plaintiffs, unless they would deliver the notes for defendant; for although he *proposed* to do so, yet when it was declined

by them, he immediately offered and tendered both money and obligation, which the plaintiffs refused, and which they can now have if they choose.

Shepley & Dana, in reply.

The attempt to foist Hanson upon the plaintiffs, as their agent, does violence to the case. The paper given him by the plaintiffs will bear no such construction. He came to them upon an errand of his own; all his desire was to better himself by obtaining an easy discharge for his debtor from the plaintiffs. This object was known to them and, of itself, would prevent their authorizing him to act at all for them in any trust relation. He was acting in concert with this defendant, who is the only one he calls upon in Maine; who is the only one that signs any obligation; who is the one that furnishes the funds, and demands to be subrogated to the plaintiffs' rights against John Benner. In the face of all this, the pretence that he was all the while *our* agent is unfounded, and is caused wholly by the exigencies of the defendant's case.

It is argued that the defendant has done all that was required, and has made no claim against the plaintiffs. But this affords no reason, if it were so, why the plaintiffs should have accepted at the hands of Hanson a less complete discharge of claim or suit than was stated in their writing. Besides, the suit against J. Benner and trustees is still pending, and they have not yet had any opportunity for claiming costs against the plaintiffs. John Benner never consented that the suits should be entered 'neither party,' nor has he given any agreement that he would not *claim* cost, if the plaintiffs were to do what the defendant demands of them.

SHEPLEY, C. J. — The paper signed by the plaintiffs and bearing date on February 15, 1849, cannot be considered as constituting J. B. Hanson their agent. If Hanson could not induce the Benners to accede to the proposed terms of settlement, he could not be required to carry that agreement into effect. The plaintiffs could not have maintained any action

against him upon it. That paper is what it purports to be, an agreement or offer of the plaintiffs, to settle their suits against the Benners upon certain terms, and placed in the hands of Hanson, that he might avail himself of the benefit of it. It would become binding upon the plaintiffs upon an acceptance and performance by Hanson. He insists that there has been a performance. The money to be paid was tendered within the stipulated time. A paper signed by the defendant acknowledging the reception of one dollar "in full of all claims and demands of every description," and stating that an entry of neither party was to be made in the plaintiffs' action against John Benner and trustees with respect both to principal and trustees, and that a like entry was to be made in their action against himself, was also tendered. No other paper or proof appears to have been presented.

The plaintiffs, by their agreement, were entitled to have "an obligation from the adverse parties to forbear any suit or trouble to us on account of proceedings against them."

Trustees are parties to a suit, and were adverse parties to the plaintiffs in their suit against John Benner. If the parties defendant in that suit could recover costs against the plaintiffs, it would occasion trouble to them on account of those proceedings. No document or proof was presented to the plaintiffs showing, that those defendants, either principal or trustees, had agreed to an entry of neither party or to relinquish their claims to costs.

The defendant in this action and Hanson assumed to make such an agreement for them, but it does not appear that they had any authority whatever to do so. Nor does it appear, that the suit against John Benner and trustees, has ever been discontinued or adjusted in any other manner, or that the trustees have been discharged without costs, or that the plaintiffs are not liable to pay costs to them.

There does not therefore appear to have been a substantial compliance by Hanson with all the material terms offered by the plaintiffs.

It does appear, that they stated in the orders prepared for

their attorneys, that the conditions of their agreement had been fulfilled. They must have done so under a misapprehension of their rights or from a willingness to waive a more strict performance, if that arrangement was perfected. Hanson declined it; and their erroneous statement or waiver founded upon it fell with it. Being part of an arrangement never completed the plaintiffs cannot be bound by that declaration. *The action is to stand for trial.*

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

RICE, J., concurred in the result.

INHABITANTS OF AUGUSTA *versus* INHABITANTS OF KINGFIELD.

By R. S. c. 32, § 1, mode 2, "legitimate children shall follow and have the settlement of their father, if he have any within the State, until they gain a settlement of their own; but if he have none, they shall in like manner follow and have the settlement of their mother, if she have any."

If the father of the pauper never had any settlement in the State, and has voluntarily and absolutely abandoned and deserted his wife and left the State; while he is living, she can gain no settlement independent of her husband in her own right.

And if she marry another illegally, while her first husband is living, she can acquire no rights by *residence* under that association.

But her settlement, at the time of her marriage, is not lost or suspended by marrying one having no settlement in the State.

Where the mother of the pauper at the time of her marriage lived with her father, who had a settlement in the town where they lived, this will not authorize the Court to infer that the mother had a derivative settlement from her father.

ON FACTS AGREED.

ASSUMPSIT, for the support of one Granger, a pauper. The notice and answer were regular and seasonable. The amount claimed was necessarily expended.

William Granger, the father of the pauper, never had a settlement in this State. In Sept. 1815, he married Sally Trask, the mother of the pauper, at the house of her father in Kingfield, — he then having a settlement in that town, and she residing with him.

William Granger left his wife and the State, before the pauper was born at his grandfather's in Kingfield, which was May 6, 1816, and has never contributed to the support of herself or his child, though she often heard from him, by way of other people, as living in New Brunswick, as late as the year 1842.

The mother and pauper continued to reside in Kingfield, in her father's family, till October, 1821 or 1822, when she married one Moody. In Feb. following, she, with Moody, removed into another town, and from thence to Bingham. In 1849, or 1850, Moody died. They never received aid as paupers.

The pauper continued to reside with his grandfather, and did not live with his mother after her marriage with Moody. In 1822, the grandfather, with the pauper, moved from Kingfield to Freeman, where they both lived together till the pauper became twenty-one years of age. Up to that time neither received aid as paupers. Since arriving at twenty-one years of age the pauper has gained no legal settlement.

It was stipulated, that upon these facts, the Court might draw such inferences as a jury might, and render judgment by nonsuit or default.

Baker & Titcomb, for the plaintiffs, took the following positions: —

1. The mother of the pauper had her residence in Kingfield, which was not changed by the marriage with Granger. The pauper's residence was in Kingfield, where he was born, the father having no other residence in this State.

2. The marriage with Moody, during the life of the first husband, was void, and no settlement of the mother of the pauper through her was gained thereby, or by her subsequent residence with Moody.

3. The pauper was emancipated, and gained a residence of his own, by residing with his grandfather in Kingfield, pursuant to § 2, c. 122, of Act of 1821. *Freetown* v. *Taunton*, 16 Mass. 52; *Granby* v. *Amherst*, 7 Mass. 1; *Lubec* v. *East-*

port, 3 Greenl. 220; *Dennysville* v. *Prescott*, 30 Maine, 470; *St. George* v. *Deer Isle*, 3 Greenl. 390.

Paine & Pillsbury, for defendants.

The plaintiffs are to satisfy the Court, that the defendants are chargeable. The burden of proof is on the plaintiffs.

The case finds that the father never had a settlement in the State, and that the pauper has not gained a settlement since he was twenty-one.

1st. The pauper is not proved to have gained a settlement in Kingfield through his mother.

It is true that the mother's father had a settlement in Kingfield at the time of her marriage, Sept. 28, 1815, and she was then residing with him. But *non constat* that she then had the settlement of her father. He may have gained a settlement there after she became twenty-one.

2d. But if the pauper's mother did have a settlement at the time of her marriage in 1815, she has since that gained a settlement in Bingham, and the pauper derivatively through her. She married a second husband in October, 1821 or 1822, and by carefully examining the statement, it appears that she moved with her second husband to Bingham sometime in 1826 or 1827. The pauper, born in 1816, would then have been ten or eleven years old. The mother, with her husband, continued to reside in Bingham from 1826 or 1827, to 1849 or 1850, receiving no aid as a pauper.

But it will be contended that the second marriage was void and that the pauper's mother could gain no settlement in Bingham by living there with a man who was not her husband.

The statement shows that prior to the birth of his child, in 1816, the father of the pauper left his wife and child, and abandoned the State, but that the wife heard from him as late as 1842.

The facts are not inconsistent with the wife's honesty. She may not have been married till the first husband had been gone seven years, and up to that time she may not have heard from him. A jury would be authorized to infer this in the absence of proof to the contrary.

The second marriage, therefore, was not illegal and void, and the wife might gain a settlement under her second husband in Bingham.

But if the second marriage was illegal and void, the woman was competent to gain a settlement in Bingham in her own right.

The case abundantly shows that the husband utterly abandoned his wife in 1815 or 1816 and the State too. Now it has been settled that under such circumstances the wife may be treated as a *feme sole;* may contract, sue and be sued. *Gregory* v. *Paul*, 15 Mass. 31; *Gregory* v. *Pierce*, 4 Met. 478; *Beane* v. *Morgan*, 4 M'Cord, 148; *Arthur* v. *Broadwax*, 3 Ala. 557. If then a *feme sole* for one purpose, why not for this?

3d. The pauper was emancipated and gained a settlement in Freeman, by being there from 1822 till he was twenty-one, receiving no aid as a pauper. His father had utterly abandoned him; his mother had ceased to have care of him. *Wells* v. *Kennebunk*, 8 Maine, 201.

Howard, J. — It is admitted that the father of the pauper never had a settlement within this State. The pauper would, therefore, "follow and have the settlement" of his mother, if she had any. Statute, 1821, c. 122, § 2, mode 2.

It is admitted that the mother resided with her father, when she was married, in 1815, and that he then had a settlement in Kingfield. But it is not admitted, or proved, that she had a derivative settlement from him; nor does it appear that she acquired a settlement in that town, unless it was gained subsequently to her marriage. It is not material in this case, to inquire where her settlement was, if it were not in the town of Kingfield.

The pauper was born in 1816, and before that time, his father had left the mother and the State. The settlement of the mother, if she had any, at the time of the marriage, would not be lost or suspended by her marrying one having no settlement in the State; but she could not gain a settle-

ment in her own right, after marriage, and independent of her husband, while he was living, and the marital relation subsisted. She would be restricted in this respect, by the general legal disabilities of a *feme covert.* His absence from her, and from the State, and neglect to contribute to her support, would not restore her to the rights of a *feme sole*; for, as agreed, she often heard from him through others, and as late as in the year 1842, as living in the Province of New Brunswick. His death could not, therefore, be presumed from his absence, nor was the marriage thereby dissolved.

Where the husband has voluntarily, and absolutely deserted the wife, with intention to renounce the marital rights and duties, and has gone out of the State to remain, or was never an inhabitant of the State; or where he compelled her to leave, and continue separated from him, in another State, the general rule of the common law imposing upon her the disabilities of a married woman, has been relaxed, and she has been allowed to act as a *feme sole*, so far as to contract debts, and transact business in her own name, and to sue and be sued. In such cases she is partially relieved from her legal incapacity, from necessity, and in reference to her security and protection; but the relief extends no further than the objects to be attained. She is not wholly absolved from the general obligations, duties and disabilities of a married woman. She cannot marry again during the life of the husband; nor can she acquire any rights, independent of him, not specially authorized by law, which conflict with the matrimonial relation. The law favors the continuance of that relation, and countenances no act of either party tending to its dissolution, without sufficient cause; and therefore, the gaining of a separate settlement by either, during marriage, is unauthorized, and not warranted by law. *Hallowell* v. *Gardiner*, 1 Maine, 93; *Jefferson* v. *Litchfield*, 1 Maine, 196; *Gregory* v. *Pierce*, 4 Met. 478; See Co. Lit. 132, b. 133, a; *De Gaillon* v. *L'Aigle*, 1 B. & P. 357; *Stratton* v. *Bushnach*, 1 Bing. N. C. 139.

The second marriage of the pauper's mother, "in 1821 or

1822," was unlawful, and she acquired no rights by residence under that association. It therefore appearing that the father of the pauper had no settlement in this State, and not appearing that the mother had any in Kingfield, the pauper could not have a derivative settlement from either in that town. Before he was of age, he was not competent, upon the facts stated, to gain a settlement in his own right, and it is admitted, that since that time, none has been acquired.

Plaintiffs nonsuit.

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

RICHARDS *versus* MORSE *& als.*

Where, in an action of *tort*, the defendant was arrested on the writ and committed to prison, but was subsequently released on giving bond to the plaintiff, in accordance with the provisions of § 17, c. 148, R. S.; and after judgment was recovered against him, neglected to comply with the conditions of the bond; — *Held*, that such bond was obligatory as a statute bond.

In a suit on *such bond*, the damages will be the amount of the judgment and costs of the action in which it was given, with the interest thereon.

ON FACTS AGREED.

DEBT, on a bond given by Joseph Morse, the principal, for release from imprisonment on *mesne process*, in an action of *tort*, in accordance with § 17, c. 148, R. S.

Judgment was rendered in that action against Morse, which has never been paid, nor did he within the time set forth in the condition of the bond, cite the creditor, or make any disclosure.

The case was submitted to the Court for a legal decision.

Morrell, for defendants.

The bond is such as is authorized, when the arrest is made on mense process founded on contract, under provisions of § 2, c. 148, R. S.

The action on which this bond was given was not founded on *contract*, and the arrest was not made in pursuance of the provisions of the above section.

The arrest was made under § 9, which authorizes the writ to issue against the body of defendant, and that he might be arrested and imprisoned, or give bail, as provided in c. 114.

The bond taken, was not the bond authorized and required by § 9, c. 148. This bond required other and different duties of defendant and imposed different penalties.

The bond authorized by § 17, is given as an *additional* privilege or right, to a person arrested on mesne process, founded on contract.

By sections 3, 4 and 5, provision is made for disclosure of such person, and by § 7, he may be discharged from arrest upon such disclosure; and by the 17th §, he "may *also* be released from such arrest by giving bond."

Thus, a person *so* arrested, may procure his release by submitting himself to examination, &c. or he may *also*, in like manner, be released by giving bond.

And this provision is made for a person who stands to the plaintiff in the relation of *debtor*. It is a process for the relief of poor debtors. It is based upon the idea of what *power* a creditor should have over his debtor, and the specific relief a debtor should have when the creditor is pursuing him with legal process.

He may disclose before the magistrates, and procure his release from arrest, or he may give bond that he will disclose after final judgment, and in like manner be released.

The bond required by § 9, is distinguishable from this as a common bail bond, the primary meaning of which is, a specialty, providing for the appearance of the defendant at Court. Bouv. Law Dict., "Bail Bond."

It is also to be taken to the sheriff or officer serving the process.

May, for the plaintiff.

Rice, J. — This is debt on a bond given under the provisions of § 17, c. 148, by Joseph Morse, to the plaintiff, to procure his release from imprisonment, he having been arrest-

ed on mesne process in an action of *crim. con.* commenced against him by the plaintiff.

The defendant contends that this is not a statute bond, and that the action cannot be maintained; that he, having been arrested on mesne process in an action of tort, the only bond authorized by the statute is prescribed by § 95, of c. 114, and should run to the sheriff, with the condition, that the defendant should appear and answer to the suit, and abide the final judgment thereon, and not avoid.

It is also contended that the 17th § of c. 148, applies only to cases of arrest in actions originating in contract, express or implied, and when the relation of debtor and creditor exists.

Technically, a tort feazor is not a debtor, so long as the claim against him is in right of action merely, nor is a party having a claim against another, for a wrong done, a creditor, until that claim has been ascertained and the damages liquidated by a judgment. Before judgment, the relation of plaintiff and defendant exists, between parties thus situated, but not that of debtor and creditor. After judgment, and after the damages have thus been liquidated and determined, the defendant becomes the judgment debtor, and the plaintiff the judgment creditor.

By keeping these distinctions in view the application of the provisions of the statute become easy. In chapter 148, sections from two to eight, inclusive, the provisions relate to arrests on mesne process, in actions originating in contract, in which the relation of debtor and creditor exists. The *debtor* is therefore authorized to cite the *creditor* to hear him disclose, &c.

Section 9, authorizes arrests in actions not founded in contract and provides for a release by giving a bond to the sheriff according to provisions of § 95, c. 114.

Sections from 10 to 16, inclusive, provide for disclosure, &c., in cases where there has been no arrest.

Section 17, is as follows; "whenever any person shall be arrested or imprisoned on mesne process, in any civil action, he may be also released from such arrest by giving bond to

the plaintiff, with surety or sureties to the acceptance of the plaintiff, or approved by two justices of the peace and of the quorum, of the county, where such arrest or imprisonment may be, in double the sum for which he is arrested or imprisoned; conditioned that he will within fifteen days after the last day of the term of the court at which the judgment shall be rendered in such suit, or after the day of the rendition of judgment if before a justice of the peace, notify the judgment creditor," &c., for purpose of disclosing.

These provisions, it will be observed, are broader and more comprehensive than those in the preceding sections, and apply to arrests on mesne process in all civil actions, whether originating in tort or contract. Hence the bond is not to the *creditor*, a term before judgment only applicable to actions in contract, but to the *plaintiff*, a term at all times, equally applicable, whether the action originate in contract or tort. Then, the condition of the bond is, to notify the *judgment* creditor, after the rendition of judgment, which applies as well to actions in tort as in contract.

From these considerations, we think the bond is a statute bond and that judgment must be for amount of the execution, interest and costs.

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

WILLIAMS, *Judge of Probate, versus* ESTY.
SAME *versus* DINGLEY.

By § 16 of c. 113, of R. S. it is enacted, that whenever in any suit against any administrator, it shall appear that he has neglected or refused to account, upon oath, for such property of his intestate, as he has received, after he has been cited by the Judge of Probate for that purpose, execution shall be awarded against him, for the full value of whatever personal property of the deceased has come to his hands, without any discount, abatement or allowance for charges of administration or debts paid.

Whenever the default contemplated by this section has been committed by an administrator, a suit is maintainable against his *sureties* upon the administration bond.

And the amount of the personal property returned in the inventory of the estate, is *prima facie* evidence of the sum for which execution shall be awarded against them.

If the sureties for such default are prosecuted in separate suits, execution will be issued for the full amount of the personal estate of the intestate in each suit, but satisfaction only in one suit may be obtained.

ON FACTS AGREED.

These are two actions of *debt* on bond, signed by defendants as sureties of William Mathews, administrator on the estate of Edward Mathews.

William Mathews was appointed administrator on the first day of November, 1847, and returned an inventory on the last Monday of January, 1848, of the personal estate appraised at $3718,97.

The administrator never rendered any account of his administration. He was cited, upon the petition of creditors of the estate, to appear on the 24th day of May, 1852, and settle such account. At that day he appeared by attorney, when the petition was continued until the second Monday of July, 1852, when he failed to appear and made default; whereupon the Judge of Probate decreed his removal from his trust as administrator, and on the petition of creditors appointed Joseph W. Patterson, administrator *de bonis non* of the same estate.

On the same day, on the petition of said Patterson, the Judge of Probate authorized and directed him to put the administration bond of said Mathews in suit. These are the same then authorized.

These suits were defaulted; whereupon the plaintiff moved the Court to enter up judgment, and award execution in each of said actions, to the amount of the appraised value of the personal property returned in the inventory of the estate, which motion is resisted by the defendants.

The Court was to render such judgment as the law and facts will authorize.

H. W. Paine, for defendants.

The plaintiff is not entitled to execution for the amount sought, because —

1. § 16, c. 113, R. S. which regulates this matter, authorizes the issuing of execution against the administrator alone, and not against the sureties. It is in the nature of a penalty.

2. The inventory is not admissible in evidence against the *sureties.*

3. Execution is to issue for the amount of personal property which has come into the *hands* of the administrator.

The inventory is to comprize all the goods and credits which have or shall come to the possession or *knowledge* of the administrator. R. S. c. 106, § 3.

The inventory, therefore, is not proof that the property therein contained, has come into the hands of the administrator, even as against him.

North, for the plaintiff.

On examination of the statute, under which these actions are brought, (c. 113, R. S.) it will appear that two classes, of suits on administration bonds are contemplated. One without the consent of the Judge of Probate, regulated by § § 5, 6, 7, 10, 11 and 12; — the other by the consent and direction of the Judge, under proviso to § 7 and § 16th, both classes by § 13, resulting in a general judgment for the penalty of the bond. But execution is to be awarded in the first class of cases under § 14, which provides that the person for whose benefit the suit is instituted shall first have his claim ascertained by judgment of Court. In the 2d class, under § 16, when it shall appear in any *such suits*, that the administrator has neglected or refused to account after he has been cited by the Judge of Probate, execution shall be awarded against him for the full value of whatever personal property came into his hands.

In one case the amount of the execution is determined by the amount of claim ascertained by judgment of Court; in the other by the amount of personal property by inventory returned.

The judgments are recovered by the Judge, in trust, for the benefit of all persons interested in the penalty of the bond. But § 18 evidently contemplates the second class of cases in

which judgment is to be rendered and execution awarded for the amount of the personal property; for if the administrator is in office, the Judge is to require him to account for the same; if not in office, the Judge shall assign such judgment and execution to the rightful administrator, to be collected, and the avails to be accounted for as assets.

RICE, J. — These actions are against sureties on an administration bond, and both depend upon the same state of facts. The principal has not been sued. The defendants have submitted to a default. The only question to be determined is the amount for which execution shall be awarded. It is agreed that the administrator, who is the principal in the bond, has been duly cited to settle his account of administration, but has wholly neglected to do so. The plaintiff now claims execution according to the provisions of the 16th section of chapter 113, R. S., which is as follows: —

"Whenever in any such suit, against any administrator, it shall appear that he has neglected or refused to account upon oath, for such property of his intestate, as he has received, after he has been cited by the Judge of Probate for that purpose, execution shall be awarded against him, for the full value of whatever personal property of the deceased has come to his hands, without any discount, abatement or allowance for charges of administration or debts paid."

It is contended by the defendants that this section is penal in its character and applies to the administrator, in person, only, and does not affect the sureties in any way, whatever.

By the third section of chapter 106, every administrator, before entering upon the execution of his trust, is required to give a bond, with good and sufficient sureties, resident within this State, in such sum as the Judge of Probate shall order, payable to said Judge or his successor, conditioned among other things, to administer according to law, all the goods, chattels, rights and credits of the deceased; and to render upon oath, a true account of his administration, within one

year, and at any other times when required by the Judge of Probate.

The undertaking of the sureties is, that their principal shall comply with the conditions in his bond. For any failure on his part they are equally liable to parties interested with the principal.

Chapter 113 is an Act in terms "respecting probate bonds, and remedies on the same." It contemplates (§ 8) cases in which sureties may be sued on such bonds, when the principal is not made a party, and provides for bringing in the principal by them, as a party. There is no provision in the chapter, by which sureties are, in terms, exempted from liability where the conditions of the bond have been broken. To hold that they were not liable under the 16th section, would be to offer a premium for extreme negligence or excessive and wholesale waste on the part of administrators. Under such a construction all that an administrator would find it necessary to do, to discharge his sureties from liability on his bond, would be wholly to neglect his duty, and set the authority of the Judge of Probate at defiance, by refusing to render any account of his administration. Such a construction is wholly inadmissible.

The administrator has, under oath, returned an inventory of the personal estate of the intestate. This is *prima facie* evidence of the amount of personal property which has come into his hands; *Weeks* v. *Gibbs*, 9 Mass. 74; and this devolves on him the necessity of discharging himself from the items which the inventory contains. 2 Greenl. Ev. § 347. This has not been done, and to the extent of that inventory of personal estate, ($3718,97,) execution will be awarded in both cases, the amount, however, can be collected but once.

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

YEATON *versus* YEATON *& als.*

Where evidence is introduced on trial, without objection, as to the *terms* of a vote passed by a proprietary, and no question is raised concerning *them*, the presiding Judge may rightfully instruct the jury as to the *effect* of such vote.

But if any question arises of what in truth were the *terms* of the vote, that *fact* is determinable only by the jury.

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

TRESPASS *quare clausum.* One defendant pleaded title in himself, and the others justified as his servants.

The *locus in quo* was a strip sixteen rods wide on the easterly end of Lot No. 98, as claimed by plaintiff, and on the westerly end of Lot No. 101, as claimed by defendants, in Belgrade.

The plaintiff derived his title to the southerly portion of Lot No. 98 from Christopher Dunn, through mesne conveyances, and introduced office copies of their deeds, from Sam'l Stuart, to George Penny, and from Penny to Dunn; but no grant from the original proprietors.

The defendant's title to Lot 101, originated in a grant from the original proprietors, to the heirs of William Bowdoin in June, 1795.

Evidence was introduced, that only two plans of the territory had been made for the proprietary, one by Obadiah Williams in 1791, and the other by Jones & Prescott in December, 1795.

By the plan of Williams, the land in dispute belonged to plaintiff's lot, but by Jones & Prescott's plan, it belonged to the defendant's lot.

The defendant showed, by Reuel Williams, that the plan of Williams was found to be very defective, and that Jones and Prescott were directed by the proprietary to make a new survey and plan, which they did, and which was adopted by the company, and all grants since made had been done according to that plan. The company kept a record of all grants by them made, which was in his possession, and he had examined so far as he was able, but could find no grant of Lot No. 98,

although from a memorandum found in his own writing, he believed that a grant had been made of it since 1803; that at some time the proprietary had voted that, when the lots granted to members, according to plan of Williams, fell short, the deficiency should be credited to the grantees, and when they overrun, the excess should be charged to them.

A copy of the grant and vote of the proprietary will be found in the opinion of the Court.

The plaintiff contended that the title to lot No. 101, vested in the heirs of William Bowdoin in June, 1795, by virtue of the vote and grant of that date; that as the plan of Williams was the only one then in existence, the grant must have been made with reference to that plan; and argued that the vote of 1797, was not one extending lot No. 101 to the line run by Jones and Prescott, but the one referred to by the witness, Mr. Williams.

But the Judge instructed the jury that though the grant of June, 1795, vested the title in the grantees, it was competent for the proprietary subsequently to extend the lot granted to the line of Jones and Prescott, and that by the vote of 1797 they had done so.

There was no evidence of what this vote of 1797 was, other than what appeared in the record copies of the grant, and in the testimony of the witness.

A verdict was returned for the defendants, and the plaintiff excepted to the foregoing instruction.

Paine and *Bean*, for plaintiff, objected to the instruction given on the following grounds: —

1. Because it assumed on the evidence of the recital, to determine as matter of fact that there had been such a vote.

2. Because it assumed that there had not been a prior grant of lot No. 98, according to Williams' plan.

3. Because a fair construction of the vote, as recited, is not an enlargement of the lot.

Bradbury, for defendants, argued the following points in support of the instruction.

1. The grant of lot No. 101, to Wm. Bowdoin's heirs, under whom the defendant, Richard Yeaton, claims, carries the title according to Jones and Prescott's plan, and by that plan the *locus* belongs to that defendant. *Hatch* v. *Kimball*, 16 Maine, 146; *Colby* v. *Norton*, 19 Maine, 412; *Milliken* v. *Coombs*, 1 Maine, 343; *Doloff* v. *Hardy*, 26 Maine, 545.

2. The ruling of the Judge is in effect that the vote and grant are sufficient in form to give title, and so they are.

3. The plaintiff was not prejudiced by the instructions, for he had no title, and the verdict should not be disturbed.

Rice, J. — The plaintiff, John Yeaton, is the owner of a part of original lot number 98, and the defendant, Richard Yeaton, has title in part of original lot number 101. These lots abut upon each other. The land in dispute is a strip sixteen rods in width, and is claimed by both of the parties, as being part of their respective lots.

In 1791, one Williams surveyed the lands in that neighborhood, belonging to the proprietors, including numbers 98 and 101, and made a plan thereof. By that plan, the land in dispute constitutes a part of lot No. 98.

December 14, 1795, Jones & Prescott surveyed and made a plan of the same lands. By their plan, the disputed land is a part of number 101.

Reuel Williams, a witness called by defendants, testified, that the plan of Williams was found to be very defective, and that Jones & Prescott were directed by the proprietary to make a new survey and plan, which they did in 1795, and which was then adopted by the company. Since that time the grants had always been made according to Jones & Prescott's plan; Williams' plan was then repudiated, and has not been known as a plan since, nor any grants made by it.

The defendant, Richard Yeaton, (the other defendants justifying under him) pleaded soil and freehold, and as evidence of title to the *locus in quo*, introduced a grant from the original proprietors to the heirs of William Bowdoin, the ancester of his grantor, dated March 6, 1800, which recites, that the proprietors, "at a legal meeting, held at Boston, this third day

of June, A. D. 1795, called and regulated according to law, have voted, granted and assigned to the heirs of William Bowdoin, Esq., and their heirs and assigns forever, the following lots of land situate, lying and being in Washington, so called, now Mt. Vernon and Belgrade, in the county of Kennebec, and Commonwealth of Massachusetts, being marked and numbered one hundred thirty-nine, one hundred eighteen and one hundred and one, containing two hundred acres each, and delineated on a plan of said township, made by John Jones and Jedediah Prescott, dated Dec. 14, 1795, reference thereto being had, will more fully appear, and agreeably to a vote of the proprietary passed the 19th day of June, 1797."

The plaintiff showed no original grant of lot No. 98. At the time of the vote of June 3, 1795, by which No. 101 was granted to the heirs of Wm. Bowdoin, the survey and plan of Jones & Prescott had not been made, and the plaintiffs, therefore, contended that the lot which passed by that vote and the grant issued in 1800, extended only to the line indicated on the plan of Williams, which excluded from No. 101 the *locus in quo*. But upon this point the Judge instructed the jury, "that though the grant of June 3, 1795, vested the title in the grantees, it was competent for the proprietary, subsequently, to extend the lot granted to the line of Jones & Prescott, and that by the vote of 1797, they had done so."

The objection is, that by this ruling, the Court determined a fact which should have been referred to the jury.

To determine whether instructions are correct or otherwise, reference must always be had to the facts as they are then presented. The case finds, that there was no other evidence of what this vote in 1797 was, than what appeared in the record copies of this grant, and in the testimony of Mr. Williams. The original record of the vote passed in 1797, or a copy thereof, would have presented evidence of a higher and more satisfactory character. But this evidence of the vote was introduced without objection; it was uncontradicted, unexplained and uncontrolled by any other facts then before the Court. The evidence of the terms of the vote pass-

ed in 1797, being thus before the Court, it became proper for the Judge to instruct the jury as to the effect of that vote. Had there been any question as to what were in fact the terms of the vote in 1797, that question should have been settled by the jury as a matter of fact. But no such question appears to have been raised at the trial. In view of the case as then presented, we do not perceive, that there was any error in the instructions. The exceptions are therefore overruled.

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

INHABITANTS OF WEST GARDINER, *versus* INHABITANTS OF FARMINGDALE.

Where conflicting testimony upon the question at issue is submitted to the jury, the Court have no authority to set aside the verdict, unless it *manifestly* was found from prejudice, bias or improper influence, or by a mistake of the facts or law of the case.

ASSUMPSIT for the support of a pauper, alleged to belong to the defendant town.

The case was tried at *Nisi Prius*, before RICE, J., when a verdict was returned for plaintiffs.

A motion was filed by defendants to set aside the verdict, as being against the evidence.

What the evidence was, sufficiently appears from the opinion of the Court.

Emmons, for defendants.

Danforth & Woods, for plaintiffs.

RICE, J. — The pauper had a derivative settlement in that part of Hallowell which is now included in the town of Farmingdale. During different periods of his life, he has been an inmate in the family of Samuel Clay, his brother-in-law, who resided in that part of the town of Gardiner, which is now included in the town of West Gardiner. Samuel Clay deceased in 1848, and since that time, McCurdy,

the pauper, has been much of the time in the family of Mrs. Clay, widow of said Samuel. In 1845, the town of Hallowell furnished supplies to McCurdy, as a pauper, by paying his board to Mr. Clay. These supplies were continued to the beginning of the year 1846, since which time, no supplies have been furnished by Hallowell.

The original settlement of McCurdy having been thus established upon the territory of Farmingdale, the plaintiffs would be entitled to a verdict, unless the defendants could show that he had lost that settlement by acquiring one in some other town. This they have attempted by proving such settlement within the present limits of West Gardiner, by a continued residence therein, for a period of five years together, during which time he had not received supplies as a pauper. The evidence shows the pauper to have been subject to occasional periods of mental alienation, and that although he was always at liberty to abide in the house of Mr. and Mrs. Clay, as a home, whenever he chose to do so, he occasionally absented himself and wandered about the country without any fixed place of abode.

Two questions were presented upon the testimony for the consideration of the jury. First, did McCurdy, at any time, after he was supplied by Hallowell in 1845, have his residence or home at Clay's? If so, was such residence continued for a period of five consecutive years, without legal interruption?

The defendants contend that the evidence sustains both propositions. The plaintiffs deny both, and say that if, in fact, at any time after 1846, M'Curdy had his residence or home at Clay's, such residence did not continue for five years without interruption and without receiving supplies as a pauper from some town.

First, the plaintiffs maintain, that within less than five years after the supplies from Hallowell had been discontinued, the pauper was sent to the Insane Hospital, by authority of two magistrates, and that the expenses incurred at the hospital were paid, for him, as a pauper, by the city of Gardiner. The

proofs show that he was committed to the hospital, Sept. 6, 1850, by two justices of the peace, under the provisions of § 13, c. 178, R. S. This section of c. 178, was repealed by c. 33 of the Acts of 1847, by which Act different provisions for committing to the hospital, insane paupers, were provided. The commitment of the pauper by those magistrates was without legal authority and void, and no legal obligation was thereby imposed upon the city of Gardiner, to pay for his board or other expenses at the hospital. This payment, thus made, without liability, on the part of the city of Gardiner, was not furnishing supplies to M'Curdy, as a pauper, within the meaning of the statute, and could have no effect upon the question of his gaining a settlement.

To constitute a residence or home, which, if continued for five years without interruption, will establish a legal settlement, it is requisite that there should be at the commencement *actual personal presence*, accompanied with the intention to make that residence a home. The act and the intention must concur. When such a home is once established, it continues until it is intentionally changed or abandoned.

The proof was conclusive that for a period of more than five years from January, 1846, McCurdy had his abode, most of the time, at the house of Clay; and the tendency of the evidence was to show that during all that time, when he was in his right mind, he considered and treated that house as his home; yet there was also evidence of a contrary tendency, that which tended to show if he ever had intelligently adopted that place as his home he deliberately abandoned it before the five years had expired.

This evidence was all submitted to the jury, and there being no complaint, it is presumed, with appropriate instructions by the Court.

It is the province of the jury to consider and weigh conflicting testimony, and where there is evidence on both sides, courts will not feel authorized to disturb the verdict of a jury, unless the result is so manifestly erroneous as to make it apparent that it was produced by prejudice, bias or some im-

proper influence, or by mistake of the facts or the law of the case. The burden of relieving themselves from the derivative settlement of the pauper, was upon the defendants, and whatever may be our impression as to the preponderance of the evidence in the case, we do not think it so manifestly in favor of the defendants as to authorize us to disturb the verdict. *The motion is therefore overruled.*

SHEPLEY, C. J., and TENNEY and CUTTING, J. J., concurred.

AUGUSTA BANK *versus* CITY OF AUGUSTA.

The *capital stock* of a bank can only be assessed once, and that upon the stockholders to the value of their shares.

But property composing no part of its capital, so held by a bank, that no other person or corporation could be legally taxed for it, as owner, is liable to be assessed to such bank.

Thus, shares of a rail road corporation, which it may hold by an *absolute title,* may rightfully be assessed to the bank.

And parol evidence, that the absolute title was intended to be a conditional one, is inadmissible.

A *corporation* owning personal property, not composing a part of its capital, is liable to be taxed for it in the town of its established place of business.

ON FACTS AGREED.

ASSUMPSIT, for money had and received.

In October, 1851, the Kennebec & Portland Rail Road Company borrowed of the plaintiffs five thousand dollars, and gave their note for the same on three months, and at the same time caused the Portsmouth & Portland Rail Road Company to issue to the plaintiffs a certificate in the usual form, of fifty shares in the capital stock of that company.

On the first day of May, 1852, the plaintiffs held the note aforesaid, and the said shares by that arrangement, and, in Oct. 1852, sold said shares at private sale and applied the proceeds to the payment of said note.

While the bank held said shares, the dividends upon them were paid to the Kennebec & Portland Rail Road Company.

It was agreed, if parol evidence was admissible to show

the fact, that at the time the note was given, the said shares were transferred to, and held by the plaintiffs as collateral security for the payment of said note, and for no other purpose, with power to sell the same and to collect the note therefrom, if not otherwise paid to the satisfaction of the plaintiffs.

On the first of May, 1852, the clerk of the P. S. & Portsmouth Rail Road Company, notified the assessors of Augusta of the ownership by the plaintiffs of the shares aforesaid, and in consequence of said notice, they assessed the bank as owners thereof, and the stockholders in the bank were taxed without any diminution in consequence of the assessment of these shares.

The plaintiffs refused to pay the tax thus assessed on demand of the collector, and a warrant of distress, in due form, was put into the hands of a constable of the city, with instructions to collect the same by distraint.

Upon the call of such officer, the plaintiffs paid said tax and cost thereon under protest, and to prevent the seizure and sale of their property.

This action is brought to recover back said tax and costs.

If the Court should be of opinion, that the plaintiffs were liable by law to be assessed for said shares, a nonsuit is to be entered; otherwise the defendants are to be defaulted.

J. H. Williams, for plaintiffs.

1. The provisions of law to govern the assessors are found in chap. 159 of Laws of 1845.

By § 4, "all shares in moneyed corporations" are classed as *personal* estate.

By § 9, "all personal property shall be assessed to the *owner*, in *the town*, where he shall be an inhabitant on May 1st," &c., *except* in certain cases, viz; "machinery and goods" belonging to any corporation shall be assessed to such corporation, in the town where such machinery and goods are situated or employed.

But shares of stock are not within the exception, and fall therefore under §§ 9, 10.

"The owners" are the stockholders, and all their personal property for the purpose of taxation, is represented by the shares of the several shareholders, who are taxable for them "in the towns where they reside." 5 Greenl. 133; 10 Mass. 516.

2. A *corporation, eo nomine*, is not liable to be taxed for *any* of its personal property, by the general terms of said Act. Sect. 2, does not name *them* among the subjects of taxation.

Sect. 5, in its *exemptions*, does not exempt corporations, as such, but only the *property* of certain corporations.

Only in the particular case provided for in § 9, is "a corporation," as such, made a subject of taxation. Thus, for "real estate" and for "certain personal property," a corporation, as such, is to be taxed.

The phrase in § 2, "personal property of the *inhabitants* of this State," does not refer to corporations. 10 Mass. 517.

3. The provisions of clause 2, of §§ 10 and 11, show that no intention existed to tax property *twice*.

As to admissibility of the evidence that the shares were held by the plaintiffs as collateral, I refer to *Reed* v. *Jewell*, 5 Greenl. 96; *Smith* v. *Tilton*, 1 Fairf. 350; 9 Wend. 227; 14 Wend. 66.

Lancaster & Baker, for defendants.

1. By § 9, of c. 159, of the laws of 1845, all personal property shall be taxed to the owner in the town where he shall be an inhabitant on the first day of May of each year.

By § 2, of c. 165, of the same laws, shares in rail road companies are declared to be personal property and taxable as such, to the owners in the places where they reside.

By § 13, of c. 1, of the R. S. the word person, in the R. S. and in all subsequent statutes, "may extend to and include bodies politic and corporate, as well as individuals."

Who were the owners of these fifty shares in the capital stock of P. S. & P. R. R. Co. on the first day of May, 1852? The certificate for them issued to the bank in the usual form on the 27th October, 1851, and was absolute and unconditional on its face, and the bank so held them on the first day

of May, 1852, for all legal and practical purposes. The bank then were the owners, and parol evidence is inadmissible to show, that, at the time the said certificate issued, any thing different was intended from what the papers, made at the time, indicate.

2. By § 13, of c. 76, of the R. S. the clerks of corporations are required on oath to return to the assessors of any town where any stockholder may reside, the name of the holder and the number of shares held by him, "and such returns shall be the basis of taxation on said property."

The case finds that the assessors of Augusta for the year 1852, assessed the tax complained of on those shares, in accordance with the return which was sent them by the clerk of the P. S. & P. R. R. Co. This the law last cited required them to do; how can that be illegal which the law enjoins?

This return is the only evidence the assessors are allowed to have of the ownership of these shares; in other words, it is conclusive upon them, and the law is imperative and peremptory, that it shall be the basis of taxation. Parol evidence or any other is therefore inadmissible, to change the law or affect the assessors in the discharge of their duties.

3. Nor is the argument, that if this tax be legal the capital stock of the bank will be twice taxed, a sound one. In the first place it is not true in fact. At the time the tax was assessed, these shares did not form any part of the capital stock of the bank. The note, which the Ken. & Port. R. R. Co. gave to the bank for the money borrowed, did represent so much of the capital stock of the bank, but these shares were separate and distinct property and liable by law to be taxed to the owner, whoever or whatever he might be, as much as any other description of personal property. If an individual had been the holder he could not have escaped taxation; why then should the bank? If the bank choose to become the owner of taxable property under such circumstances, it must take it, *cum onere*, with the liability to be taxed which rests upon it.

SHEPLEY, C. J. — By the tax Act of 1845, c. 159, § § 2, 3, 4, the intention is clearly exhibited to subject all real and personal property of the inhabitants of this State to taxation, unless it be specially exempted. It is equally clear, that it was not the intention to subject the same property to be twice taxed at the same time, in the ordinary mode of taxation, when such a result could be conveniently and safely avoided. § § 10, 11, 12, 13, 14.

Hence it is, that the second provision of the tenth section is found to declare, that all real estate belonging to any corporation, as well as all its machinery and goods, shall be assessed to such corporation, in the town or place where such real estate or machinery and goods are situated or employed; and that when the stockholders are assessed for the value of their shares, their proportional part of the value of such real estate, machinery and goods, shall be deducted from the value of their shares.

Yet it is true, that property is liable in many cases to be taxed twice, when it would appear to be difficult or unsafe to make provision by law to prevent it. Thus, stock in trade may be taxed to the owner, while he may be indebted for it to many persons, who may be taxed for those debts, or for the money loaned to purchase it. Real estate may be taxed to a mortgager in possession, while the mortgagee is taxed for the money secured by the mortgage.

A valuation of taxable property is, usually, very much greater than the actual value of the property owned by a community. This may be unavoidable. So imperfect are all human institutions, that perfect equality in the imposition of burdens is not to be expected. These provisions for valuation and taxation, are not considered to be in conflict with the general purpose to have all property subjected to taxation once, and only once, at the same time.

If the fifty shares of the Portland, Saco & Portsmouth Rail Road Co. constituted a part of the capital of the Augusta Bank, they were liable to taxation only by an assessment upon its stockholders, for the value of their shares. If they did

not constitute a part of that capital, and were held by the bank by such a title, that no other person or corporation could be legally taxed for them, as the owner; they should be held liable to taxation to the bank, for the general purpose of the law would otherwise be defeated.

It appears from the agreed facts, that the Kennebec & Portland Rail Road Co., borrowed of the Augusta Bank $5000, and gave its note to the bank therefor, and at the same time caused a certificate for the fifty shares to be issued to the bank in the usual form of absolute ownership. It is apparent, that the note and the stock both did not constitute a part of the capital of the bank. The loan of $5000, being made in the usual course of its business, the note received for it would constitute a part of its capital. The purchase of stock or shares in another corporation, would not be a transaction in the usual course of business, and it does not appear, that any portion of its capital was paid out therefor.

It is agreed, that the Kennebec & Portland Rail Road Co., and not the bank, received the dividends payable upon these shares. That the shares were sold by the bank on October 9, 1852, and that the proceeds were applied to pay the note. The conclusion is unavoidable, that the shares did not constitute a part of the capital of the bank, and that they were not assessed as such.

Parol evidence would not be admissible to prove, that the absolute title of the bank was intended to be a conditional one.

This case is not therefore, like the case of the *Waltham Bank* v. *The Inhabitants of Waltham*, 10 Metc. 334, where it was decided, that rail road shares, held by the bank in mortgage, were not taxable to the bank, but were to the mortgager.

Although parol evidence could not be admitted to change an absolute title into one conditional, it would not follow, that the bank holding the shares by an absolute title, might not, upon parol evidence, be held accountable to the Kennebec & Portland Rail Road Co. for their value.

It is insisted, that no provision is made by statute, for the

taxation of personal property to a corporation, except in cases provided for by the tenth section of c. 159, not including shares in a corporation.

Provision having been made by statute, c. 1, § 3, that the word "person," might include bodies politic and corporate, as well as individuals, the Legislature does not appear to have been careful to notice corporations by name, when making enactments designed to operate upon all owning property or subjected to responsibilities. Nor has it been careful in all such cases to use the word person. Provision having been made by the ninth section of the statute, c. 159, that all personal property, except that enumerated in the tenth section, should be assessed to the owner in the town or place where he should be an inhabitant; when a corporation has been ascertained to be the owner, and to have its place of business established in a town or place, it must be considered as liable to taxation for personal property, not composing a part of its capital, especially in cases coming within the provisions of the statute, c. 76, § 13. *Plaintiffs nonsuit.*

TENNEY, APPLETON and CUTTING, J. J. concurred.

STATE *versus* ELEAZER HUTCHINSON.

The crime of adultery is well laid in an indictment, if at the time of the offence, one only, of the parties, is alleged to be married.

An indictment was found in March, 1853, charging that the defendant on the 1st day of Nov. 1852, and on divers other days and times, &c., did commit the crime of adultery with L. H., the wife of one M. H., he, the said Eleazer, being *then* and *there* a married man and having a lawful wife alive; *Held*, that the indictment did sufficiently allege, that the defendant was married to some other than said L. H., at the time of the alleged offence.

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

INDICTMENT, found at the March term, 1853, for the crime of adultery. In the second count it charges, that the defendant, at Gardiner, "on the first day of November, 1852, and on divers other days and times, between the first day of November aforesaid and the sixteenth day of December, 1852,

at said Gardiner, did commit the crime of adultery with Lucy Hersey, the wife of one Moses Hersey, by having carnal knowledge of the body of her, the said Lucy Hersey, he, the said Eleazer Hutchinson, being then and there a married man, and having a lawful wife alive," &c.

The jury returned a verdict of "guilty."

After this vedict was rendered, the respondent's counsel moved that judgment might be arrested on said verdict, for the following reasons: —

1. Because said indictment alleges that the act charged was committed on the first day of November, 1852, and on divers other days and times, between the first day of November, 1852, and the first day of January, 1853, leaving the time vague and uncertain.

2. Because said indictment is bad and insufficient in law to sustain a judgment thereon.

3. Because said indictment charges several different offences in each of the two counts.

4. Because all the allegations in the indictment may be true, and yet no offence be committed.

The motion was overruled, and defendant excepted.

Lancaster & Baker, for defendant, maintained the grounds taken in their motion, but considered the first three, under this proposition: —

1. The count was bad for uncertainty and duplicity, and cited Arch. Crim. Plead. 46, 49 and 50; *Pierce* v. *Pickens*, 16 Mass. 470; 2 Hawk. P. C., c. 25, § 28 or 82; *English* v. *Pierson*, 6 East, 395; *Commonwealth* v. *Maxwell*, 2 Pick. 139; *Commonwealth* v. *Wyman*, 8 Met. 247; *State* v. *Nelson*, 29 Maine, 329; *Carlton* v. *Commonwealth*, 5 Met. 532; *State* v. *Howe*, 1 Richardson, (S. C.) 260; 8 N. H. 163; 2 Hale, 178; 1 Chitty's Crim. Law, 217, 218 and 225.

2. Under the fourth alleged reason for arrest, that for aught that appears, Lucy Hersey, at the time of the alleged offence, may have been the wife of defendant. It does not appear that she was not his wife at that time, and nothing is to be taken by intendment. 6 Met. 243; 6 Cush. 78; 35 Maine,

205. She might have been the wife of Hutchinson in Nov. 1852, and the wife of Moses Hersey in March, 1853, for she might have been divorced and married again.

Vose, County Attorney, for the State.

APPLETON, J. — The indictment in this case alleges that "Eleazer Hutchinson of Gardiner, in the county of Kennebec, on the first day of November, A. D. 1852, at Gardiner aforesaid, he, the said Eleazer Hutchinson, being then and there a married man and having a lawful wife alive, did commit the crime of adultery with Lucy Hersey, the wife of one Moses Hersey, by having carnal knowledge of the body of her, the said Lucy Hersey," &c. It is impossible to misunderstand the meaning of the language used in this indictment. One does not readily perceive what more is required to convey to an ordinary understanding a clear and distinct idea of the nature and character of the offence charged. It would savor more of niceness than of wisdom to discharge the defendant upon distinctions such as are raised in this case. In *State* v. *Tibbetts*, 35 Maine, 205, there was no allegation that the defendant was a married man, having a lawful wife alive, at the time when the offence was alleged to have been committed. In *Com.* v. *Reardon*, 6 Cush. 79, DEWEY, J., says, "it is true, that if the party indicted is himself alleged to be a married man, the indictment will be good and sufficient in form, without any allegation that the person with whom he had sexual intercourse was a married woman. But it is no less true, that the indictment in such case may equally allege both the parties to the adultery to be married persons." In the present case the allegation is full and distinct, that at the time set forth in the indictment the defendant was a married man. The offence is equally committed in such case, whether the woman is or is not married. *Exceptions overruled.*

SHEPLEY, C. J., and TENNEY, and CUTTING, J. J., concurred.

LIBBY *versus* COWAN *& als.*

By 33d rule of this Court, it is ordered, that "in actions on promissory notes, orders or bills of exchange, the counsel of the defendant will not be permitted to deny at the trial, the genuineness of the defendant's signature, unless he shall have been specially instructed by his client, that the signature is not genuine, or unless the defendant being present in Court, shall deny the signature to be his, or to have been placed there by his authority."

This rule is neither repugnant to law, nor against sound policy, and may rightfully be enforced in the trial of matters embraced within it.

Thus, in a suit upon a promissory note, the plea of the general issue, will not require the plaintiff to prove the signature, unless it is otherwise denied.

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

ASSUMPSIT, on a promissory note.

When the plaintiff proposed to read the note, the defendants' attorney objected, without proof of the signature, but would not say he was specially instructed to deny the genuineness thereof. The Court overruled the objection, and permitted the note to be read to the jury.

Thereupon the defendants' counsel requested the instruction, that the defendants having pleaded the general issue, and thereby put in issue the genuineness of the note, the plaintiff has not made out his case, without proof of the signatures to the note.

The Court declined to give those instructions, but did say to them, that the plaintiff having read his note, the presumption of law, in the absence of any other evidence, was, that it was a genuine note, and it would be their duty to find a verdict for plaintiff.

Lancaster & Baker, for defendants.

Bradbury & Morrell, for plaintiff.

HOWARD, J. — This Court has been authorized, from its organization, to establish and record such rules and regulations, not repugnant to law, as may be necessary, respecting the modes of trial and conducting business, in relation to suits at law and in equity. R. S. c. 96, § 9; Statute of 1821, c. 54, § 4.

Rules and regulations, now in force, were ordained and established, in pursuance of this authority, in 1822. Among which, that numbered 33, entitled, "of the denial of signatures," so far imposes restrictions upon the counsel for the defendant, in actions on promissory notes, orders, and bills of exchange, as not to permit him to deny at the trial, the genuineness of the defendant's signature to the instrument in suit, unless he shall have been specially instructed by his client that it is not genuine, or unless the defendant, being present in Court, shall deny the signature to be his, or to have been authorized by him.

It has been held that this rule is neither repugnant to law, nor against sound policy. It deprives the defendant of no rights, and adopts no new rule of evidence, but has been found to be convenient, and salutary in preventing delay, and avoiding the accumulation of unnecessary costs and expenses. It is both right in principle, and safe in its practical operation in proceedings in Court. *McDonald* v. *Bailey*, 14 Maine, 101. In *Sellars* v. *Carpenter*, 27 Maine, 497, the 34th rule, respecting the admission of office copies of deeds in evidence, was sustained against objections, upon similar grounds.

The instructions of the presiding justice were in conformity with the 33d rule referred to, and not against law. The signature to the note sued not being denied, it might be regarded, in the absence of evidence to the contrary, as genuine. The requested instructions were, therefore, properly withheld. *Exceptions overruled.*

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

Leonard *versus* Wildes.

One, who puts his name upon the back of a note, when it is made, or at a subsequent time, in pursuance of an agreement made with the payees at the time the contract, out of which it originated, was made, is chargeable as an original promisor.

And *such note* is legal evidence to support a count for money had and received.

Leonard *v.* Wildes.

Where a note is payable to partners, and by them negotiated, the indorsee after releasing the partners, may call them as witnesses in an action against *such* makers.

If one of the payees, being partners, of a note, negotiated it, after the dissolution of the firm, without authority from his co-partners, their subsequent ratification will make the transfer valid.

And although indorsed by one of the partners, for a purpose foreign to the business of the firm, yet, if afterwards ratified by the other partners, *such* transfer is effectual.

The mode of computing interest on notes where partial payments have been made, stated in the case of *Dean* v. *Williams*, 17 Mass, 417, is adopted in this State.

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

Assumpsit, on a promissory note of the following tenor: —

"Gardiner, July 14, 1849.

"For value received, I promise to pay Clays & Dinsmore or order seven hundred and twenty-five dollars and sixty-seven cents, in four months. "John Kelley, 2d."

On the back of the note was this indorsement, "Responsible without demand or notice, Clays & Dinsmore," and above this was the name of "William Wildes," the defendant; also indorsed "May 10, 1852,—Received one hundred and twenty-six dollars and eighty-two cents."

The writ contained two counts, one of them being for money had and received. The general issue was pleaded. The signatures upon the notes were not denied.

Testimony was introduced by defendant, tending to show that he was not at Gardiner at the time the note was made, &c.

The plaintiff called Bradbury T. Dinsmore, who was objected to, as being one of the firm of Clays & Dinsmore, but after a release of the liability of said firm on the note in suit, was executed and delivered to him, by the plaintiff, he was allowed to testify. By him it appeared that Clays & Dinsmore sold to Kelley, a raft of lumber, and also a raft to defendant, and they agreed to indorse each other's paper. Kelley took away his raft, some four or five days, or perhaps a week, before the defendant took his. When Kelley took his raft, he left this note signed by him, and when the defendant came

for his, this note was taken out of their safe, and defendant put his name on the back, as he had agreed.

Defendant's counsel contended, that the name of Wildes being upon the back of the note, and the firm name of the payees having been indorsed upon the back also, at some time unknown, or at all events, before the note was negotiated at the Gardiner Bank, the legal presumption is, on the failure of proof to the contrary, that the name of Wildes was thus put upon the note as an indorser, and in legal effect subsequent to the indorsement of the payees, and this notwithstanding his name is written above that of the payees, and desired the Judge so to instruct the jury, which request was declined.

The Court instructed the jury, that if they were satisfied from the evidence, that the defendant put his name upon the note, in pursuance of an agreement, made with the payees at the time the contract out of which it originated was made, he would be liable as an original promisor, whether he actually signed when the note was originally made, or at a subsequent time; but if there was no such original agreement or understanding, and he put his name upon the note, at a time subsequent to the making and delivery, he would then stand in the situation of a guarantor, and would not be liable; and that the note produced, not being such a note as is described in the first count, the plaintiff cannot recover upon this count.

Defendant's counsel, among other things, requested the Judge to instruct the jury —

1st. That the note is not evidence to support the second count.

2d. That an indorsee cannot recover upon the money count. The facts alleged in this count do not make a good cause of action, because it is not alleged, that the money was had and received at the request of the defendant.

3d. If the note was indorsed to the plaintiff, by Henry T. Clay, in the name of the firm of Clays & Dinsmore, after the dissolution of the firm, and without authority for that purpose by other members of the firm, that indorsement is void, and the plaintiff cannot recover upon the note.

4th. If the firm was not at that time dissolved, still, Henry T. Clay had no authority to indorse the note to the plaintiff, for a purpose foreign to the business of the firm, unless so permitted by the other members.

5th. If it is true, that the defendant put his name upon the note, after it was made and delivered to Clays & Dinsmore, he cannot be holden in this action.

6th. In such case, if holden at all, he is holden as a guarantor; and since there is no declaration against him as guarantor, he is not held at all in this action.

The 1st, 2d, 5th and 6th requests were refused by the Court.

The third request was complied with, but in connection with it, the Court said, that if such indorsement was subsequently ratified by the other members, the indorsement would be good, although the firm might then have been dissolved.

The fourth requested instruction has likewise been given, with the addition, that if ratified by the other members afterwards, the indorsement would then be good.

The Judge also instructed the jury, that the rate of damages would be to compute the interest from the time when the note became due to the date of the partial payment indorsed, add the interest to the principal and substract the partial payment, and then compute the interest on the balance to the day of the verdict.

A verdict was returned for plaintiff for the amount of the note and interest.

W. Gilbert, for defendant.

H. W. Paine, for plaintiff.

Shepley, C. J. — The case is presented on exceptions and on report of the testimony. According to the testimony of Dinsmore, a member of the firm, to which the note was made payable, the defendant indorsed his name on the back of the note, within four or five days after it was made by Kelley, in accordance with an engagement to do so, before it was made, and before the note had been negotiated by the payees; who could not be required to indorse it, to avail themselves of his

contract, and as he could not be liable to them as an indorser, he must be regarded as a maker. *Irish* v. *Cutler*, 31 Maine, 536.

Dinsmore was properly admitted as a witness for the plaintiff. His claim to have his partners account for the note could not be affected by the result of this suit.

A compliance with the position of the defendant's counsel, with respect to the effect of the names as found upon the back of the note, would have required the jury to disregard Dinsmore's testimony, stating when and how the defendant's name was written upon it; and the request founded upon that position was properly refused, and the instructions given were correct.

The first and second enumerated requests for instructions were properly refused.

If the defendant upon the testimony was to be regarded as a maker and not as an indorser, the note would be evidence to support the count for money had and received, and its allegations were sufficiently formal.

The third request assumes, that there had been a dissolution of the firm. If given, it might have withdrawn from the jury a consideration of the testimony introduced to prove it. The fourth was also objectionable, as assuming that the note was indorsed, "for a purpose foreign to the business of the firm." The instructions given in connection with these requests, appear to have been appropriate and essential to a correct presentation of the case, for consideration by the jury.

The fifth and sixth requests were properly refused, for reasons already stated.

When the only member of a firm entitled to complain, that the note had been improperly negotiated, or that it had been negotiated for a purpose not within the scope of the partnership, had been examined as witness in the case, without making any objection to its negotiation, the jury would be authorized to infer, that it had been done with his consent, or that he had subsequently approved of it.

The rule respecting the mode of casting interest, stated in

the case of *Dean* v. *Williams*, 17 Mass. 417, has been received here, whether the payments were or were not voluntarily made. *Exceptions and motion overruled.*

TENNEY, APPLETON and CUTTING, J. J., concurred.

NORTON *versus* WEBB.

Where one person engages to support another without a designation of any place, where such support should be furnished, the election of the *place* is with the person to be supported.

But after this election is once made, he cannot revoke or change it.

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

WRIT OF ENTRY.

The demandant conveyed a farm, lot No. 45, to the tenant, who at the same time re-conveyed it in mortgage. Upon this mortgage the action is brought. The condition of the mortgage was, "that if the said Farwell Webb, his heirs, executors or administrators, shall support me and Betsey Norton, my wife, in our house on said lot, No. 45, 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, otherwise remain in full force."

It appeared in evidence, that demandant and wife lived in the family of tenant, on the farm described in said deed, for two years after it was given, when they left it, and had received no support since.

The tenant contended that he had the right, under the terms and conditions of the deed, to furnish the support contemplated, at the house on said farm; and if he furnished

support at that place, it was not optional with demandant to have his support there, or elsewhere, as he chose.

But the presiding Judge instructed the jury that it was originally optional with the demandant to have his support in said house on the farm, or elsewhere, as he might choose. That if the demandant had elected to have his support in said house, he would be bound to receive it there and could not afterwards revoke or alter it; but if the plaintiff had not so elected, the defendant would be bound to support the plaintiff and his wife elsewhere; and that the burden of proof was on the defendant to show that the plaintiff had elected to take his support in said house, and that the acts of the plaintiff in going to live on the farm, in the house with the defendant, were legitimate evidence, tending to prove such election.

A verdict was returned for the demandant.

Morrell, for tenant.

It is obvious, that a right, or power of choice, is given to the mortgagee, by the terms of the conditions, in regard to the place of his support, and it is equally obvious, that that right is not an *unlimited* one, and gives the mortgagee no right, except the right to "choose" to have his support at a *particular* place.

It does not confer the right to choose to have his support at "*any place* he might designate, but a right to have that support in our house, on said lot No. 45, if he choose."

The contract on the part of the mortgager, binds him to the *unconditional* support of the mortgagee, and the agreement of mortgagee is equally unconditional to receive such support, as specified.

There is no *option* with the mortgagee, as to *manner* or *quality* of that support; he cannot elect to have *more* or *different,* than is provided by contract.

He has the right to require that he should be supported in our house, on lot 45, and there all option ends.

And the reason of this provision is obvious.

The arrangement is one by which mortgagee had deeded to defendant his farm, to provide for his support, and his pur-

pose was to secure the right to have that support on the homestead, and that if he chose to live there, it should not be in the power of the mortgagee to say he should live *elsewhere.* He did not intend, or desire to secure the right to live elsewhere.

Vose, for demandant.

SHEPLEY, C. J. — The Court decided on a former occasion, that the mortgager might retain possession until there had been a breach of the condition, if the mortgagee had elected to receive support in the house upon the farm. 35 Maine, 218. During the last trial a question was presented, whether the mortgager had the right to elect, where he would furnish support to the mortgagee and his wife, if they had not elected to receive it upon the farm. The jury were instructed, that he had not that right. That he would be bound to furnish it elsewhere at their request.

When one person engages to furnish support for another without a designation of any place where it should be furnished, many reasons might be offered in favor of a construction, authorizing the support to be furnished where the person providing it should elect, it being a suitable place. But a different construction has prevailed, requiring the support to be furnished, where the person to be supported should elect to receive it without occasioning unnecessary expense. *Wilder* v. *Whittemore*, 15 Mass. 262; *Fiske* v. *Fiske*, 20 Pick. 499; *Flanders* v. *Lamphear*, 9 N. H. 201; *Holmes* v. *Fisher*, 13 N. H. 9.

The instructions given appear to have been in conformity to this construction of the contract.

Exceptions overruled.

TENNEY, APPLETON and CUTTING, J. J., concurred.

WALKER *versus* PATTERSON.

To charge an executor, on a written contract, to pay a debt due from his testator, it must be founded upon a sufficient consideration.

And the action will then lie against him *personally*, although the contract was signed in his representative capacity.

Proof of the consideration required to sustain the contract, must be furnished by the party who would enforce it.

Where an executor was dissatisfied with the exhibit of the company debts and assets, made by the surviving partners of his testate; and by leave of the Judge of Probate he referred the matter in dispute, and the balance of the indebtedness of the company beyond its assets was found by the referee, one third of which the executor agreed in writing to pay to a creditor of the company, but did not secure the estate from any further or other liability for the partnership debts; — *Held* that the contract was without any valuable consideration, and no action could be maintained thereon.

ON FACTS AGREED.

ASSUMPSIT, for money paid for defendant.

The defendant is executor of the last will and testament of Isaac Smith, late of Hallowell, deceased. The will was approved and defendant entered upon his trust. Said Smith, was, at the time of his death, a co-partner with the plaintiff and one Richard F. Perkins.

The surviving partners filed in the probate office of the county of Kennebec, a statement and inventory of the accounts of said partnership, as required by law.

The defendant, as executor, not being satisfied with their return, with the approval of the Judge of Probate, agreed to submit the matters in controversy between said co-partners to an arbiter. The whole amount of indebtedness of said co-partnership was by him found and the total assets in the hands of the surviving partners, leaving a balance of indebtedness of $587,41, besides a claim for insurance paid by the surviving partners, and not embraced in the accounts.

Among the debts due from the co-partnership was a note of $300, running to Williams Emmons.

At the hearing, after the results had been ascertained, the defendant gave to the surviving partners a paper of the following tenor; — "My proportion, as executor of the estate of Isaac

Smith, of the liabilities of the co-partnership of Smith, Walker & Perkins, as estimated, and a list of which is left with Wms. Emmons, Esq., amounting to $1850,27, is $195,80, which sum, together with $76,05, being the amount of Walker & Perkins' bill for insurance on vessels, &c., last year, I agree to pay as my full proportion of said liabilities, on the note held by Wms. Emmons, Esq., signed by Smith, Walker & Perkins, for $300, dated March 2, 1847, two years interest on which having been paid. "J. W. Patterson, *Executor.*

"August 22, 1849."

On this note, March 5, 1851, the defendant paid for interest, $18,00. The balance of said note, not having been paid by defendant, was paid to Emmons by plaintiff, to recover which this action is brought. The estate of Smith is solvent and not finally settled.

It was stipulated that if, in the opinion of the Court, the action could not be maintained, the plaintiff is to become nonsuit; otherwise the defendant is to be defaulted for the sum agreed by him to be paid on the note due to Wms. Emmons, and interest.

Evans, for plaintiff.

The defendant is *individually* liable on his contract, although he subscribed it, as "executor." It created a *new contract* between the parties, which executors and administrators cannot do, to bind the estate.

The *mode of payment*, originated with the defendant and binds himself.

The agreement was founded on sufficient consideration. The settlement of the co-partnership concerns, and the implied, if not *express* obligation on the co-partners to pay the remaining debts, formed a sufficient consideration.

In the margin of the original paper, in defendant's own writing, are the words "W. & P. to pay $1578,42," being the balance of the co-partnership indebtedness. This is evidence of an express promise on their part.

The authorities are very decisive on the questions. *Thacher & al.* v. *Dinsmore*, 5 Mass. 302; *Foster* v. *Fuller*, 6 Mass. 58.

In both these cases the notes were signed as "guardian" but both were held personally liable.

In *Wheaton* v. *Wilmarth*, 13 Metc. 422, concluding paragraph of the opinion, the Court held an administrator personally responsible, to one who had, *at his request*, become guarantor on a note against his intestate. Story on Prom. Notes, § 63; *Hill* v. *Bannister*, 8 Cowen, 31; *Davis* v. *French*, and cases cited by SHEPLEY, C. J., 20 Maine, 21; *Sumner* v. *Williams & al.* 8 Mass. 162.

The defendant has abundant assets of the estate for his indemnity, and no injustice will be done by holding him personally responsible, whereas the plaintiff has no remedy against the executor, the action being barred by the statute of limitations without fault on his part, but by the negligence of the defendant himself.

Vose, for defendant.

An attempt is here made to hold the defendant in his *private* capacity in opposition to his express stipulation. It seems there was some dispute as to the indebtedness of the estate, and to ascertain the amount, the matter was submitted to arbitration. No bond was given defendant, no promise in consideration of the submission preceded the same. It was like the case of *Pearson* v. *Kenney*, 5 D. & E. 6, for the purpose of ascertaining the amount of indebtedness due from the testator, which cannot bind the defendant in his private capacity.

The principle, that an agent who exceeds his authority is bound personally, does not apply to this case.

Here is no new contract; no new consideration; no value received; no forbearance to sue; no release of any demand against the estate, as a consideration for the promise; no extinguishment of one contract, by the substitution of another, as by giving a negotiable note in payment of an account. The paper is not negotiable in its terms, and does not even purport to be for value received. It is a mere ascertainment of the proportion due from the estate, and an agreement on

the part of the defendant in his *official* capacity, that such sum is due on demand.

But neither the holder of the note, nor the plaintiff has made the demand as might have been done of the estate.

The defendant never intended to charge himself personally, and according to decided cases, he is neither legally, nor morally bound. *Macbeath* v. *Haldimand*, 1 T. R. 172; *Hodgdon* v. *Dexter*, 10 Cranch, 345; *Brown* v. *Austin*, 1 Mass. 208.

The commencement and conclusion of this instrument, show clearly, that the intent of the defendant was simply to act in his capacity as executor.

In the case *Rann* v. *Hughes*, in the notes to the case of *Mitchinson* v. *Hewson*, 7 D. & E. 346; where demands were submitted to a reference to ascertain the amount due, no new consideration being proved, all the Judges agreed, that the defendant could not be liable in her personal capacity; the promise must be coëxtensive with the consideration. This case is believed to be in point, as is also the subsequent case of *Ten Eyck* v. *Vanderpool*, 8 Johns. 120, which refers back to the case of *Rann* v. *Hughes*, as authority, and is a much stronger case than the one at bar, inasmuch as the defendant in his note acknowledged a value received. In the case at bar, there was no such acknowledgment, and no consideration existed as a matter of fact.

Shepley, C. J. — The law applicable to this case, appears to have been correctly stated in the case of *Davis* v. *French*, 20 Maine, 21.

Assuming the contract subscribed by the defendant, as executor, to bind himself, if made upon sufficient consideration, the only question presented will be, whether such a consideration is exhibited by the agreed statement.

The arbitrator appears to have determined only the amount of the debts due from the partnership, and the amount of its assets in the hands of the survivors. These facts having been ascertained, the amount to be paid out of the private property

of each member would be determined. It might happen, that one would be required to pay more than his share from the inability of another member to pay his due proportion.

The defendant by his contract appears to have agreed to pay the exact third part, that would be payable from the estate of his testator, and the amount of a bill paid by the survivors for insurance of the partnership property. If he had secured the estate from any further or other liability for partnership debts, that might have constituted a sufficient consideration for his contract. But he does not appear to have done so. The creditors of the partnership might have collected their debts from the estate of his testator, and the executor's remedy would have been to collect the amount over the testator's share of the other members. They would not have been jointly liable for each other, beyond the amount of the assets of the partnership. Nor would they have been bound by the memorandum made by the defendant, and not signed by them; "W. & P. to pay $1578,42."

It is not perceived, that the rights of either member of the partnership were at all varied, or that the defendant derived any personal advantage from the contract signed by him, or from the submission and award.

Proof, that a written contract for payment of a debt due from another, was made for a valuable consideration, must come from the party, who would enforce it; and the proof to be derived from the agreed statement, is not sufficient.

Plaintiff nonsuit.

TENNEY, APPLETON and CUTTING, J. J. concurred.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1853.

COUNTY OF WASHINGTON.

(*) PORTER *versus* PILLSBURY.

The time allowed to a party, on notice to attend the taking of a deposition, has relation to the distance to the place of caption from the place where he resides, not to the place of caption from the place where he may happen to be found.

The holder of a personal claim, with a mortgage of land as collateral, may by a suit at law, after foreclosure, recover the balance due on the debt, deducting the value of the *land* at the time of the foreclosure.

By permitting the mortgage to be foreclosed, the mortgager waives all claim to be allowed *in such suit*, for the net incomes which accrued to the mortgagee from the land during the three years of foreclosure.

In redeeming land, of which the mortgagee has taken possession for a foreclosure, if he account for the net incomes *actually received*, the burden is upon the mortgager to show a want of ordinary care in its management.

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

DEBT on a judgment recovered in 1843, damage $1424,00, cost $24,27. Plea, *nil debet.*

The defendant introduced evidence tending to show a representation made by the plaintiff, *that* the judgment in suit, was obtained on a note, secured by mortgage of land; *that* he had foreclosed the mortgage and sold the land, for between $800 & $900; *that* it brought all that it was worth; and *that* he should recover the difference between what it brought, and the amount of the judgment in suit.

The defendant then offered the depositions of Samuel Pillsbury and others, to which the plaintiff objected on the ground, that no sufficient notice had been given to him, inasmuch as the notice was served upon his counsel, only 18 hours before the time appointed for the caption, to attend the taking at Rockland, 110 miles from Machias, the residence of both the plaintiff and his counsel; all which appears by the certificate of the magistrate, and papers by him annexed to the deposition of Samuel Pillsbury, which objection was never waived.

The Court overruled the objection, and admitted the depositions.

The plaintiff introduced depositions to show the rents and profits of the mortgaged property, during the three years it was held by him, and the proceeds of sale at the end of that time, and also the value at the time of foreclosure and sale.

The plaintiff requested the Court to instruct the jury, that the actual receipts from the rent and sale of the mortgaged property, after deducting necessary expenses, should fix the sum to be allowed upon the judgment, unless they were satisfied, that the plaintiff had not used ordinary care and prudence in the management and sale of the property.

The plaintiff also asked the Court to instruct the jury that, if they should find that the plaintiff offered for sale, and did sell, all the title which the defendant mortgaged to him, the plaintiff should not be made to suffer loss from any defect, real or supposed, in said Pillsbury's title, which tended to diminish the price down to that for which said property sold.

The Court declined to give these instructions, but instructed the jury, *that* in reference to the admissions of the plaintiff, offered by the defendant in evidence, the jury were to take the whole admissions together; *that* it was for them to determine, under all the circumstances and facts proved, upon how much of these admissions they could rely, including those of the party in his own favor as well as those making against him; — *that* these admissions were evidence for their consideration to be compared and weighed with the other evidence in the case, the effect of all which was for

their consideration; — *that* the judgment introduced by the plaintiff showed conclusively an indebtedness for the amount therein specified; — *that* it appeared the plaintiff entered to foreclose his mortgage on Sept. 7th, 1841; — *that* in entering into possession for the purposes of foreclosure, he was bound to exercise that care and prudence in the management and control of the property mortgaged, which a prudent owner would exercise in the management and control of his own property; — *that* if redeemed, he was bound to account for such net sum, as, using the diligence and care of a prudent man in the management and control of his own property, he received, or which, using such care and diligence, he might have received; — *that* the jury should ascertain the indebtedness on Sept. 7th 1844, when the foreclosure expired; *that* after ascertaining the rents for which, upon the principle before stated, the plaintiff was bound to account, they should deduct therefrom, all reasonable charges for agencies in the management and disposition of the property, all sums paid for taxes, all expenditures in the repairs of buildings erected, or in the erection of buildings necessary for the enjoyment and proper use of that species of property, and should apply the net sum then remaining towards the reduction of the plaintiff's judgment; — *that*, after finding the indebtedness of the defendant, on Sept. 7, 1844, according to those principles, it remained for them to ascertain the true cash value of the mortgaged premises at that time, and if it was equal to the amount then due to the plaintiff, they should render their verdict for the defendant, if less than such amount so due to the plaintiff, their verdict should be for the plaintiff for the balance due him after deducting the cash value of the mortgaged premises at the time the foreclosure became perfected; — *that* in determining the cash value at the date of the foreclosure of the mortgaged premises, they should take into consideration the testimony of the several witnesses respectively produced by the plaintiff and the defendant, the price given for the property at the sale at auction, and after comparing the whole testimony, and considering all the facts, determine for themselves from the

various elements presented for their consideration, its actual cash value at that time; — *that*, if the title of Pillsbury was defective and there was any diminution of price from such defect of title, the defendant should suffer for such defect of his title; — *that*, if the title was perfect in Pillsbury and by foreclosure became perfect in the plaintiff, then the defendant is entitled to have allowed in reduction or payment of the plaintiff's judgment, the cash value of the property at the time when the title became perfected by foreclosure in the plaintiff; and *that*, unless they find a defect in the title of Pillsbury, they must take the actual cash value as before stated. The verdict was that the defendant did not owe. To which rulings and instructions and refusals to instruct the plaintiff excepted.

R. K. & C. W. Porter, for the plaintiff.

1. The depositions of Samuel Pillsbury and others were improperly admitted, for want of notice. R. S. c. 133, § 9, p. 580, as amended, by Act of 1842, c. 31, § 17; *Homer* v. *Brainerd*, 15 Maine, 54; *Howard* v. *Folger*, 15 Maine, 447; *Leavitt* v. *Leavitt*, 4 Maine, 161.

2. The first instruction asked for, was proper, and should have been granted; because; —

First. Opinions as to value of lands, are not suitable evidence. 1 Greenl. Ev. § 440, p. 592 and seq.; *Peterboro'* v. *Jaffney*, 6 N. H. 462; *Rochester* v. *Chester*, 3 N. H. 349; *Beard* v. *Kirk*, 11 N. H. 397.

Second. A mortgagee is only bound to account for *actual receipts*, unless he has been guilty of fraud or wilful default. Powell on Mortgages, 1028; Bacon's abridgement, 3, 657; 4 Kent's Com. 166, 182; 2 Story's Equity Jurisp. 285; *White* v. *Brown*, 2 Cush. 412; *Hatch* v. *White*, 2 Gall. 152; *Tooke* v. *Hartley*, 2 Brooke, Penn. 125; *Amory* v. *Fairbanks*, 3 Mass. 562; *Saunders* v. *Frost*, 5 Pick. 259; *Fulthorp* v. *Foster*, 1 Vernon, 476; Anonymous, 1 Vernon, 45.

3. The second instruction asked for should not have been denied; because; —

First. A mortgagee in selling the mortgaged estate is not

bound to warrant the mortgager's title. Story's Eq. Jurisp. § 1013, page 278.

Second. The plaintiff offered for sale and sold all the title derived from the defendant, and if there was suspicion of the strength of that title, he should not suffer for it.

B. Bradbury, for the defendant.

1. The depositions offered by defendant were properly admitted.

The service was made upon the attorney of the plaintiff at Rockland, the place named for the caption of the deposition, allowing all the time which the statute requires.

The provision of the statute, c. 133, § 9, applies to the adverse party, but does not refer to his counsel, and is based upon the idea that the service, when upon the party, is made at his usual place of abode.

In this case, the attorney was at Rockland for the purpose of taking testimony in this cause.

But the facts stated in this caption (which is conclusive) do not afford the basis for the objection taken by plaintiff's counsel.

2. The instruction of the Judge as to the effect of the plaintiff's admissions, proved by defendant, was correct. Greenl. Ev. vol. 1, § 201, and cases cited in note.

3. The instruction of the Judge as to the diligence and care of the mortgagee in the management of the estate, the appropriation of the rents and profits for agencies, taxes, expenditures for repairs, was correct. *Cazenove* v. *Cutler*, 4 Metc. 246.

4. The instruction of the Judge that the jury should find the true cash value of the mortgaged premises on the 7th of September, 1844, when the foreclosure expired, and if it was equal to the amount then due the plaintiff, they should render their verdict for the defendant; if less, then their verdict should be for the plaintiff for the balance due him after deducting from such balance the cash value of the mortgaged premises, at the time the foreclosure became perfected,

was the true rule of damage. *Hatch* v. *White*, 2 Gall. 161; *Hunt* v. *Stiles*, 10 N. H. 466; 7 Alabama, 708.

5. An auction sale of mortgaged property is only one of the elements, by which to ascertain its true value.

TENNEY, J. — This action is upon a judgment, for the purpose of obtaining a balance, claimed to be due thereon, a part having been satisfied by means of the foreclosure of a mortgage of real estate, given by the defendant as collateral security for the original cause of action.

Objections were made at the trial, by the plaintiff, to the depositions of Samuel Pillsbury and other persons, offered by the defendant, on the ground, that the notice of their taking, was not so long prior to the caption, as the statute requires. The justice has certified, that "the adverse party was duly notified to attend, as will appear by the notice annexed." By this reference, the notice itself makes a part of the certificate, and shows that the plaintiff and his attorney had their residence at the time in Machias, in the county of Washington, a distance of one hundred and ten miles from the place of caption; and at thirty minutes after eight o'clock in the afternoon of Sept. 27, 1852, were notified, that the depositions objected to, would be taken at two o'clock in the afternoon of the next day. By R. S. c. 133, § 9, amended by statute of 1842, c. 31, § 17, the notice is required to be such, that the adverse party shall be allowed, between the service of the notice, and the time appointed for the taking the deposition, time for him to travel from his usual place of abode, to the place of caption, not less than at the rate of one day for every twenty miles. It is very clear, in this case, that the plaintiff was not legally notified of the taking of the depositions. The appearance of the attorney and the putting of interrogatories by him, were under a written protest, that the plaintiff was not bound, by the notice, and could not be regarded as a waiver of a right to object on that account.

It may be regarded as the settled doctrine of the law of this State, that the holder of a personal obligation, (or a judg-

ment thereon,) for which a mortgage of real estate has been given, as collateral security, may recover the balance of the debt due, deducting the value of the mortgaged premises, at the time of the foreclosure. *Tooke* v. *Hartley*, 2 Bro. Ch. 125; *Amory* v. *Fairbanks*, 3 Mass. 562; *Hatch* v. *White*, 2 Gal. 152; *Omaly* v. *Swan*, 3 Mason, 474; *Dunkley* v. *VanBuren*, 3 Johns. Ch. 330; *Globe Ins. Co.* v. *Lansing*, 5 Cowen, 380; *Lansing* v. *Goelet*, 9 Cowen, 346; *Hughes* v. *Edwards*, 9 Wheat. 489; 4 Kent's Com. Lecture 57, p. 173 and seq., (1st Ed.)

In determining the sum to be allowed on account of the foreclosed mortgage, the excess of the amount of the rents and profits over and above that expended in repairs, necessary improvements, &c., is not to be added to the value of the real estate at the time of the foreclosure. In redeeming from the mortgage at any time, before the title becomes absolute in the mortgagee, the rents and profits are to be accounted for by him, because the mortgager has the right to save the estate from forfeiture, by the payment of the sum, which is due in equity. But the suit upon the personal contract is at law, and the equities, which the debtor had while the mortgage was open, are extinguished. He has no greater right in such action, to claim that the net avails of the rents and profits should be deducted from the amount of the judgment, than he has, that the sum should be refunded to him on a foreclosure of a mortgage on an estate of sufficient value to discharge the entire debt, secured thereby. It is through the laches of the mortgager, that the estate is not redeemed, while his equities remain, and on a failure to do so, the whole land, and its use from the time possession was taken for a breach of the condition, become the property of the mortgagee.

The instructions to the jury were not in accordance with these principles; and the plaintiff's counsel waived the right to have those given, which were in harmony with the law, by requesting those less favorable to him. And if those requested, were substantially given, he has no ground of complaint. The Judge was requested by the plaintiff's coun-

sel to instruct the jury, "that the actual receipts from the rent and sale of the mortgaged property, after deducting necessary expenses, should fix the sum to be allowed upon the judgment, unless they were satisfied, that the plaintiff had not used ordinary care and prudence in the management and sale of said property." The jury were instructed, "that in entering into possession for the purpose of foreclosure, he was bound to exercise the care and prudence in the management and control of the property mortgaged, which a prudent owner would exercise in the management and control of his own property." The instructions given were more stringent against the plaintiff, than those requested. By the latter, he was holden only to the care and prudence required of those standing in the same relation to the property, which he did; by the former, he was bound to exercise the care and prudence which an owner would exercise, in the management and control of his own property. The management and control of property like the mortgaged premises, is expected to be different by an absolute owner, from that by one, having entered thereon, for condition broken, as a means of obtaining payment of his debt.

Again, by the instructions requested, if the plaintiff had introduced satisfactory proof, that he had accounted for all the rents and profits actually received, the burden would have been upon the defendant to show a want of ordinary care and prudence in the management and sale of the property. The import of the instructions given was, that the plaintiff was bound to show, that he had exercised the care and prudence in the management and control of the property, which an owner would have done in relation to his own property.

The instruction, that if the title of the mortgager was defective, and there was any diminution of price from such defect of title, the defendant alone should be the sufferer for that cause, was correct, and did not differ materially from that requested. The defendant could transfer only his own right; and the foreclosure could vest in the mortgagee no greater interest, than that which the mortgager had at the time of the

execution of the mortgage; and any defect of title shown, operated, under the instructions, to diminish the amount satisfied by the foreclosure of the mortgage.

Exceptions sustained.

SHEPLEY, C. J., concurred.

HATHAWAY, J., concurred in the result.

RICE, J., concurred in sustaining the exceptions, but from that part of the opinion which precludes the mortgager, (when sued, after a foreclosure, for the balance due on the mortgage debt,) from making claim for rents and profits received by the mortgagee previous to the foreclosure, he dissented, and observed; — "A mortgage is merely collateral to the principal debt, why then should it not be treated as other collateral security? Were stocks of any kind or choses in action mortgaged, and these collaterals applied in payment, and an action brought to collect a balance, can there be any doubt that our courts would require the party thus claiming a balance to account for the interest or dividends collected, as well as for the principal, or value of the stocks? The same principle must apply to mortgages of real estate. When a party claims a *balance,* he must account for *all* he has received from the collateral security in his hands.

It will be found that the rule laid down in the cases, cited by Judge TENNEY, originated in combating the doctrine of the English Chancery Courts, that by an absolute foreclosure of the mortgage the *whole mortgage debt* was thereby paid, or when the mortgager was allowed to claim a balance, the foreclosure should thereby be reöpened. It is this English doctrine of *absolute payment,* that is so ably refuted by Judge STORY in the case cited. I do not find that the facts in any of the cases relied upon raise the question of accounting for rents and profits, nor that the attention of the courts was called to that question. Hence the general terms in which the doctrine announced in the opinion of Judge TENNEY is stated.

The equitable, and I think, the true doctrine applicable to this class of cases, is thus stated by PARSONS, C. J., in the

case of *Newhall & al.* v. *Wright*, 3 Mass. 138. — "If neither the mortgager nor any subsequent mortgagee will redeem, the presumption is violent, that the land, *together with the rents and profits received*, is not worth more than the debt and interest due. If it should be worth less, and the first mortgagee should sue the mortgager to recover the deficiency, *in that suit the mortgager will be allowed not only for the value of the lands* when the mortgagee took possession, *but also for all the rents and profits he received after possession.*"

(*) THAYER *versus* MOWRY *et al.*

Until the expiration of twenty years from the recovery of a judgment, there arises, *from lapse of time*, no degree of presumption that the judgment has been paid.

For an agreement by a judgment creditor that he would allow, *upon the judgment*, the amount which, *prior to the judgment*, he had received toward the debt, in the dealings of the parties, such receipt of the money is a sufficient consideration.

In a suit upon such judgment, the jury, if the receipt of the money and the agreement of the plaintiff be proved, may treat the amount received as a payment upon the judgment.

In such a case, the defendant is entitled to introduce evidence of the plaintiff's agreement, and of the state of their dealings previous to the judgment, and of any facts which could justify the jury in finding that the money had been received by the plaintiff, and to what amount.

Such evidence has no tendency to impeach the judgment. Its effect can only be to show, that, by a valid arrangement, it has been paid.

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

DEBT upon a judgment recovered in March, 1831, for $516,76 debt, and $14,71 costs. Upon the writ in that action the property of the defendants was attached.

The present action was brought February 4, 1851. The plaintiff read the record of the judgment, and introduced the execution issued thereupon, March 10, 1831, returned no part satisfied, and it was admitted that no alias execution had ever issued. The defence relied upon in the pleading, was payment.

The defendants offered as witness, I. R. Chadbourne, who testified, that he was attorney for the defendants, in the original suits; that he was in attendance upon the S. J. Court, in Machias, in June, 1831, and that he then received from the defendant Mowry, a letter of instructions in reference to the original suit, being the suit upon which this judgment was recovered, which letter contained certain receipts signed by the plaintiff, and a letter from him to Adams & Fessenden; that said letter and enclosures were never seen by him (the witness) from about the time he received them until after the commencement of this suit, when he searched for them at the request of Mowry, and found them in his office, where they had been ever since June, 1831; that Mowry was a member of the Legislature, in March, 1831, and on the valuation committee, which continued its sessions into the ensuing summer.

The defendants read in evidence, the writ and note upon which this judgment was recovered, and also the letter of the plaintiff to Adams & Fessenden, dated June 1, 1824, also a copy of an execution recovered against the defendant Mowry, by Adams & Fessenden, for debt $672,34, and costs $15,75, discharged by S. Thayer, (the plaintiff,) also a certain paper, of which the following is a copy.

"Received of J. Mowry, Esq. five hundred and forty-five dollars, by his deed to Thomas Moon, to be accounted for on demand. "Solo. Thayer.

"Lubec, Nov. 11, 1825."

Endorsed; "$448,04. Received towards this receipt four hundred forty-eight dollars, and four cents."

Samuel Mowry was introduced by the defendant, and testified, *that* he was present at a conversation between the plaintiff and his father, Jabez Mowry, one of the defendants, May 5, 1851, at plaintiff's office; *that* his father asked the plaintiff how much he received on the Rice deed, and on the Moon receipt; *that* the plaintiff said he received on the Rice deed and the Clark note $508 or $510, and about $100 for balance of Moon receipt; *that* his father asked the plaintiff if these sums were not received towards the joint note of Fowler,

Boynton and himself, [the present defendants, being the note on which judgment was recovered,] and the plaintiff said yes, and if they were not indorsed on that note, he would allow it towards the execution; *that* the plaintiff figured it, and said if this is allowed as I have received it, on that joint note, you (said Jabez) will owe me $200 to $300 on general account; *that* his father replied he did not owe him a dollar on general account, and *that* the parties separated in anger.

To each and every part of the foregoing evidence, the plaintiff objected as it was offered.

On cross-examination, the witness, Samuel Mowry, testified that his father became embarrassed in 1824 or 1825: — It did not appear that the other defendants had not always continued solvent.

The Judge instructed the jury, *that* the judgment produced was conclusive evidence of indebtedness to its amount, at the time of its rendition; *that*, if obtained by error, fraud or mistake, the proper proceedings should have been instituted to revise it, or to procure a review, and new trial; *that*, those proceedings not having been instituted, it was perfectly immaterial whether the defendants intended to have had the action demurred; or whether they had a defence to the suit or not; *that* this suit is not barred by the statute of limitations, nor does the presumption of payment arise till after the full and entire period of twenty years; *that* when the judgment was obtained, the defendants might have claims against the plaintiff, which could not have been filed in set-off; *that* the plaintiff, as it appeared, had other claims against the defendant Mowry, alone; *that*, if they found that that defendant was bound, as between him and his co-signers, to pay that debt, and that he had made payments which were to have been applied to the note, on which this judgment was rendered, but which were not so applied, they would consider whether the parties had not subsequently adjusted this matter between themselves; *that*, in this connection, the facts, if proved, that attachments had been made on the original writ, that no proceedings were had on the execution obtained, that the other parties

were solvent, and that during much of this time Mowry was solvent, were facts proper for their consideration with the other facts in the case; *that*, if they found the judgment to have been fully paid or in no part paid, they would so return by their verdict; *that*, if it had been paid in part, they would find for the balance.

To the rulings of the Judge, admitting the evidence objected to by the plaintiff, and to the instructions given to the jury, the plaintiff excepted. The verdict was that the judgment had been fully paid. The plaintiff also filed a motion for a new trial, on the ground that the verdict was against evidence and against the weight of evidence.

Thayer and *Thacher*, for the plaintiff.

The record of the judgment was conclusive evidence of the defendants' indebtedness, and of the amount.

No evidence of facts prior to its rendition is admissible to impair its effect. Nothing of defence can be allowed, which might have been proved at the time of its recovery. *Flint* v. *Sheldon*, 13 Mass. 453; *Footman* v. *Stetson*, 32 Maine, 17; *Granger* v. *Clark*, 22 Maine, 128; *Cook* v. *Darling*, 18 Pick. 393. By reason of the admission of Mr. Chadbourne's testimony, therefore, the exceptions should be sustained. *McLellan* v. *Richardson*, 13 Maine, 82; 14 Maine, 228.

The admission of the original note and writ was wrongful. How could those papers show the judgment void or paid? Having no possible tendency in any way to aid the defendants, they ought not to have been received. For the same reason, the execution recovered by *Adams & al.* v. *Mowry*, in 1823, especially as it was a matter *inter alios*, was erroneously introduced; and the same objection lies to the introduction of the plaintiff's letter of June 1, 1824, nearly seven years before the judgment, and also to receipt of November 11, 1825. Its only tendency was to prove a payment before the judgment was recovered, and thus collaterally to reverse the judgment. *Smith* v. *Miller*, 14 Wend. 188; *Langdon* v. *Potter*, 13 Mass. 319; *Bannister* v. *Higgins*, 15 Mass. 73.

The great error of the Judge (it is respectfully submitted,)

is in the following instruction: — "that when judgment was obtained by the plaintiff, the defendants might have claims against the plaintiff which could not be filed in set-off; that the plaintiff, it appeared, had other claims against the defendant Mowry alone; that if they found that the defendant Mowry was bound between him and co-signers to pay the debt, and that he had made payments which were to be applied to the note upon which this judgment was rendered but which were not so applied, they would consider whether the parties had not subsequently adjusted this matter between themselves, and that in this connection the facts, if proved, that attachments had been made in the original action, that no proceedings were had on the execution obtained, that the other parties were solvent and during most of the time Mowry was solvent, were to be considered with other facts in the case."

All facts which existed prior to the judgment, which were not admissible at the time to prove payment of the note, would be inadmissible to prove payment of the execution. The existence of mutual demands between Thayer and Mowry, as that fact raised no presumption of the payment of the note, on trial of the action, neither could it raise a presumption of the payment of the execution or judgment. If, as the Judge says, "no presumption of payment can arise until after the full and entire period of twenty years, how can such presumption of payment be inferred from mutual dealings, mutual accounts and mutual demands existing between the parties short of that time? All the facts suggested by the Judge were only such as might raise a presumption of payment, but such presumption cannot arise till the lapse of twenty years.

It is not possible to raise a presumption that a judgment was satisfied, from the fact that other demands existed between the parties, or that the judgment creditor owed the defendants at the time the judgment was recovered.

The whole of Samuel Mowry's testimony, if it prove any thing, can only show that the judgment was taken for too

large a sum. But that point, as already stated, was not open, under a mere plea of payment.

B. Bradbury, for the defendants.

1. The testimony of Chadbourne was admissible to identify certain papers, which were offered in evidence, and to show that they were in the possession of defendants' counsel in connection with the original suit during its pendency, and to explain why they were not then used.

2. The writ and note upon which the judgment was recovered, the letter of Thayer to Adams and Fessenden of June 1, 1824, the execution of Adams and Fessenden against Jabez Mowry, discharged by Thayer, were all admissible. For the object of them was to show that the judgment was originally a debt from Mowry to Adams and Fessenden, that Thayer purchased this demand of Adams and Fessenden, and adjusted it by taking the note signed by Mowry and the other defendants, which was the basis of the judgment in suit, establishing the fact that it was well understood between Thayer and Mowry, that the note upon which the judgment in suit was obtained, was to be paid by Mowry, and that the other parties were but sureties.

3. The receipt for $545, through the deed of Thomas Moon, dated November 11, 1825, was admissible, being directly connected with this transaction by the testimony of Samuel Mowry.

4. The testimony of Samuel Mowry was admissible to show such a condition of affairs and business relations between these parties as would tend to prove a payment of this judgment by the defendant Mowry.

TENNEY, J. — This action was commenced on February 4, 1851, upon a judgment recovered in March, 1831, for the sum of $531,47, debt and costs. The defence was alleged payment. Evidence was introduced tending to prove, that Mowry was the principal on the note, which was the cause of action in the first suit, and the other defendants were his sureties.

The defendants, as it appears from the exceptions, attempted to establish two propositions. One was, that before the recovery of the judgment, the plaintiff had received moneys belonging to Mowry, nearly or quite equal to the amount of the judgment; and the other was, that notwithstanding the judgment was taken for the full amount of the note and costs, instead of the execution thereon being enforced as it is contended that it might have been, it was suffered to remain, in consequence of a valid agreement, that the moneys so received, should be applied to the satisfaction of the judgment and execution. Evidence was introduced, relied upon by the defendants, in proof of these propositions; and the instructions complained of, were given to the jury, not as authorizing the impeachment of the judgment collaterally, but for the purpose of presenting to them the question, whether there was a consideration for the agreement alleged to have been made, that payments, which should have discharged the note, or been indorsed thereon, were actually applied to the satisfaction of the judgment after its recovery. The jury were instructed, that if they should find, that the defendant Mowry was really the principal in the note, and bound to pay it, as between him and the other makers; that he had made payments, which were to have been applied to the note, but which were not so allowed, they would consider, whether the parties had not subsequently adjusted this matter between themselves; that, in this connection, the facts, if proved, that attachments had been made on the original writ, that no proceedings were had upon the execution obtained, that the other parties were solvent, and that during much of this time, Mowry was solvent, were facts proper for their consideration, with other facts in the case.

In these instructions no imperative rule of law was given to the jury to give weight to the delay of the plaintiff to enforce his execution, if he could probably have done so successfully, but they were allowed to consider the effect due to these facts, in connection with the other evidence before them. The jury could not have understood the Judge to have held,

against his positive statement to the contrary, that payment of a judgment can be presumed short of twenty years; but only to have allowed them to consider the circumstance of having omitted to enforce his judgment against those inducements, which ordinarily influence creditors, when no arrangements had been made for a settlement thereof, connected with the facts, attempted to be established, that he had in reality received payment of his debt, before the suit, and had agreed to allow the payment on the judgment. The admission of the evidence, for which it was introduced, and the instructions to the jury are free from error.

Exceptions overruled.

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

TENNEY, J. — If the instructions had evidence for their basis, the jury were to judge of all the facts, under the direction of the Court; and their finding cannot be disregarded, simply because the evidence was weak, and such as would have inclined the Court to believe, that it might have come to a different conclusion.

Positive evidence was introduced, that the plaintiff had received moneys belonging to the defendants, sufficient to cover the amount of the judgment now in suit. When the parties were together in May, 1851, the books and papers of both parties being present, and to some extent examined, the plaintiff admitted, that he had received from the Rice and the Wm. Clark note about five hundred dollars, and also one hundred dollars by balance of the Moon receipt, upon the note on which judgment was rendered; that he had agreed, that these sums should go in payment of the joint note, (which is understood to be the same,) and if they had not been so allowed on the note, they should go towards the execution; and the plaintiff thereupon remarked, being some excited and angry, "if that's allowed, as I have received it, towards the joint note, you will owe me $200 or $300 on the general account," which Mowry denied. This evidence, if true, when

considered alone, and unconnected with other circumstances, relied upon in proof of payment, were insufficient to authorize the jury to find, that payment had been made from moneys received after the recovery of the judgment; but it certainly tends strongly to show, that it was recovered, when little or nothing was due upon the note, and that it was wrongfully or improvidently taken. And from the facts, that no means were put in operation for almost twenty years, for its collection, and no satisfactory explanation of this delay offered, it is not strange, that the jury should have done the plaintiff the justice to infer from all the facts together, that he had really done after the recovery of the judgment, what he frankly admitted he had agreed to do before, in reference to the note. If the jury erred, the error is not so palpable, as to authorize the Court to disturb the verdict. *Motion overruled.*

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

WILSON, DOUGLASS & CO. *versus* SHERLOCK.

Res gestæ, of which declarations may constitute a part, are such transactions only as the parties were connected with while the negotiation between them was incomplete.

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

ASSUMPSIT, on account annexed for balance $212,00, due for 100 barrels of flour.

The plaintiffs, merchants of New York, on *December* 3, 1844, parted with one hundred barrels of flour, value, with truckage, &c., $424. It was delivered on the same day to one Casey, a resident of New York, by whom it was shipped to the defendant in Eastport.

Their sale book, (introduced at the trial, on notice to produce,) showed, that they charged the flour to the defendant, and that on *December* 5, they received one half the amount, $212,00. The evidence showed that that payment was made by hand of Casey.

The plaintiffs introduced evidence tending to show, that

Casey was the agent of the defendant in making the purchase.

In order to show, that the purchase was made of the plaintiffs by Casey, on his own account, and that the sale to the defendant was made by *Casey* and not by the plaintiffs, the defendant offered in evidence an account current made up and signed by Casey, on Dec. 5, 1844, between himself and the defendant, in which he charged the defendant under date of December 4, with half amount of bill of flour, $212, W., D. & Co. The genuineness of Casey's signature was proved.

The plaintiffs objected to the reception of the paper. But it was admitted, and went to the jury, and to its admission the plaintiff excepted. The verdict was for the defendant.

D. T. Granger, for the plaintiffs.

B. Bradbury, for the defendant.

The paper was admissible. It was made up on the same day, (5th December,) on which he paid half the bill to the plaintiffs, charging that he had made the sale to the defendant on the 4th.

It was a written statement made at the time of the transaction by Casey, whom the plaintiffs have made a participator in the transaction.

The stating this account and charging Sherlock one half the bill of flour was contemporaneous with the payment by Casey to Wilson, Douglass & Co., and tends to illustrate that fact, and was "so connected with it as to be regarded as the mere result and consequence of the coëxisting motives."

It was an act performed at the time of the transaction by Casey, through whom they claim to hold the defendant, and directly connected with the principal fact in the case, explaining the motives and intentions of the parties.

It was surely admissible then as part of the *res gestæ*.

But the paper was of no consequence in the cause, as the Court will perceive by examining it. It charges Sherlock with "one half bill of flour of W., D. & Co.," which half? Had Casey paid one half of the bill and charged it to him, or had

Sherlock furnished Casey with the money to pay one half and was the charge designed to cover the unpaid portion of the bill?

SHEPLEY, C. J. — If a sale was made by the plaintiffs to the defendant, it was made, and the flour was delivered on board of a vessel at New York, on December 3, 1844, and the transactions respecting the sale were then closed.

Testimony appears to have been introduced for the plaintiffs to prove, that Henry P. Casey, professing to act as agent for the defendant, gave directions respecting the sale. In an account made out on December 5, 1844, rendered to the defendant and subscribed by Casey, the defendant was charged under date of December 4, 1844, with half amount of bill of flour W. D. & Co., and upon proof of Casey's handwriting, it was received as testimony for the defendant, against the objection of the counsel for plaintiffs.

It is insisted, that it was part of the *res gestæ*, and as such legally admissible. That term can be properly applicable only to transactions, with which the plaintiffs were connected, while the negotiation, sale and delivery were incomplete. The plaintiffs do not appear to have been in any manner connected with the accounts between Casey and the defendant; nor does that account appear to have been made until after the business respecting the sale and delivery of the flour had been completed.

If that account be considered as a paper not connected with those transactions, it is only a declaration made by Casey in writing, without the sanction of an oath; without the knowledge of the plaintiffs, and without any opportunity for an examination.

The rights of the plaintiffs could no more be affected by it, than by an oral declaration made by Casey in their absence.

It is alleged to have been unimportant, and that the plaintiffs without its introduction would have failed to obtain a verdict.

The Court cannot determine what effect it may have had

upon the minds of the jurors, to induce them to return a verdict for the defendant. It cannot be regarded as immaterial testimony. *Exceptions sustained, verdict set aside and new trial granted.*

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

(*) SMITH *& al. in Scire Facias, versus* EATON *& al.*

The Court has no jurisdiction of a trustee suit, in which it appears that the debtor and trustees all reside out of the State, and have no property in it.

Such a suit, if the objection be seasonably taken, will be abated.

It is no valid objection to a trustee's disclosure on *scire facias*, that it was made before a justice of the peace.

It is a general rule, that, to a defendant in *scire facias*, no ground of defence is open, which he might have taken in the original suit.

Whether a trustee, who has suffered a default in the original suit, can by a disclosure on *scire facias* take objection to the jurisdiction; *quere.*

Property belonging to a resident of New Brunswick, and situated within the territorial jurisdiction of that Province, upon his obtaining a certificate of bankruptcy under its laws, is thereby transferred to his assignee.

After such a transfer, one who had been indebted to the bankrupt, being no longer accountable to him, cannot be charged as trustee in a suit against him.

ON EXCEPTIONS and ON REPORT from *Nisi Prius*, HATHAWAY, J., presiding.

SCIRE FACIAS.

The plaintiffs reside in this State. They brought their action, (returnable to the late District Court,) against James Albee, Jr., as principal defendant, and against Henry F. Eaton and Joseph E. Eaton, as his trustees.

Albee and the Eatons are inhabitants of the British Province of New Brunswick, resident in the town of St. Stephens, adjoining the boundary line of this State. As they were occasionally doing business in this county, the process was served upon them here. Neither of them making any appearance in that suit, the principal defendant was defaulted, and the Eatons were adjudged to be trustees. Upon the execu-

tion that was issued, the officer made demand seasonably upon the trustees.

This is an action of *scire facias* against them as trustees. At its return term, they offered a disclosure made prior to the entry of the action.

It was made before a justice of the peace. For that reason the plaintiffs objected to its admission. It was however received, and they filed an exception.

From the disclosure, accompanied by documentary evidence, it appeared among other things *that*, before the service of the original writ, Albee had been decreed to be a bankrupt; *that* his assignee had been appointed; and *that* he, (Albee,) had obtained from the commissioner a full discharge, which had been duly certified by the Court of Chancery, according to the laws of that Province.

The disclosure also unfolded a series of large transactions between the trustees and the principal defendant, and denied any indebtednes by them to him.

To control that disclosure, the plaintiffs offered in evidence the deposition of one James Albee and also the disclosure made by these defendants, in the suit *Lovejoy* v. the same *James Albee, Jr.*, in which they were summoned as trustees.

The case was then submitted to the Court for such judgment as the law requires.

Whidden, for plaintiff.

These defendants are sought to be charged by reason of their holding funds of the principal defendant, under a trade which we say was a fraud against his creditors. They were defaulted and adjudged trustees in the original suit. But they now come and deny the jurisdiction of the Court, and file a disclosure denying any goods, effects or credits of Albee.

The truth of this disclosure we controvert, and contend, that it is wholly disproved by their own disclosure made on oath in *Lovejoy* v. *Albee & trustees*, referred to in 33 Maine, 414, and also by the deposition of James Albee.

J. Granger, for the defendants.

This action is not maintainable. It is but a continuation of

the original proceedings, the Court in that suit had no jurisdiction, and therefore the judgment upon default is merely void. 9 U. S. Dig. title, *Scire Facias; Lovejoy* v. *Albee*, 33 Maine, 414, and cases there cited; *Gardiner* v. *Barker*, 12 Mass. 36; *Jacobs* v. *Miller*, 14 Mass. 132; *Tingley* v. *Bateman*, 10 Mass. 343; *Eaton* v. *Whitney*, 3 Pick. 484; *Guild* v. *Richardson*, 6 Pick. 364; *Lawrence* v. *Smith*, 5 Mass. 362.

The statute provision, extending the trustee process to foreigners, can be of little avail, as it will seldom be practicable to compel the trustee to bring the funds or property into the State to be taken on execution.

It seems to have been decided, that that provision is not applicable, when the defendant and his supposed trustee all resided out of the State. *Lovejoy* v. *Albee*, 33 Maine, 414. The disclosure itself shows, that the defendants cannot be held.

[*Chase*, for the plaintiffs interposed. — We object to any reference to the contents of the disclosure. We filed an exception to its introduction, on which we now rely. The disclosure could not be taken before a justice of the peace, especially the disclosure of a trustee not resident within the jurisdiction. R. S. c. 119, § § 9, 10, 11, provides that if the trustee is to depart from the State, he may notify, and disclose before a justice of the peace. But the Court may require him to answer further on oath, and this too, not before the justice, but in Court. After taking the disclosure, the justice has no further power. It is not for him to decide, whether the trustee shall or shall not answer further. The further answer must be in Court, and not by mere pleading, but on oath. The disclosure then was not rightfully admitted, and the admission of it having been excepted to, its contents are not here to be stated or examined.]

Granger, for defendants.

The disclosure itself shows, that the defendants cannot be held.

It is very clear, that if Albee could maintain no action against the defendants in New Brunswick, where they reside,

these plaintiffs cannot maintain this action. *Blake* v. *Williams*, 6 Pick. 287; *M. F. Ins. Co.* v. *Weeks*, 7 Mass. 438.

And how, upon what principle, could Albee maintain an action against the defendants?

Even if defendants had been indebted to him and had his property in their hands, the disclosure shows that it passed to the assignees by the proceedings in bankruptcy.

The defendants could not defend against a suit by the assignee in bankruptcy by showing payment to the plaintiffs in this suit on execution against them.

Chase, for the plaintiffs, in reply.

I come to this cause with some diffidence, because it *seems* to be understood that, in *Lovejoy* v. *Albee*, the Court gave some intimations unfavorable to a suit of this kind. But I think *that* case turned merely on the want of *personal service* on the trustees. If so, it does not disprove jurisdiction, but only proves the want of parties properly in Court. In *this* case the principal defendant and also the trustees were served with personal notice *in the State*. The cases then are different. *There*, too, the question was on original suit, *here*, on *scire facias*. In *that case* there was a right to say "not notified;" not so in *this case*.

The privilege of one summoned as trustee, is merely to disclose, not to inquire into jurisdiction. Why, he has to apply to the Court for the very leave, if he wish to disclose anew.

The objection to jurisdiction must be taken in the original suit.

When a trustee asks for leave to disclose anew, it is to put before the Court a case for their adjudication, thus admitting jurisdiction. This privilege of a trustee is merely a *locus penitentiæ*, an opportunity to correct mistakes. It is too late to say, "no jurisdiction."

Thus I am relieved from the difficulty supposed to arise from the decision in *Lovejoy* v. *Albee*.

But there are views presented in that case by the Court, from which I have the misfortune to dissent.

The Court say they cannot act beyond the territorial sov-

ereignty. But clearly, if goods are found here, they can be bound by a judgment of the Court. Now I think *goods* can be equally bound *in rem* by the trustee process as by an attachment on writ. So of property in the pocket of the debtor, though intangible. Suppose a person to come into the State holding property of one, who, if within the State could be held here; can it be allowed that such a person, with such property in his possession, should secure it from the law? The great ordinance of the law is, that such property shall be subject to pay debts due to our own citizens. And under such a principle, what difference can it make whether the property be tangible or intangible. The question, as between the creditor and debtor, is not now under consideration. Have we not brought all parties properly before the Court? The legislature has provided that notice in many classes of cases, though given *out* of the State, perfects the jurisdiction. But in this case the notices all were given *within* the State.

The statute authorizes suit to be brought where either of the parties reside. This shows that the Court may get jurisdiction as to dwellers abroad. How plain to a common reader, that the trustees, if holding the defendant's property, and found and summoned here, may be charged for such property. The statute expressly authorizes the summoning of foreigners, if holding property.

But, if the party be actually present and summoned here, what reason can be given why there should not be jurisdiction in the Court equally, whether property be or be not found?

The process could avail nothing to a plaintiff, if the trustee disclosed no property. But such a rule does not touch the question of jurisdiction.

Surely it is more favorable to a foreigner, that he should be held as trustee, than to have tangible property attached, and withheld from his use.

I do not controvert the authorities on which the decision in *Lovejoy* v. *Albee* is placed. There is no occasion. Our system is statutory; more comprehensive and salutary. That decision, however, in its practical bearing is of injurious tendency.

A trade has long been growing up on the frontier, between the dwellers on both sides of the State line. Credits have been mutually and freely extended. The trade has become large and beneficial. That decision breaks it up, and impairs the ties of friendship, kindness and confidence which have so happily prevailed.

In this view it is submitted very respectfully, that the Court has full jurisdiction; and if the disclosure is to be acted upon at all, an examination of its detailed facts will show indebtedness by the trustees; but when taken in connection with the depositions we have introduced, their liability is abundantly apparent, and it is not seen why they are not to be charged.

APPLETON, J. — It was decided in *Lovejoy* v. *Albee*, 33 Maine, 415, that this Court has no jurisdiction where the defendant and trustee both reside without the State, and have no property within it. If in the original suit in which the defendant was summoned as trustee, objections to its maintenance had been seasonably interposed by plea or by motion it would have been abated. The alleged trustee, instead of taking exception, submitted to the jurisdiction, suffered a default, and an execution issued upon which a demand has been duly made on him.

The general rule of law undoubtedly is, that the defendant in *scire facias* cannot avail himself of any ground of defence which was open to him in the suit of which that is a continuation. It may be a question, therefore, whether the defendant can take advantage on his disclosure on *scire facias* of the want of jurisdiction of the Court in rendering the judgment in which he was defaulted, or whether his only remedy is not in reversing it by writ of error. In the view, however, which we have taken, the determination of this question does not become necessary. From the disclosure of the trustees on *scire facias*, it appears that Albee, the defendant, and the trustees in the suit *Smith & al.* v. *Albee & trustees*, are now and ever have been residents in the Province of New Brunswick; that on January 4, 1849, Albee became a bankrupt; that an

assignee was appointed, and that on the 17th April, 1849, some days before the service of the trustee writ on the defendants, he obtained a certificate of discharge from the commissioner and certified by the Court of Chancery under the acts, 5 Vict. c. 43, and 6 Vict. c. 4. These facts being set forth in the disclosure and established by documentary proofs, the defendants claim that they should not be considered as having any goods, effects or credits of the principal debtor in their hands or possession, that even if indebted to Albee, which they deny; that such indebtedness has ceased and new relations have arisen between themselves and his assignee binding upon them by the law of the country to which they owe allegiance.

From the answers of the defendants, it appears that previous to his bankruptcy they had large dealings with Albee and received from him various conveyances of real and personal estate, on account of which the plaintiffs claim that they should be charged. To determine this, resort must be had to the law of the domicil of the principal debtor and the trustees, for if no indebtedness exists there, none can arise from merely passing over the line, which divides one government from another. Now by the law of New Brunswick, the bankrupt is divested of all property within its territorial jurisdiction, and the same is transferred to the assignee as effectually by operation of law as it could be by the most solemn contract of the parties. *Bradbury* v. *Stephenson*, 1 Allen, 631. For the real estate conveyed, the trustees could not have been charged, had it been situated in this State. The laws regulating the acquisition or the transmission of title to personal estate are those which are in force where the owner is domiciled. The owner of personal property situated in the country where he resides, has a title to it wherever he may be. It is true, that when the property is here at the time of the assignment, the title of the foreign assignee is postponed to the claims of creditors resident in this country, but this principle does not apply, when it was at the time of his bankruptcy in the jurisdiction in which the bankrupt resided, and

has since been brought here. In *Pastoro* v. *Abraham*, 1 Paige, 237, the controversy was between the bankrupt and his assignees and creditors, all residing in the country under whose laws the assignment was made. In delivering his decision, WALWORTH, Ch. says, "even the property itself at the time of the assignment was constructively within the jurisdiction of that country, being on the high seas, in the actual possession of a British subject. Under such circumstances the assignment had the effect to change the property, and divest the title of the bankrupt, as effectually as if the same had been sold in England under an execution against him, or he had voluntarily conveyed the same to the assignee for the benefit of his creditors." The same doctrine was fully affirmed in the opinion of MARCY, J., in the same case, in 3 Wend. 538, and is sanctioned by Story in his Conflict of Laws. A large proportion of the property purchased by the original defendant consisted of logs and lumber. If that purchase was in good faith, the title was vested in the purchaser. If void for any cause, the assignment transferred it to the legally appointed assignee. So too if any contracts were in force between these defendants and Albee, or any equitable relations subsisting between them, they were transferred, and the title to them and the right to enforce them was perfected in the assignee. The bankrupt, his assignee and the defendants were all domiciled in New Brunswick, subject to the laws of that Province, and while they were all thus subjects, all the assets of the bankrupt, whether real or personal, whether equitable or at common law, passed from him as entirely as if his death had intervened. Every State has uncontrolled jurisdiction over all property, real or personal, within its territory. The defendants had ceased to be the debtors of Albee or to hold any property of his; new relations had arisen and become perfected, by which whatever obligations they were under to him, if any, were henceforth due to and were to be enforced by another. By leaving temporarily that government no change in their legal rights or duties was created, and if they then ceased to have any goods, effects or credits of the principal

debtor, there has nothing occurred since, by which they can justly be adjudged to possess them. Whether the *lex loci contractus*, the *lex rei sitæ* or the *lex domicilii* is to govern, is immaterial, as in either event the rights of the parties must depend on the law of the Province of New Brunswick, and according to those laws, whether they had had the property of the principal debtor in their hands or not, or had been indebted to him or not, they must be discharged, as the title to such property, and the right to enforce all subsisting contracts, had become perfected in the assignee of Albee.

These views do not conflict with the principles established in *Blake* v. *Williams*, 6 Pick. 286, and in *Holmes* v. *Remsen*, 20 Johns. 299, in which it was held that an assignment in bankruptcy in England does not transfer the personal property of the bankrupt here, or his debts due from our citizens as against his creditors resident here. But in those cases the property was in this country at the time of the assignment, and consequently amenable to our laws. The debtors of the bankrupt were citizens and subject to our jurisdiction. In this case, the property was in a foreign land, and the defendants were the subjects of a foreign government and bound by its laws. When they came within our jurisdiction, they brought with them their existing relations to their own citizens, according to the laws of their country. *Potter* v. *Brown*, 5 East, 129.

But it has been urged that the assignment of the bankrupt was fraudulent on his part, and that therefore nothing passed to his assignee. Were it so, whatever might be its effect on the bankrupt's discharge, it would not reïnvest him of his former estates. In *Morrison* v. *Albee*, 2 Allen, 145, the certificate of discharge of the same Albee, whose trustees the defendants are alleged to be, received the consideration of the Supreme Court of New Brunswick. It was there held that evidence that the bankruptcy was fraudulent and collusive, was inadmissible, in a trial in *Nisi Prius*, to impeach a bankrupt's certificate duly obtained from the commissioner and certified by the Court of Chancery, under the acts, 5 Vict.

c. 43, and 6 Viet. c. 4. CARTER, C. J., in his opinion says, "all our act requires to give validity to the certificate is, 1st, that it should be under the hand and seal of the commissioner with certain requisites as to form and substance; 2d, that the bankrupt should make oath that it was obtained fairly and without fraud, &c., and 3d, the subsequent confirmation by the Court of Chancery, which is not made without affording an opportunity to the creditors to oppose it."

Indeed it is difficult to perceive upon what principles the trustees could be charged for real or personal estate situated in another government or for contracts to be there performed, or how they could be required to remove property from another jurisdiction for the purpose of exposing it here to be levied on. *Lovejoy* v. *Albee*, 33 Maine, 415; *Baxter* v. *Vincent*, 6 Vermont, 615. *Defendants discharged.*

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

(*) MCALLISTER *versus* FURLONG.

In some classes of cases, a defendant in one suit may be sued in another suit as trustee of the person who was plaintiff in the former suit.

Such suit against the defendant as trustee operates as an attachment of the fund in his hands.

After such attachment has expired, the trustee suit cannot delay or impair the right of the plaintiff in the original suit in obtaining judgment and execution against the defendant.

Such an attachment expires, unless within thirty days from the judgment, a demand on the execution be made upon the trustee.

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

ASSUMPSIT.

The action was referred by rule of Court. The referees awarded a recovery by McAllister. While that suit was pending, Furlong was summoned in another suit, as trustee of McAllister. At the third term of the trustee suit, McAllister was

defaulted, and Furlong was also defaulted as his trustee. In a few days afterwards, execution was issued against them. It does not appear that any demand upon the trustee was ever made by virtue of that execution.

McAllister's attorneys in this suit claim a lien for their taxable costs and advances.

The case is submitted to the Court for judgment according to principles of law.

Fuller & Harvey, for the plaintiff.

J. Granger, for the defendant.

TENNEY, J. — This action was referred by a rule of Court, after it was entered; and the referees made their award in favor of the plaintiff, and received their fees from his attorney. While the suit was pending in Court, the trustees of the ministerial and school fund in Bayleyville brought an action against the plaintiff, and summoned the defendant as trustee. At the February term, 1852, being the third term after the trustee action was commenced, the principal and trustee therein were defaulted, and judgment rendered for the plaintiffs; execution was issued on March 9, 1852. The writs in the two suits are a part of this case. The plaintiff's attorneys claim a lien in this action for their taxable costs, and the amount paid to the referees.

The attachment under the trustee process expired in thirty days after judgment thereon, unless measures were taken within that time to make it available. The report does not show the execution to have been in the hands of an officer, within that time, or any demand to have been made upon the trustee according to the R. S. c. 119, § § 74, 80 and 81. *Bachelder* v. *Merriman*, 34 Maine, 69. Neither does the report state, that the trustee paid the money or any part thereof, after being adjudged trustee, under the provision of § 66 of the same chapter, as he might have done, and thereby have discharged a part of his liability, or took any other course, which gives him the right, by virtue of any thing done under

the trustee process, to resist the judgment, to which the plaintiff would otherwise be entitled.

According to the agreement of the parties, the report of the referees should be accepted, and judgment entered thereon.

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

(*) PIKE *versus* MUNROE.

A conveyance of land, bounding it *on* a fresh water stream, extends to the centre or thread of the main channel of the stream.

The purchaser of upland, adjoining navigable tide waters, takes the shore to low water mark, where the ebb of the sea does not extend more than one hundred rods.

A grant conveying land, bounded at a monument, at high water mark, thence running *down river* to another monument, proved to be some short distance back from the edge of the bank; and extending back between parallel lines *from said river*, far enough to embrace a specified number of acres, conveys not only the upland but the flats to the distance of one hundred rods, if they extend so far.

In construing a deed of conveyance, the legal rule is, to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated.

Such intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties to it.

Whatever, in a conveyance, is expressly granted, cannot be *diminished* by subsequent restrictions. But general or doubtful clauses may be *explained* by subsequent words or clauses, not repugnant to the express grant.

Doubtful words and provisions in a grant are to be construed most strongly against the grantor.

ON FACTS AGREED AND ON DOCUMENTS AND TESTIMONY REFERRED TO.

WRIT OF ENTRY to recover possession of a piece of land on the river St. Croix, in Calais, where the tide flows and ebbs.

The demanded premises are part of a strip of flats or shore, twenty-five rods wide, and lying between high water mark and low water mark.

In 1792, John Bohannan purchased one hundred acres of

land in the then plantation No. 5, now the city of Calais. It was bounded as follows: — "Beginning the south side of a large white rock on the bank;" "and from thence running *down river* 50 rods to a stake and stones; [the testimony showed that "the white rock was not entirely covered by the tide at high water," and "that the stake and stones were situated on the bank of the river, on the top of the bank in the bushes, some short distance from the edge of the bank"] and from said rock first mentioned, and said stake and stones running back *from said river* 50 rods wide, in parallel lines, south-west, so far as to include the full quantity of one hundred acres, with the privileges and appurtenances thereto."

In the construction of this deed, the controversy was, whether it did or did not convey the flats or shore below the high water mark.

Edward H. Robbins was one of the grantors in that deed.

In 1796, Bohannan conveyed the lot to Robbins, by the same description.

In 1797, Robbins conveyed to Bohannan the northerly part of said lot by the following description: —

"All my right, title and estate in the northerly *moiety or half* of the hundred acre lot on which the said Bohannan now lives, *and bounded on said river;* the half part hereby conveyed is bounded as follows, to wit: — *Beginning on the bank of said river at high water mark*, on the line dividing the premises from the lot on which David Ferrol lived, and commonly called the Ferrol lot, and thence running on the bank of said river on high water mark twenty-five rods, and from thence, and the bounds first mentioned, extending back by parallel lines one mile, according to the courses by which the conveyance of said land was made to said Bohannan, so as to include fifty acres. And I, the said Robbins, do hereby covenant with said Bohannan, that the premises are as free from all incumbrances as when conveyed by him to me."

An examination of subsequent conveyances shows, that if a title to the flats was acquired to Bohannan, under the last described deed of Robbins to him, the demandant has failed

to establish any title in himself, so far as relates to the part now in controversy.

The Court, by agreement of parties, having power to draw inferences as a jury might, "are to enter judgment as to law and justice shall appertain."

Such further facts, (relative to the occupation of the premises and the situation of the parties,) as the Court considered auxiliary to a rightful construction of the deeds, are stated in their opinion.

Pike, for the demandant.

Downes and *Chase*, for tenant.

RICE, J. — Both parties trace their title to the same source, claiming through mesne conveyances from John Bohannan, who was the grantee of the original proprietors of the town of Calais. November 10, 1796, Bohannan conveyed to Edward H. Robbins, one hundred acres of land situate in the present city of Calais, then plantation No. 5, in Washington County, by the same description contained in his deed from the proprietors, to wit: — "Beginning at the south side of a large white rock on the bank, in a south-west direction from the space between two uncovered rocks at the first small point above Stone Point, so called, and from thence running down river fifty rods to a stake and stones, and from said rock, first mentioned, and said stake and stones, running back from said river, fifty rods wide, in parallel lines, south-west, so far as to include the full quantity of one hundred acres, with privileges and appurtenances thereto."

Samuel Jones, in his deposition states, that the "white rock," on the bank of the river, was not entirely covered at high water; and that the "stake and stones," were situated on the bank of the river, on the top of the bank, in the bushes, some short distance above the edge of the bank.

The first question raised, is whether the line starting from the white rock and running *down river* to a stake and stones, is a line running on the river, or whether the words *down*

river simply indicate the general direction of the line from one monument to the other.

In *Hartsfield* v. *Westbrook*, 1 Hay. N. C. 258, it was held, that the terms in a deed, "down the swamp," constituted the swamp the boundary, though a straight course from the monuments at the *termini* of the line would not follow the line of the swamp.

In *Den* v. *Mabe*, 4 Dev. 180, the Court held, that a line from a monument on a river, west, "*up the river*" to a stake, was equivalent in law to "with the river" and that the line must pursue the course of the stream.

A call in a deed, "up the creek," means, ordinarily, a line run with the creek, and does not indicate the general course of the line. *Buckley* v. *Blackwell*, 10 Ohio, 508.

In *Homamond* v. *McGlaughon*, Taylor's R. 136, cited in a note in 6 Cowen, 547, the Court say, "when a deed, patent, or grant, describes a boundary from a certain point *down a river, creek, or the like*, mentioning also course and distance, should the latter be found not to agree with the course of the river, &c., it ought to be disregarded, and the river considered the true boundary."

In *Jackson* v. *Louw*, 12 Johns. 252, the Court say, where the call in the deed was from a point on the creek, thence *up the same*, those words necessarily imply that it is to follow the creek, according to it turnings and windings.

Nor is it material that a monument on the river should be specifically named in the deed. It is sufficient, if it be made to appear that the monuments referred to are, in fact, *on* the river.

There are still other parts of the description in the deed that throw additional light upon its construction; such as the words, "from said rock first mentioned, and from the stake and stones, running back *from the river*, fifty rods wide, in parallel lines, south-west so far as to include one hundred acres," thus strongly indicating the river as one of the boundary lines of the lot.

From these considerations, we think it is apparent that the

parties understood that one end of the lot was bounded *on* the river. If it were a fresh water stream, according to the rule laid down in *Lunt* v. *Holland*, 14 Mass. 149, the land conveyed would extend to the centre or thread of the main channel of the stream.

But this is a navigable river in which the tide ebbs and flows, and the question is raised whether the grant extends to low water mark, or is restricted to the bank of the river, at high water mark.

By the common law all that portion of land, on tide waters, between high water mark and low water mark, technically known as the "shore," originally belonged to the crown, and was held in trust by the King for public uses, and was not the subject of private property without a special patent or grant. *Hale's de jure Maris*, c. 4; *Storer* v. *Freeman*, 6 Mass. 437; *Commonwealth* v. *Alger*, 7 Cush. 53.

But by the ordinance of 1641, Colony Laws, c. 63, § 3, p. 148, "It is declared that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor, on land adjoining, shall have propriety to the low water mark, when the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through the sea, creeks, or coves, to other men's houses or lands."

This ordinance has been held both in Massachusetts and this State, in a series of judicial decisions, to have superseded the common law, applicable to the proprietorship of the "shore," on tide waters, and to have vested an absolute title thereto in the proprietors of the adjoining upland, subject only to the limitations and qualifications contained in the proviso to the ordinance. *Lapish* v. *Bangor Bank*, 8 Maine, 85; *Winslow* v. *Patten*, 34 Maine, 25; *Commonwealth* v. *Alger*, 7 Cush. 53.

By the application of these rules of construction and principles of law, it follows that the deeds, from the proprietors to Bohannan, and from Bohannan to Robbins, conveyed not

only the upland, but also the flats, in front of and adjoining the same, to the extent of one hundred rods from high water mark, if they extended so far.

On the 3d day of April, 1797, Robbins, the grantee in the deed from Bohannan, re-conveys to his grantor, the northerly half of said lot of land by the following words of description; to wit, "all my right, title and estate in the northerly moiety or half of the hundred acre lot on which the said Bohannan now lives, and bounded on said river; the half part hereby conveyed is bounded as follows; beginning on the bank of said river, at high water mark, on the line dividing the premises from the lot on which David Ferrol lived, and commonly called the Ferrol lot, and thence running on the bank of said river, on high water mark, twenty-five rods, and from thence, and the bound first mentioned, extending back by parallel lines one mile, according to the courses by which said land was conveyed to said Bohannan, so as to include fifty acres, and I, the said Robbins, do hereby covenant with the said Bohannan, that the premises are as free from all incumbrances as when conveyed by him to me."

There can be no doubt as to the identity of the lot of land conveyed by this deed. It is the northerly half of the same hundred acres which Bohannan had conveyed to Robbins by his deed of November 10, 1796.

The plaintiff contends that by this conveyance Bohannan was bounded by, and restricted to high water mark; and that the upland only passed by this deed.

The owner of upland, to which flats adjoin, may sell the upland without the flats, or the flats without the upland, or both together. *Deering* v. *Long Wharf*, 25 Maine, 50. The defendant contends that both passed by this deed from Robbins.

The description in the deed is not entirely consistent with itself. The general descriptive terms are, "all my right, title and estate, in the northerly moiety or half of the hundred acre lot on which said Bohannan now lives, and bounded on said river." We have seen that Robbins owned not only the

upland, but by operation of law, his title extended to and included the flats adjoining as part of his lot. Had the description stopped here, there could have been no doubt as to the true construction of the deed.

But it is contended that these general terms in the description are limited and controlled by the restrictive words which follow; "thence running on the bank of said river at high water mark," so that the grant cannot extend below that point.

The old books say if there be two clauses or parts of a deed, repugnant the one to the other, that the first shall be received, and the latter rejected, unless there be some special reason to the contrary. Am. Jurist, vol. 23, p. 279.

The first deed and the last will shall operate, is the ancient maxim. Plow. 541; Shep. Touch. 88.

Subsequent words shall not defeat precedent ones, if by construction they may stand together. But where there are two clauses in a deed, of which the latter is contradictory to the former, then the former shall stand. Cruise's Dig. Title Deed, c. 20, § 8.

These, however, are technical rules of construction, which were adopted, as declared by Lord MANSFIELD, "for want of a better reason," and are not entitled to much consideration, and should never be resorted to for purposes of construction unless difficulties are presented which cannot be resolved by more satisfactory rules. In modern times, they have given way to the more sensible rule of construction, which is in all cases to give effect to the intention of the parties if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties to it.

Robbins had purchased the whole lot of Bohannan; it contained one hundred acres; was fifty rods wide, and necessarily extended one mile from the river, and though not bounded in terms by high water mark, he was bounded by monuments which in fact stood substantially at high water mark. His

title to the flats accrued to him only by the force of this deed.

He conveyed all his *right, title* and *estate* to the northerly half of the lot; the tract conveyed was twenty-five rods wide, just half the width of the whole lot; it contained fifty acres; its western boundary was the same distance from the river as the western line of the original lot, and though bounded on the river at high water mark, these bounds were at the same point on the face of the earth, as were the monuments in the deed from Bohannan.

Whatever is expressly granted, or covenanted, or promised, cannot be restricted or diminished by subsequent provisions or restrictions; but general or doubtful clauses precedent, may be explained by subsequent words and clauses, not repugnant or contradictory to the express grant, covenant, or promise. *Cutler* v. *Tufts*, 3 Pick. 272; *Willard* v. *Moulton*, 4 Maine, 14.

If a deed may operate in two ways, the one of which is consistent with the intent of the parties and the other repugnant thereto, it will be so construed as to give effect to the intention indicated by the whole instrument. *Sally* v. *Forbes*, 4 Moore, 448. Thus if I have in D, black acre, white acre and green acre, and I grant you all my lands in D, that is to say, black acre and white acre, yet green acre shall pass. *Stukeley* v *Butler*, Hale, 172.

When one, being the owner of three parcels of land described in a certain deed, conveying them to him, made a deed of conveyance of "three parcels or lots situated in P. and bounded as follows, to wit; the first lot beginning at, &c. (setting forth the boundaries of this lot only,) being the same which was conveyed to me by deed," &c., referring to the deed describing the three lots, it was held, that the deed conveyed all these parcels, and that to restrict it to one would be giving it an effect far short of what the words required. *Child* v. *Ficket*, 4 Maine, 471.

That all doubtful words and provisions are to be construed most strongly against the grantor, is an ancient principle of

the common law, which is recognized as a sound rule of construction by modern jurists.

It is quite probable that neither party fully understood the precise nature and extent of their rights in the flats, at the time the several conveyances referred to were made. But from the contemporaneous and subsequent acts of the parties, as well as from the language of the deeds, we think it satisfactorily appears that each party understood, at the time the several conveyances were made by them, that they parted with all the rights they then had in the flats adjoining the uplands described in their deeds, and that this appears as fully, to say the least, in the deed from Robbins to Bohannan, as in the one by which Robbins obtained his title. Such being the fact, no interest remained in him which could descend to the plaintiff's grantor, and consequently the plaintiff has no title to the premises in dispute.

A nonsuit is therefore to be entered.

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

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[*] BURKE *versus* BELL.

It seems, that by the common law an officer has authority to make an arrest upon reasonable ground of suspicion, without warrant, and if his suspicion vanishes he may discharge the person arrested without bringing him before a magistrate. But he cannot lawfully detain him without warrant any longer than a reasonable time for bringing him before a magistrate.

A by-law of a town is invalid, if it be repugnant to the general law of the State.

The general law, Stat. of 1848, c. 71, § 2, provides, that if an officer "shall detain any offender, without warrant, longer than such time as was necessary to procure a legal warrant, such officer shall be liable to pay all such damages as the person detained shall suffer thereby.

To that enactment, a town by-law, authorizing an officer to arrest and detain without warrant for the space of forty-eight hours, is repugnant.

In a suit against an officer for arresting and detaining the plaintiff, such a by-law can furnish no defence.

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

TRESPASS.

The defendant was a police officer of the town of Eastport. He arrested the plaintiff and confined him two days in the house of correction of that town. For that arrest and imprisonment this action is brought.

The defendant justified under the twenty-second article of the by-laws of the town, approved by the County Commissioners, as follows: —

"If any person shall be found intoxicated or brawling or fighting in any of the streets or other public places within the town, the police officer or his deputies shall have power to commit such person to the house of correction and confine him for a space not exceeding forty-eight hours. And any person so carried to the house of correction shall forfeit and pay one dollar; and if confined more than one day, two dollars. And of whatever sums received for such commitment and confinement the master of the house of correction shall be entitled to receive one half for feeding and taking care of such person."

The plaintiff contended that the by-law was repugnant to the general law of the State, and could therefore furnish no protection to the acts of the defendant.

B. Bradbury, for the plaintiff.

The authority of a town to establish by-laws is given by R. S., c. 5, § 22. That section provides that a town may make such orders and by-laws for managing the prudential concerns of the town as they may judge conducive to the good order and peace of the same, and annex penalties, not exceeding five dollars, for any one offence. By "prudential" is meant the subordinate discretionary concerns and economy of a town. No town can make by-laws repugnant to the general law of the State. It requires no argument to show that the by-law in question is utterly repugnant to the general law. Whenever an officer is justifiable for arresting without warrant, it is his duty to obtain one as soon as possible after the arrest, and then, within a reasonable time, to bring the accused to trial. Stat. of 1848, c. 71, § 1. True, the over-

seers of the house of correction may, by their *written* order, commit an intoxicated man to the house of correction, for a term not exceeding forty-eight hours. But this authority exists only, when the safety of the person intoxicated, or the good order of the community requires it, for the purpose of security, if necessary, "till such person can be conveniently carried before a magistrate, and restrained by complaint and warrant in the usual course of criminal prosecutions."

By this authorization, the State reposes in the judgment and faithfulness of the overseers a confidence, which the town has no power to transfer to the police officer, however convenient it may seem that the police officer should possess and exercise such power. It is not to *him* that the State has consented to entrust such power, and the town cannot give it. The by-law therefore is merely void.

Hayden, for the defendant.

The only question is whether the twenty-second article of the by-laws is repugnant to the general laws of the State. By R. S. c. 178, § 31, a power like that which the defendant exercised, was conferred upon the overseers of the house of correction. In changing the person, upon whom the power is conferred, is there any thing repugnant to the general law? The police officer is chosen by a ballot of the town, and is sworn to the faithful discharge of duty, while the overseers of the house of correction are appointed by the selectmen, and are not bound by any oath. The power in some one, is fully recognized. From the nature of the general duties of the police officer, this power can be exercised by him more conveniently, and perhaps with more safety to all concerned, than by the overseers, and the objects of the statute be fully effected. The rights of the drunken man are not violated by merely changing the officer by whom the duty of restraining him shall be performed.

By chapter 159, § 5, of the R. S., a similar power of arresting is given to constables, sheriffs and others in case of an unlawful assembly.

The right to restrain the person intoxicated, while he is

dangerous and until he is in a fit state for trial or discharge, is not in contravention of his individual rights. 11 Maine, 208. And we can see no good reason why changing the officer who shall perform the act, should make a law, otherwise valid, repugnant to the laws of the State.

APPLETON, J. — The R. S. c. 5, § 22, provides that the inhabitants of a town at a legal town meeting may make such orders and by-laws for managing the prudential concerns of the town as they may judge conducive to the good order and peace of the same and annex penalties not exceeding five dollars for any offence, provided such orders and by-laws shall be approved by the County Commissioners." By R. S., c. 178, § 31, concerning houses of correction, the overseers of any such town house of correction "may commit thereto for a term not exceeding forty-eight hours, any person publicly appearing in a state of intoxication or in any manner violating the public peace, whenever the safety of the person intoxicated or the good order of the community require it, for the purpose of security, if necessary, *till such person can be conveniently carried before a magistrate and restrained by complaint and warrant* in the usual course of criminal prosecutions." In 1848, by c. 71, § 1, it is made the duty of every sheriff, deputy sheriff, constable, city marshal and his deputies, watchmen and police officers, "to *arrest and detain until a legal warrant for his apprehension can be obtained*, every person found violating any law of the State or any legal ordinance or by-law of such city or town." By § 2 of this statute, if the officer in the exercise of the power before granted shall act wantonly or oppressively, or shall detain any offender *without warrant longer than such time as was necessary to procure a legal warrant*, such officer shall be liable to pay all such damages as the person detained shall suffer thereby.

These statutory enactments being in force, the question arises, whether the twenty-second by-law of the town of Eastport, under which the defendant justifies, can afford him

any protection, as being in conflict with these provisions. That by-law provides that "if any person shall be found intoxicated or brawling or fighting in any of the streets or other public places within the town, the police officer or his deputies shall have power to commit such person to the house of correction and confine him for a space not exceeding forty-eight hours. And any person so carried to the house of correction shall forfeit and pay one dollar, and if confined more than one day, two dollars. And of whatever sums received for such commitment and confinement the master of the house of correction shall be entitled to receive one half for feeding and taking care of such person." This by-law, it will be perceived, contemplates no criminal proceeding after arrest and commitment. It does not provide for detention "till such person can be conveniently carried before a magistrate and restrained by complaint and warrant" nor "until a legal warrant for his apprehension can be obtained," but it authorizes the police officer upon view to arrest and commit without any reference to ulterior criminal proceedings. It leaves the citizen at the mercy of an inferior municipal officer and divests him of the protection of the law. The officer therefore cannot be justified by the by-law in question.

By the common law, it seems that an officer may apprehend upon reasonable grounds of suspicion, and without a warrant, without being liable therefor as a trespasser. So if his suspicions vanish he may discharge the person arrested without bringing him before a magistrate. *McCloughan* v. *Clayton*, 3 E. C. L. 161. But it is the duty of the officer so arresting upon suspicion to take the person so arrested before a magistrate as soon as he reasonably can, and if he is guilty of unnecessary delay he is liable as a trespasser. *Wright* v. *Court*, 4 B. & C. 596.

From the case as reported, it appears that the plaintiff was committed to the house of correction and detained there two days and then discharged. The arrest was not upon suspicion, and the discharge because such suspicions were unfounded. Nor was the commitment and detention for the purpose

of restraining the plaintiff till legal proceedings could be had. The defendant is without justification.

Judgment for plaintiff.

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

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[*] NICHOLS *versus* VALENTINE *& als.*

Though a wrongful act have been committed against a person, yet, if he have sustained from it no damage, either actual or constructive, it furnishes him no cause of action.

The property in goods, acquired to the officer by attaching them on mesne process, is merely a special one.

Such special property consists simply in the right of retaining the articles attached for the purpose of responding the judgment by a sale at auction.

If, in relation to any specific description of articles, the law prohibits such a sale, such articles cannot legally be attached on mesne process or seized on execution.

Spirituous liquors are of that description. The law prohibits a sale of them at auction.

An attachment of such liquors, though made in due form, can confer upon the attaching officer no special property or right of possession.

A possession of such liquors under such an attachment, being for the mere purpose of an unlawful sale, can confer upon the possessor no rights.

An attaching officer, though in the actual possession of such liquors, but claiming no rights in them except under the attachment, can maintain no suit for a forcible taking of them from his possession, even though such taking be by one having no right or authority.

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

TRESPASS, for fifty barrels of spirituous liquor. The general issue, with brief statement, was pleaded. The evidence admitted tended to prove the following facts.

One Barrett sued out his writ against Arthur Doon upon a note of $1200. Upon that writ, this plaintiff, Nichols, being sheriff of the county, attached the liquor, Nov. 27, 1851, and took it into his possession.

On Dec. 5, 1851, the liquor was taken from the custody of the sheriff by the defendant Valentine, the city marshal, claiming to act under a warrant duly issued for the seizure of the liquor under the Act "to suppress drinking houses and tipling shops."

The validity of that warrant was contested. But the view taken by the Court renders it unnecessary to present the evidence on that point.

The other defendants were the aids and servants of Valentine.

The action *Barrett* v. *Doon*, was defaulted, and the execution was seasonably placed in the hands of the sheriff.

The defendants offered evidence to prove, that the action of Barrett against Doon was groundless and collusive, designed by both parties fraudulently to defeat the "Liquor Law" of the State.

In answer to an inquiry by the Judge, the defendant disavowed any attempt to implicate the sheriff in the illegal proceedings, which they proposed to prove.

The Judge then ruled, that the evidence offered upon that point was inadmissible.

If, upon the evidence admitted, the plaintiff's action can be maintained, and the foregoing ruling of the presiding Justice was correct, the defendants are to be defaulted. If the action cannot be maintained upon the evidence admitted, the plaintiff to be nonsuit. If the action can be maintained upon the evidence admitted, and the ruling of the presiding Justice excluding the evidence offered by defendants, is erroneous, a new trial to be granted.

George M. Chase, for the plaintiff.

By the attachment of the liquor, the sheriff acquired a special property in it. To one party or to the other, he must account for its value. In order to do this, when the property be taken from him by violence, the well established principles of law entitle him to recover against the person taking it.

That there is property in such liquor, notwithstanding the statute relied upon by the defendants, has been already decided by this Court. *Preston* v. *Drew*, 33 Maine, 558.

Joseph Granger, for the defendants.

RICE, J. — The liquors in controversy were attached by the plaintiff, who was then Sheriff of Washington county, on the 27th day of November, 1851, on a writ in favor o

Thomas Barret against Arthur Doon. This writ, it is conceded, was in due form of law, and issued from a court of competent jurisdiction.

After the liquors had thus been attached, the defendant Valentine, who, it is admitted, was marshal of the city of Calais, and the other defendants, acting as his aids, seized said liquors on a warrant of search, issued by the Judge of the Police Court of the city of Calais, on a charge that they were intended for sale in violation of law. This act of seizure constitutes the trespass of which the plaintiff complains.

The general property in the liquors was not in the plaintiff. He had, if any thing, only a special property in the articles attached; simply a right to hold them, so that they should be forthcoming to respond to the final judgment in the suit in which they had been attached.

By the defendants it is contended that these proceedings gave the plaintiff no such right of control over the property as will enable him to maintain this suit, because, it is affirmed, that the process on which it was attached was fraudulent in its inception, and without any foundation; and further, because the liquors were intended for sale in violation of law, and were not attachable by the laws of the State, and were lawfully seized by the defendants.

It may not be necessary to consider all the points raised in the defence.

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

The action cannot be maintained by proof alone, that the other person has conducted illegally or wrongfully. He must proceed further and show, that he has suffered injury in consequence of such conduct. *Lambard* v. *Pike*, 33 Maine, 151.

The object of attaching property on mesne process, is, that it may be held to be seized and sold, after judgment, on execution. It is therefore very clear, that chattels which cannot lawfully be seized on execution, cannot be lawfully attached.

Pierce v. *Jackson*, 6 Mass. 242; *Badlam* v. *Tucker*, 1 Pick. 389; *Davis* v. *Garrett*, 3 Iredell, 459.

By our laws, all personal property attached on mesne process, except such as is liable to perish, or waste, or be greatly reduced in value by keeping, or to be kept at great expense, must be sold by public auction.

Chapter 211, of the laws of 1851, provides, that no person shall be allowed at any time to manufacture or sell, by himself, his clerk, servant or agent, directly or indirectly, any spirituous or intoxicating liquors, or any mixed liquors a part of which is spirituous or intoxicating, except agents appointed by the selectmen of towns or the mayor and aldermen of cities. Such agents may sell in their respective cities and towns, spirits, wines or other intoxicating liquors, to be used for medicinal and mechanical purposes, and *no other*.

Except by these agents, the sale of spirituous and intoxicating liquors is absolutely prohibited to all our citizens. There is no exception in favor of sale by judicial process. Indeed to permit such sales, would be to afford the most ample facilities for evading the law. The law deems the indiscriminate sale of intoxicating liquors, like the sale of obscene books and pictures, or the sale of diseased and corrupted provisions, injurious to the public health and morals. It has therefore placed upon the general traffic the seal of its reprobation.

After thus prohibiting our citizens not only from keeping "drinking houses and tippling shops," but from all general traffic in intoxicating liquors, it would be an absurdity to say that the officers of the law, under its forms and by its protection, may become the vendors of those inhibited articles, restrained only by the obligation to sell to the highest bidder.

Nor can the officer transport the liquors out of the State for sale. His authority to sell under judicial process is limited to his precinct.

This species of property is therefore not attachable by judicial process under the existing laws of the State.

The plaintiff therefore acquired, by virtue of his attachment, no legal right to the possession of the liquors, and if

he had the actual possession, it must necessarily have been with the intention to sell them without authority and in violation of law.

By § 16 of c. 211, of the laws of 1851, it is provided, that no action of any kind, shall be maintained in any Court in this State, either in whole, or in part, for intoxicating or spirituous liquors sold in any other State or country whatever, nor shall any action, of any kind, be had or maintained in any Court in this State, for the recovery or possession of intoxicating or spirituous liquors, or the value thereof.

The provisions of this section of the statute have been so construed by this Court as to apply only to such liquors as were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the statute. *Preston* v. *Drew*, 33 Maine, 558.

When thus limited, the provisions of the statute apply to the case at bar, as presented by the plaintiff.

From these considerations, it is apparent that the plaintiff has lost no legal rights by the interposition of the defendants, and is not in a condition to maintain any action against them, on account of the acts described in his writ. In this view of the case, it becomes unnecessary to consider the exceptions presented.

According to agreement, a nonsuit must be entered.

SHEPLEY, C. J., and TENNEY and HATHAWAY, J. J., concurred.

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[*] HODGDON, *Petitioner for partition, versus* WIGHT *& al.*

If, from the payment of State taxes for a succession of years, there arises a presumption that the tax of an earlier year had been paid, that presumption may be repelled by proof.

In ascertaining whether the tax of such earlier year was or was not paid, the books kept by the State Treasurer, may be received in evidence.

The assessment and collection of State taxes for several successive years after a forfeiture to the State had accrued for the non-payment of a previous year, are not to be deemed a waiver of the forfeiture.

Such subsequent assessments and collections might, perhaps, be considered a pledge that the State would still allow the proprietor to redeem against the forfeiture.

A statute, passed several years after such a forfeiture had accrued, and allowing the land to be redeemed within a limited time, may be taken into the account to show that the State never intended to preclude the proprietor from redeeming.

But, under the lights of such a statute, the State, by continuing to assess and collect the subsequent taxes, cannot be considered to have waived its claim to the forfeiture further than it has manifested its intention to do so by its enactments.

In relation to a sale by the Land Agent of property belonging to the State, which he was authorized to make only upon certain prescribed public notifications, it is competent for the Legislature to ratify the sale and confirm the conveyance, although the prescribed notifications had not been given.

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

Petition for Partition.

The petitioner represents, that he is seized in fee simple of 3593 acres in township letter B, in the second range of townships west from the east line of the State, and in the county of Aroostook, holding the same in common and undivided with persons to him unknown, and prays that his portion of the township may be set off to him in severalty.

Public notice having been given of the pendency of the petition, Lothrop Wight and William A. Brown appear, and by brief statement represent, that under a deed from the Ocean Bank, dated in Dec. 1846, they are the owners in fee of 6244 acres in common and undivided with others in said township; that said bank obtained its title to 2271 acres in May, 1837, and to 3972 acres in Feb'y, 1843. Said respondents, therefore, say that the partition prayed for ought not to be made.

The petitioner, by counter brief statement, asserts that out of said 3972 acres (constituting a part of the land claimed by the respondents,) he, the petitioner, is entitled to said 3593 acres, and deraigns title to himself under a sale and conveyance by the State on April 29, 1849, to G. W. Stanley, for the non-payment of State tax thereon for the year 1842.

In support of his title, the petitioner reads from the Tax

Act of 1842, showing an assessment of $17,40, on that township, as its proportion of the State tax; —

Also three copies of the Weekly Age, (the State paper,) dated April 29, 1842, May 6, 1842 and May 13th, 1842, each containing the State Treasurer's advertisement, bearing date of April 22, 1842, and giving public notice of the assessment and amounts of the State tax of 1842, upon the unincorporated places of the State, and showing that the State tax upon township letter B was $17,40; and also representing, that the several unincorporated tracts were liable to the State for the payment of said assessment into the State treasury, together with interest thereon, at the rate of twenty per cent. per year, from the expiration of one year from the date of said assessment, and that any of the tracts so assessed would be forfeited to the State, unless such assessment, with its interest, should be paid in four years from the date of the advertisement.

This advertisement was made pursuant to the R. S. c. 14, and presents correctly the provisions of that statute, applicable to the case.

[In August, 1848, an Act was passed, containing the following provisions: —

"Sect. 1. It shall be the duty of the Treasurer of State, within thirty days from the approval of this Act, to publish a list of all tracts of land forfeited to the State for non-payment of taxes, specifying the amount of taxes due on each, and the time allowed by this Act to pay the same, and hereafter, annually, on the first Monday of September, the Treasurer shall publish a similar list of all tracts of land which may then have become forfeited, for the term of six months, once each week, in the Eastern Argus, Portland Advertiser, Augusta Age, Kennebec Journal, Bangor Democrat, and Bangor Courier, or as many of said papers as shall continue to be published.

"Sect. 2. Any owner, tenant in common, or other person having a legal interest in any tract of land so forfeited, or that may become forfeited to the State for non-payment of

taxes, may pay to the Treasurer at any time previous to the advertisement aforesaid, or on or before the first day of March of each year, after said lands are advertised as aforesaid, the proportion due on his part of any tract of land of all taxes, interest and cost then due, and the Treasurer's receipt shall discharge his part of said tract.

"SECT. 3. Immediately after the first day of March aforesaid, the Treasurer shall furnish the Land Agent a list of all tracts or townships of land, which have been advertised, as provided in this Act, on which the taxes, cost and interest have not been all paid; and the Land Agent shall within sixty days from that time sell the same at auction, having first given public notice of the time or times and place or places of sale, by publishing such notice three weeks successively in the State paper, and in some paper in the county where such land lies, if any paper is published therein," &c.]

The petitioner then read from the records of the land office the return made on March 23, 1849, to the Land Agent by the treasurer, setting forth his proceedings under the Act of 1848, and showing that he had advertised as said Act requires, and exhibiting a list of the forfeited lands, with the amounts due thereon respectively. This exhibit showed that there remained due on township B, on the State tax of 1842, $3,05, and $3,66, interest.

The record from the land office further showed that, on April 30, 1849, he sold at public auction such of the forfeited lands, as had not by that time been redeemed. This record however did not show that the Land Agent had previously advertised the sale in any newspaper in the county of Aroostook, nor did it show that no newspaper was therein published.

The petitioner then read the deed from the Land Agent to Stanley, the purchaser, "conveying all the right which the State had in 14593 acres in township B, being all the land in said township on which the taxes had not been paid," subject to the proprietor's right of redeeming. Also a deed of the same from Stanley to the petitioner, dated May 1, 1850.

The respondents read a transcript from the ledger of the State Treasurer, showing that the State tax of 1842 on township B was $17,40; and that there had been paid on account of it as follows:—

1842, July 28.	By Casco Bank,		$8 70
1843, Feb. 11.	L. Pierce for Ocean Bank,	(2371 acres,)	1 80
" May 29,	W. Bartlett,	1656 "	1 26
" Aug. 31,	Hale & Titcomb,	3420 "	2 59
1849, Oct. 8,	Bal. by Land Ag't, sold under forfeiture,		3 05
			$17 40

On Aug. 22, 1848, Leonard Pierce, as agent of the Ocean Bank, addressed a letter to Wm. Caldwell, a clerk in the Treasury office, requesting to be informed "the proportion of tax on 2271½ acres from Aug. 14, 1841 to Feb'y 14, 1843; and afterwards to the present year on 6244 acres, including interest, and all and every claim of the State arising from taxes assessed."

To that application Mr. Caldwell replied, under date of Aug. 26, 1848, as follows:—

"Yours of the 22d inst. in relation to taxes is received, and annexed I forward you a memorandum of the amount due on the number of acres, and for the year specified on letter B, R. 2, Aroostook county. You have paid the State tax for 1842, and the county tax for 1841 and 1842.

Acres.		State Tax.	Interest.		County Tax.	Interest.
2271,	1841,	$,80,	$2,26,			
6244,	1843,	4,85,	4,03,	1843,	$9,82,	$8,83
"	1844,	3,81,	2,53,	1844,	10,94,	7,47
"	1845,	5,33,	2,37,	1845,	15,60,	6,73
"	1846,	6,55,	1,83,	1846,	16,70,	3,60
"	1847,	3,26,	,27,	1847,	18,50,	
"	1848,	6,55,		1848,	13,00,	

amounting in all, (including fifty cents for ex's,) to the sum of $157,63."

This amount, $157,63, was accordingly paid by Mr. Pierce into the treasury.

The case was submitted to the Court for the rendition "of such judgment as to right and justice may appertain."

Cutting, for the petitioner.

The only subject for inquiry is, whether the State tax of 1842 was duly assessed and the subsequent proceedings legal; if so the petitioner must prevail.

To show the assessment, we offer a certified copy of the original Act, "To apportion and assess a tax on the inhabitants of the State of Maine, for the year A. D. 1842," so far as it relates to the county of Aroostook, and also refer to the original act, approved March 18, 1842.

In that Act we find the township taxed at $17,40.

By R. S. c. 14, § 1, it was "the duty of the State Treasurer to cause the said assessment to be published in the newspaper of the printer of the State, three weeks successively, the last publication to be within three months from the day on which such assessment was made by the Legislature."

This duty the Treasurer performed, under date of April 22, 1842, in the Age of April 29, May 6 and 13, A. D. 1842.

By sect. 9 of the same Act, it is provided, that — "If any State tax upon any township or tract aforesaid, which shall have been advertised in the manner prescribed in the first section, together with the interest thereon, as above required, shall not have been paid into the State treasury, for the space of four years next following the Act of assessment of the Legislature, &c. said tract or township shall be wholly forfeited and the title thereof shall vest in the State, free and quit from all claims by any former owner, and the same shall be held and owned by the State by a title, which is hereby declared to be perfect and indefeasible."

Was that tax then upon that township wholly paid within the four years? If not, that portion which remained unpaid, became forfeited to the State, *ex vi termini* of the Act."

By § 51 of c. 14, any part owner may pay his proportion of a tax, and free such proportion from any lien created by such tax.

Such appears to have been done by a portion of the owners of this township.

The township appears by the plan to be six miles square, and consequently contains 22040 acres, exclusive of the 1000 acres reserved for public uses.

Now it appears by the State Treasurer's ledger, that for the State tax of 1842 —

Casco Bank paid one-half, which is	11020	acres,
L. Pierce for Ocean Bank,	2371	"
W. Bartlett,	1656	"
Hale & Titcomb,	3420	"
In all	18467	
	3573	
	22040	

leaving a balance of 3573 acres on which the tax of 1842 has never been paid, and which consequently have become forfeited to the State, and which the petitioner claims.

That tax has never been paid, and the respondents by all their receipts offered, show none touching the State tax of that year on the said 3573 acres.

Mr. Pierce, an agent of the Ocean Bank, was directed in 1848, long after the land had been forfeited to the State, to pay all unpaid taxes on 6244 acres; and he corresponded with a clerk in the Treasury office upon that subject.

The specific request of Pierce in his letter was, " I want to know the proportion of tax on 2271½ acres from August 14, 1841, to Feb. 14, 1843, and *afterwards* to the present year on 6244 acres," &c.

In *answer*, the clerk very properly replied, that he forwarded him a memorandum *on the number of acres and for the year specified*, and adds you have paid the state tax for 1842.

What tax? the tax of 1842 on 2371 acres, sometimes named in this case 2371 acres, and at other times only 2271 acres, a mistake probably as to 100 acres, but we give them the augment to their brief statement.

By the respondents' brief statement in 1842, the Ocean Bank only owned in the township 2272 acres, and in Feb'y, 1843, acquired title to 3972 acres more.

And here probably originates the trouble; on this 3972 acres the taxes of 1842 had not been paid by the said bank's grantor.

Now the respondents having failed to show the payment of the State tax on 3972 acres for 1842, it became forfeited to the State and subject to their control.

That land under the Act of 1848, c. 65, having previously been advertised by the State Treasurer, was returned in a list to the Land Agent, who sold the same to G. W. Stanley.

And whether those officers in their proceedings complied with the law or not, it is wholly immaterial.

For, by statute of 1852, it is enacted that: — "Purchasers of lands, sold for alleged forfeitures to the State for non-payment of taxes, shall have no claim against the State for any defect of title to lands hereafter sold, or under any pretext whatever; but the deeds which have or may be given by the Land Agent shall vest in the grantee all the interest of the State in the lands therein described and no more; notwithstanding any irregularities in the notices or failure to comply with the provisions of the Acts under which said sales were made."

So that although there was included in the Treasurer's list 14593 acres as forfeited, and that quantity sold to Stanley, that quantity *included* the 3972 acres belonging to the State, and all the State's interest passed by the Land Agent's deed.

T. D. J. Fuller, for the respondents.

The petitioner relies upon a tax title, acquired from the State, by reason of the non-payment of a "State tax" assessed in 1842.

The respondent shows title in himself of 6243 acres. Petitioner claims 3972 out of this tract.

The petitioner must show, to make a valid title, "that the provisions of law preparatory to, and authorizing such sales, have been punctiliously complied with." "Great strictness is

required." *Brown* v. *Veazie*, 25 Maine, 362; *Mathews* v. *Light*, 32 Maine, 309.

Independent of the foregoing principle, there are facts, which appear in this case, that will incline the Court to the utmost strictness, in requiring a "punctilious compliance" with the provisions of law.

Our first position is; the tax of 1842 was paid.

Second; the Land Agent had no authority to sell.

Third; the requirements of the law have not been complied with.

1. The tax of 1842 was paid.

The respondent does not produce any receipt of payment for that year, but he does show receipts for the five consecutive subsequent years.

The presumption of law, arising from the production of these receipts is, that the previous taxes had been paid. And more especially is this presumption violent, because it shows that the State received the money, after the land was forfeited, if such payment had not been made. Receipt for a quarter's rent affords presumptive evidence of the payment of previous rent. 15 Johns. 479.

This legal presumption is further strengthened by the fact, that the agent of the respondents wrote to the Treasurer for a list of all the taxes due on the land, and was informed that the taxes due were all subsequent to that year. If there had been any error, good faith required that the respondents, or their agent, should have been notified of such error.

The respondents desired and intended, to pay all taxes which had been imposed on their land.

The State was bound, so to apply the money, as to prevent a forfeiture. It could not assess and receive pay for land, and at the same time, treat the land as forfeited to and invested in itself.

2. The Land Agent had no authority to sell the land.

First, because, as has been shown, the taxes were paid.

Second, if any forfeiture of the land accrued to the State,

it was in April, 1846, four years after the date of the advertisement.

The taxes were paid in September, 1848, more than two years after the forfeiture accrued, if any.

This was a waiver of any previous forfeiture.

If it should be said, the receipt does not bind the State, the reply is, the assessment which preceded it in every instance, is the act of the State.

If then, the petitioner should rely upon a title vested in the State, prior to September, 1848, our reply is, receiving pay for the taxes, and assessing the lands after the forfeiture, if any occurred, is a distinct waiver of it.

Third, the Land Agent had no authority to sell, because, the Treasurer did not certify the list of delinquent lands, immediately after the first day of March, to him. He certified on the 27th day of March. This is not immediately; immediately after such a day, could not be extended beyond the next day. See case of attachment, in Massachusetts, where one minute past 12 o'clock, and immediately after 12 o'clock, were held to be simultaneous. This was not a compliance with the provisions of the statute, either in the letter or substance. If the Treasurer could suspend 26 days, he could as many months. Time is as material in this case, as it is in many other cases, where the law requires different acts to be performed by officers; and a failure has been held fatal, where there was not a punctilious compliance with the statute. *Hobbs* v. *Clements*, 32 Maine, 71.

3. The requirements of the law, in the proceedings of the sale, have not been complied with, in the following particulars: —

First, the Treasurer did not advertise the lands, within thirty days from the tenth day of August, 1848.

Second, the Treasurer did not certify the delinquent lands immediately after the first day of March.

Third, the Land Agent did not advertise the lands in the county of Aroostook.

Fourth, the Land Agent did not publish the same notice in the county papers, that he did in the State paper.

Fifth, the Land Agent did not make return to the Treasurer for what sum he sold the land. 26 Maine, 233; 32 Maine, 558.

SHEPLEY, C. J. — The title of the petitioner is derived from the State, and its title from a forfeiture of the title of the former owners, occasioned by neglect to pay a State tax assessed upon the lands for the year 1842.

An objection is made, that the State could not thus acquire a title, because the State tax for that year has been paid.

The presumption arising from the payment of all taxes assessed for subsequent years is relied upon as proof of it. This presumption may be rebutted. A transcript from the books of the Treasurer of the State, exhibiting the payments made for taxes assessed upon the township and the times when and by whom they were made, was received as testimony. The receipts introduced by the respondents correspond to the entries made on those books. There is no proof, that any payments made were omitted to be entered or that any error was committed in making the entries.

Under such circumstances the presumption cannot prevail.

The State, it is said, was bound to apply the money paid so as to prevent a forfeiture.

There is no proof, that it was not applied as directed. Receipts were given stating particularly the purposes for which it was received. No objection to the appropriation appears to have been made.

It is also insisted, that the State could not assess the land as owned by others, and receive payment from them for such taxes, and yet claim to be itself the owner of those lands by forfeiture. There would have been an inconsistency in such proceedings, if there had been no intention to permit the owners to redeem. The State, however, does not appear to have insisted upon forfeitures, when it could obtain payment without. Such a course of proceedings might, perhaps, be

properly regarded as a pledge, that the owners would be permitted to redeem. By the Act approved on August 10, 1848, the owners of lands forfeited, were not only permitted to redeem them from the State, until they were finally sold at auction by the Land Agent, but provision was made, that they might redeem from the purchaser at any time within one year after the sale. Under such circumstances, by continuing to assess them, and to receive payment of taxes, the State cannot be considered to have waived any claim to a forfeiture further than it has manifested an intention to do so by its enactments.

The State having offered such facilities for a redemption, the Ocean Bank, as owner of 6244 acres, appears to have intended to redeem by payment of all taxes assessed upon them with the accrued interest, and to have employed Leonard Pierce to make such payment. He addressed a letter under date of August 22, 1848, to a clerk in the office of the Treasurer of the State, desiring to be informed of "the proportion of tax on 2271½ acres from August 14, 1841, to February 14, 1843, and afterwards to the present year on 6244 acres, including interest, and all and every claim of the State arising from taxes assessed."

The clerk, in an answer, under date of August 26, 1848, forwarded a memorandum "of the amount due on the number of acres, and for the year specified." The State tax for the year 1841 is therein stated to be due on 2271 acres; and the State and county taxes to be due on 6244 acres for the year 1843, and for several subsequent years; and the letter states, "You have paid the State tax for 1842, and the county tax for 1841 and 1842."

This is regarded by counsel as a statement, that the State tax for the year 1842, had been paid upon the 6244 acres. There is much doubt, whether it can be justly so regarded. It does not state upon what land the State tax for the year 1842 had been paid. That can only be inferred. The specific inquiry made of him respecting the 6244 acres, was limited to taxes after Feb'y 14, 1843. Before that time, his inquiry

had reference only to the 2271½ acres, and the statement of the clerk would seem to be more appropriate as an answer to that inquiry.

But it is said, he asked for information of "all and every claim of the State, arising from taxes assessed." This language was used in connexion with the words "including interest, and all and every claim," &c., and it might have been considered, and perhaps properly, by the clerk as asking only for information of all other charges or claims, beside interest, to be annexed to the interest on the taxes, respecting which a specific inquiry was made, and not as asking, if there were other taxes due on any of the lands, for other years not named. The obscurity or uncertainty in the letters between the agent of the owners and the clerk, may be the occasion of a serious loss, but the right of the State to lands already forfeited, cannot be affected thereby, even if the clerk should be regarded as having made a misstatement respecting the taxes of 1842.

After the State had acquired a title by forfeiture, nothing but its own act, or that of some authorized agent, could deprive it of that title.

It is further insisted, that the Land Agent had no authority to sell and that his proceedings were not in conformity to law.

The respondents in such case would fail to exhibit any title to the land claimed by the petitioner, and to prove the allegations made in their brief statement.

If the State had acquired a title, that of the purchaser from it has been admitted, and all defects in the proceedings cured by the Act approved on April 23, 1852, which provides, that any deeds given by the Land Agent, for lands sold for alleged forfeitures to the State, shall vest in the grantee all the interest of the State, notwithstanding any irregularities in the notices or failure to comply with the provisions of the Acts under which said sales were made. *Judgment that partition be made as prayed for.*

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

(*) NARRAGUAGUS LAND PROPRIETORS *versus* WENTWORTH.

An attorney, in virtue of his general employment for his clients, has no authority to execute a replevin bond in their name.

But if they subsequently ratify such an execution of the bond, it becomes their deed.

The prosecution, by them, of the replevin suit is such a ratification. Such a ratification discharges the interest of the attorney in the suit, and he is thereby made a competent witness for the plaintiffs.

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

REPLEVIN.

The replevin bond was signed, "Narraguagus Land Company, by W. F. their attorney."

He had no authority to execute the bond in the plaintiffs' name, "except his general authority as an attorney at law, to collect stumpage for the plaintiffs."

He was called as a witness for the plaintiffs, and was objected to because of his execution of the replevin bond in the aforesaid form. He was, however, admitted. To that admission the defendant excepted.

B. Bradbury, for the defendant.

Burbank, for the plaintiffs.

TENNEY, J. — William Freeman, Jun., the witness, executed the replevin bond to the defendant, in the name of the plaintiffs, by himself, as attorney. On the *voir dire*, it appeared that he had no other authority to do so, at the time of the execution, excepting his being employed by their agent as an attorney to collect the payment for stumpage on their lands. The only question, presented by the exceptions, is the competency of the witness to testify in the trial of the issue, raised by the pleadings.

Before service can be made of a replevin writ, the officer is required to "take from the plaintiff, or some one in his behalf, a bond to the defendant," &c. R. S., c. 130, § 10. Without this, the writ cannot be served and the suit prosecuted with propriety. In the case at bar, the bond was not given by the witness, in behalf of the plaintiffs, but he assumed to

act for them and in their name. And if he had been properly authorized by them, to execute the bond as he did, it would have been their deed.

The power of the witness was insufficient to make the bond binding upon the plaintiffs. But it was competent for them to adopt it as theirs, and if they have done so, it is an effectual ratification, and becomes their bond, from the time of its execution. The bond not purporting to be that of the witness, there was no legal service of the writ, if the plaintiffs had not adopted the execution. But having entered and prosecuted the action, and having joined the issue tendered by the defendant, the plaintiffs have effectually adopted the bond according to its meaning, as indicated upon its face. And having done so, no liability attaches to the witness; and he was competent to testify. *Exceptions overruled.*

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

(*) COOK *versus* LEWIS AND NICKELS, *his trustee.*

Under R. S. c. 107, the executor or administrator of a deceased co-partner is bound to include in his inventory the co-partnership estate for distribution.

The prior right of administering upon such estate belongs to the survivor, upon his giving a bond "for the benefit of all persons interested in the estate."

Until the survivor have given such bond, he has no power to dispose of any part of the company estate.

If he decline to give such bond, the executor or administrator of the deceased partner, on giving a prescribed bond, is to take the partnership estate into his own possession for administration.

In such case, a sale of partnership goods by the survivor is unauthorized and void, and notes given for the goods so sold are without consideration.

Of such goods, the administrator is entitled to the immediate possession; and the purchaser, therefore, is not chargeable as trustee in any suit against the surviving partner.

ON FACTS AGREED.

Hall & Lewis were copartners, transacting business under the name of Hall & Lewis. Hall died in July, 1849. At that time, though the company was insolvent, there were goods

on hand amounting to $1471. In Nov. 1849, Lewis, as surviving partner, sold the goods to Nickels, taking therefor his unnegotiable note, payable to Lewis, as surviving partner, at the same time informing Nickels that the money, when paid upon the note, would go to discharge company debts.

Lewis declined to administer upon Hall's estate, and thereupon administration of that estate and of the co-partnership effects was committed to L. M. Hall, to whom Lewis delivered the note. [The case omits to show whether the sale was made before or after the administrator was appointed; or whether the note was delivered to the administrator before or after the commencement of this suit; or whether the suit was commenced before or after the administrator was appointed.]

This is an action of assumpsit against Lewis, as surviving partner, for a debt due from the company.

The question for decision is merely whether Nickels is chargeable as trustee.

Freeman, for the plaintiff.

If the trustee is liable, it must either be because of his having given the note, or, if the sale to him was illegal, then for having in possession the goods belonging to the late firm. It is not proposed to trouble the Court with an argument on either of those alternatives, but simply to suggest that the statute, bearing upon the case, does not clearly indicate the same course to be pursued, and the same consequences and liabilities to be involved, in the settlement of partnership estates, where one of the partners has deceased, as in the settlement of the insolvent estate of an individual deceased.

There is good reason to believe that, as a surviving partner can be sued by a creditor of the firm, so the property of the partnership in the hands of a third person, can be reached by the trustee process.

Burbank, for the trustee.

The case depends upon the construction of R. S., c. 107.

The manifest intent of the law is, that whatever is liable to distribution by the administrator should be exempt from

attachment. *Martin* v. *Abbott*, 1 Greenl. 333; *Patterson* v. *Patten*, 15 Mass. 473; *Rich* v. *Reed*, 22 Maine, 28; *Page* v. *Smith*, 25 Maine, 256.

Lewis, the surviving partner, refused to give the bond prescribed in § 28. The administrator, L. M. Hall, was then required to take the company property into his hands for settlement. By that statute, all authority of the surviving partner over the property, is taken away. No valid sale could be made after the death of Hall, except by the party who had given the requisite bond. The sale of the goods to Nickels was a nugatory act. Over the goods in his hands, no person except the administrator could have any control. Nickels therefore is accountable only to the administrator. The note which he had given was uncollectable, there having been no consideration for it. It is admitted that the estate of Hall & Lewis was insolvent. If Lewis could sell the property, without giving bond, he might pay to favored creditors, and a *pro rata* distribution be defeated. This would be to sanction a great wrong. As the estate was insolvent, Lewis could have no interest in it, further than that the property should be appropriated to payment of the debts. This it is the administrator's duty to do. Hence Nickels is not chargeable as trustee.

Appleton, J. — Upon the death of one of the partners, the firm of which the deceased was a member is dissolved, and the law contemplates an entire cessation of its business. The goods and effects in possession are held by the survivor and the representatives of the deceased, as tenants in common. All suits upon outstanding claims, must be brought by or against those surviving. All rights of action belong to them at law, and they have the exclusive right to reduce them to possession, and when that is done, they are to be regarded as trustee for the partnership and the representatives of the deceased partner. If there be danger of their misapplication of the funds of the late firm, they will be restrained from interfering in the settlement of its affairs, and their management will be withdrawn from the negligent or fraudulent survivor

or survivors. The common law is powerless in the enforcement of right, or the prevention of wrong, by means of any remedial process dealing specifically with the goods and chattels of the firm, as by enjoining the survivor from interfering with them and appointing a receiver to whose efficient and reliable control they may be entrusted. To prevent the fraudulent withdrawal of assets, and the misapplication of funds, to stay the hand of waste, to entrust the disposition and management of the affairs of the firm to those who are suitable and trustworthy to supervise and control their settlement, could be successfully accomplished only through the intervention of a Court of Equity.

We have thus briefly alluded to the law as it existed before the passage of the stat. of 1835, c. 191, which was reënacted by R. S. c. 107, by which great and important alterations have been made. As this statute, so far as it relates to the administration of co-partnership property, has never received a judicial construction, it will become necessary to examine, with care, the several sections relating thereto, and to determine the direction and extent of the changes there introduced, as they may have a bearing upon the decision of the case before us.

By R. S., c. 107, § 26, the executor or administrator on the estate of any deceased member of a co-partnership, is directed "to include in the inventory which he is by law required to return to the Judge of Probate, the *whole of the partnership estate, goods and chattels, rights and credits, appraised at its true value*, as in other cases; but the appraisers shall carry out into the footing an amount equal only to the deceased's proportional part of the co-partnership interest." To enable this appraisal to be made, it is provided by § 32, that "every surviving partner, on the demand of any administrator of a deceased co-partner, shall exhibit to the appraisers the partnership property belonging to the firm *at the time of the death of such deceased partner*, for appraisement." In case of neglect or refusal on the part of such survivor, compulsory process is given to the Judge of Probate, by § 33, to

enable him to enforce compliance with the requirements of the preceding section.

The amount and value of the co-partnership estate having thus been ascertained by appraisal, the preference in administration, by § 27, is given to the survivor, upon his giving a bond "for the benefit of all persons interested in the estate," the terms of which are prescribed by § 28. The survivor thus appointed may be cited to account, and the Judge of Probate is to adjudicate upon the same, "as in the case of an ordinary administrator, and the parties interested shall have the like remedies by means of such bond, for any misconduct or neglect of such survivor or survivors, as may be had against administrators."

In case the survivor neglect or refuse to give the bond, then the executor or administrator on the estate of the deceased partner is authorized by § 30, in giving bond as provided by § 32, forthwith to "take the *whole partnership estate, goods and chattels, rights and credits into his own possession.*" The surviving partner, by § 32, is directed to surrender to him on demand, all the property of such partnership, including their books and papers and all necessary documents pertaining to the same," and to "afford all reasonable information and facilities for the execution of his trust," and in case of his neglect or refusal to comply with these statutory requirements, he is made subject to the summary process provided by § 33.

It is thus evident that the object and intent of the statute was, that ample security should be given for the protection of all interested as a preliminary to granting administration on the partnership estate, whether its affairs were to be closed by one of its surviving members or by the administrator on the estate of the deceased partner. The necessity of applying to a court of equity is obviated by giving the Judge of Probate the same powers in the case of a partnership administration as in any other case of administration. It places the property under the control of an administrator, who has given security for the faithful performance of his duties, and who may be removed upon proof of misconduct. It thus most

effectually protects the rights of the creditors and the representatives of the deceased partner which before were in peril from the fraud or negligence of the survivor, and affords a jurisdiction where all controversies may be summarily determined and speedily enforced. It substitutes an administration with security for its due performance for one without. It requires not merely that the estates of the deceased partner but of the firm of which he was a member should be settled through the probate office and under the supervision of the Judge of Probate.

Each and every provision tends to show that no sale of the goods, and that no transfer or disposition of the effects of the partnership, can be legally made before the appointment of a partnership administrator. An appraisal is required by § 26, but an appraisal would be but an idle ceremony except as preparatory to giving the required bonds and taking administration. If the survivor might legally sell, he could do it equally well before, as after an appraisal, and if before there would be nothing to appraise. By § 27, the property appraised is to remain with the survivor until delivered to the administrator who shall have given the requisite bonds. But if sold, it cannot remain and be delivered up, nor can the administrator "take the whole partnership estate, goods and chattels, as rights and credits into his possession" as he is empowered to do by § 30. If the sale would be lawful, no compulsory power should have been given by § 33, for if the survivor can lawfully sell or transfer the effects of the firm, *a fortiori* should he be entitled to retain them. If the survivor can legally sell, he may sell and transfer the whole partnership estate and utterly disobey the requirements of the statute and such disobedience will be deemed right and the requisitions of law and the rights of all will be subordinated to his will. But such conclusions cannot be admitted. The conclusion then is, that no surviving partner can legally dispose of the partnership property except as an administrator duly appointed.

The case finds that Hall has been appointed administrator

on the estate of the deceased partner as well as on that of the firm. The defendant Lewis having neglected or refused to give the required bonds, the sale by him to the trustee was without legal authority and of itself passed no title. The trustee is consequently liable to the administrator for the property in his hands and must be discharged.

In *Thompson* v. *Lewis*, 34 Maine, 167, the right to attach the interest of one partner was considered and the case of *Whitney* v. *Munroe*, 19 Maine, 42, was reäffirmed. The administrator of the firm had not been appointed and the questions arising under R. S., c. 107, were not discussed.

Trustee discharged.

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

(*) TUCKER *versus* CAMPBELL *& al.*

In a complaint for flowing land owned by tenants in common, by means of a mill-dam, all the co-tenants must join.

Such a process, brought by one of the co-tenants alone, cannot be maintained.

ON FACTS AGREED.

Complaint for flowing the plaintiff's land by means of a mill-dam. The complainant set forth his claim of an entire ownership in the land flowed. He in reality was the owner of an undivided half only; and moved to amend his complaint so that it should describe his true ownership. The respondents contended that, even if amended, the complaint is not sustainable by one of several tenants in common.

B. Bradbury, for the complainant.

One question is whether one of several tenants in common of land, can alone maintain this process. The right to the process is given by a statute, which enacts that "any person, sustaining damage in his lands by their being overflowed by a mill-dam, may obtain compensation for the injury by complaint," &c.

The fair construction of this language is, that the person

injured in his lands by flowage may recover compensation to the extent of his ownership, which in this case is one undivided half of the premises.

There can be no practical difficulty in such a construction.

If this procedure is to be regarded as *sui generis*, under the statute enactments which give the remedy, the technical rule of law as to action by tenants in common for injuries to realty, should not be invoked to control or aid in giving a construction against what is just and equitable, and fairly inferable from the language of the Act.

If it be said that the rule of law is, that tenants in common shall join in process for injuries done to the realty, the reply is, that this rule is purely technical, and has been found so inconvenient, that the Legislature has interfered to change it. R. S., c. 129, § 17.

This statute embraces all personal actions for injuries done to any lands.

The term action is comprehensive, "a civil action is a legal demand of one's rights, or it is the form of a suit given by law for the recovery of that which is due." Co. Litt. 285; 3 Bl. Com. 116.

"Personal actions are those brought for the specific recovery of goods and chattels, or for damages or other redress for breaches of contract or other injuries of whatever description, the specific recovery of lands, tenements and hereditaments only excepted." Steph. Pl. 3; Com. Dig. Action, D, 3.

Adopting these definitions as correct, a complaint for flowage would come within the terms of the statute.

Burbank, for the defendants.

SHEPLEY, C. J.—The principal question presented is, whether a tenant in common, without uniting with his cotenant, can maintain a complaint for flowing land.

By the fifth section of the statute, c. 126, any person sustaining damages in his lands by their being overflowed by a mill-dam, may obtain compensation by complaint. Whether this provision be applicable to a person having the entire title,

or to one having a portion of it, must be determined from a consideration of all the provisions of the statute. If there be found provisions that cannot be executed upon one construction, and that may be all carried into effect and operate harmoniously upon another construction, it will be obvious that the latter is the correct one.

The owner of the dam is permitted by the ninth section to prove, that he has a right to flow the land for an agreed price or without compensation. If several tenants in common may maintain several processes for flowing the same land, there may be several trials and different and contradictory verdicts and judgments respecting the same matter.

By the provisions of the fourth and twelfth sections, the height to which the water may be raised, the length of time during which it may be kept up, and what portion of the year the land ought not to be flowed, are to be determined by commissioners or a jury. If several tenants in common may maintain several complaints, there may be several and contradictory decisions upon each of these matters.

The damages having been ascertained, are by the provisions of the seventeenth section to continue to be the measure of the yearly damages, until the owner of the land or dam shall by a new process apply for an increase or decrease. Should different measures of damages be found for the different tenants in common, their several shares might become united in one sole owner, and there would be no one measure of damages, on which a new complaint could be founded by either party. Such sole owner might by conveyances create other and different tenancies in common than those existing, when the damages were ascertained; or tenants without any union of shares might entirely change their respective proportions, and under such circumstances no new process could be maintained by either party for the increase or decrease of any ascertained annual damages.

"The party entitled to such annual compensation" may by the provisions of the twentieth section maintain an action for its recovery. When the shares have become different, no one

could establish his right to recover for any sum as damages already ascertained.

By the provisions of the twenty-sixth and twenty-seventh sections, the owner of the dam may in writing offer to increase and the owner of the land may offer to decrease the annual compensation. And when the shares are different, neither party can make such offer.

In every section of the statute, in which the annual damages are mentioned, they are so as constituting one sum, as a compensation for flowing the land, and as continuing to be the measure of damages, whatever changes may take place in the title to the land.

A construction of the statute, which would authorize as many complaints as there might be tenants in common, and as many verdicts and measures of damages, might deprive the owners of land and the owners of a dam, of rights secured to them by the statute, by preventing a compliance with its provisions, while a construction requiring all the owners of the land to unite in one complaint will permit every provision of the statute to be executed, and to have its full effect. Nor can a sound argument for a different construction be found in the position, that difficulties similar to those named would occur, where there are several owners of entire tracts of low lands equally flowed; for in such cases there may be a compliance with every provision of the statute.

Nor will the proposed construction deprive any owner of land of any legal or constitutional right. When a person becomes a tenant in common of real or personal estate, he acquires his title subject to the infirmities and liabilities which by law adhere to it. *Complainant nonsuit.*

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

(*) Herrin *versus* Libbey *& al.*

A contract, obtained through false and fraudulent representations, may be rescinded or affirmed at the election of the party defrauded.

Such party, in order to rescind the contract, must, in a reasonable time after discovering the fraud, make known his election to rescind and restore the other party to his former condition.

This principle applies to contracts *under seal*, as well as to other classes of contracts.

Thus a sealed lease of land, obtained by false and fraudulent representations, though at first rescindable by the lessee, is deemed to have been affirmed, if, after discovering the fraud, he continues to occupy the land, and makes no attempt, within a reasonable time, to rescind.

His only right, in such a case, is to recover the amount of damage occasioned to him by the fraud. This amount may be deducted from the rent in a suit by the lessor upon the lease.

A deposition, taken on notice to the adverse party's attorney of record, will not be rendered inadmissible by proof that the party, taking the deposition, had been informed, prior to such notice, that the attorney had retired from the action.

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

Covenant Broken.

There was a negotiation for the letting of a farm by the plaintiff to the defendants. They selected two persons as arbitrators to decide upon the terms of the lease, and the arbitrators expressed their opinion on the subject.

The lease was made June 16, 1843, in which the defendants covenanted to pay a fixed sum for the rent and also to plough and seed ten acres of the land.

This suit was brought Jan'y 27, 1849, upon those covenants. Plea *non est factum.*

The jury in answer to specific inquiries returned, upon the evidence, that the "lease was obtained of the defendants by false and fraudulent representations," and, that "neither of the parties had waived the right to take advantage of such representations."

The Judge was requested to instruct the jury, that if they found the lease to have been obtained of the defendants by false and fraudulent representations, this action could not be maintained.

He declined to comply with this request, and instructed them, that "if they should find that the lease was obtained of the defendants by false and fraudulent representations, they might estimate the damage which the defendants had sustained by such false and fraudulent representations, and deduct that sum from such amount as they should find due, if any, to the plaintiff for the breach of the covenants in the lease, and return their verdict for the balance, if there should be any."

There was testimony tending to show, that the lease was supposed by the defendants to have been drawn in accordance with the determination of the arbitrators; and the defendants offered to prove, that Timothy Herrin, the authorized agent of the plaintiff, represented to the arbitrators, that the amount of the rent was to be paid in tavern keeping, and that this representation induced them to fix the rent at a higher rate than they otherwise would have done.

The Judge rejected this evidence.

The defendants also offered to prove, that all that part of the lease, which relates to the ploughing and seeding down ten acres of the demised premises, was not any part of the award of said arbitrators, though supposed to be so by the defendants at the time of executing the lease. This evidence being objected to was rejected.

The defendants offered evidence to show what would be a fair rent for the demised premises, which was rejected.

The defendants objected to the admission of the deposition of Asher Martin, and offered to prove by parol, that legal notice was not given them of the taking of said deposition, but the Judge declined to receive the testimony. The caption of the deposition is referred to, but no copy of it is found in the case, nor does it appear what facts were certified by the magistrate.

The captions of several other of the plaintiff's depositions showed, that notice was served upon Hodgdon & Madigan, supposed attorneys of the plaintiff, and that they did not attend at the taking.

The defendants objected to the admission of these depositions upon the ground, that though Hodgdon & Madigan appeared of record to be the attorneys of the defendants, yet the plaintiff had been expressly notified, that they had in fact retired from the case a long time prior to the notice for the taking. The depositions were admitted, and the verdict was for plaintiff for $301,85.

To the foregoing rulings, instructions and refusals to instruct, the defendants excepted.

B. Bradbury, for the defendants.

The case presents for the consideration of the Court the question, what is the effect upon a contract under seal of a fraud by which the party defending against such contract has been induced to make it?

The Judge instructed the jury that the legal effect of fraud, in such a case, would not be to defeat the action; but that they might still regard the contract as valid and binding, and return a verdict for the plaintiff, the party guilty of the fraud, allowing, in offset against his claim, such damages as they might find the defendants had suffered in consequence of the fraud.

It was contended by the defendants' counsel, and the Judge was requested to rule, that the fraud made the lease void; leaving the plaintiff to such remedy as he might have against the defendants for the use and occupation of the demised premises; and we respectfully submit, that such was the only true legal view of the case, and that the Judge erred in the instructions given.

It is among the principles most properly regarded and classed in the very elements of the law, that fraud vitiates any thing into which it enters, and can give the party guilty of it no rights. This vitiating effect of fraud extends not only to simple contracts, and those which, authenticated by a seal, are regarded as entered into with more deliberation, but even to records and judgments.

In the case of *Jackson* v. *Somerville*, decided in the Supreme Court of Pennsylvania, at the May term, 1850, of

which an abstract may be found in 13 Law Reporter, 422, this doctrine is very fully asserted. "Fraud vitiates all contracts into which it enters, and cannot be affirmed by the party defrauded. Such contracts are essentially nonentities, and even legal proceedings and judgments, founded on them, are voidable." "All contracts, specialties and transactions tainted with fraud are void, though fraud does not appear on the face of them." "When a sale is fraudulently procured by the vendee, he may be sued by the vendor before the expiration of the credit agreed to be given." 2 Saund. Pl. & Ev. 527; Chitty on Contracts, 527; 2 Sup. U. S. Dig. p. 32, No. 72, *Chess* v. *Chess*, 1 Penn. 32; 2 Sup. U. S. Dig. No. 74, *Gilbert* v. *Hoffman*, 2 Watts, 66; 2 Sup. U. S. Dig. p. 34, No. 134, *Flagler* v. *Bliss*, 3 Rank. 345; 2 Sup. U. S. Dig. p. 37, No. 199, *Tourlin* v. *Den*, 4 Harr. 76; 2 Sup. U. S. Dig. p. 40, No. 277, *Armstrong* v. *Hall*, Coxe, 178; *Commonwealth* v. *Bullard*, 9 Mass. 270; 1 Greenl. on Ev. § 284. See also, 18 Pick. 95, 106, *Hazard* v. *Irvine*, where the effect of fraud upon a specialty is particularly discussed. *Browning* v. *Haskell*, 22 Pick. 310; *Holbrook* v. *Burt*, 22 Pick. 546. We have not yet been able to find the case in which, in an action upon such an instrument, the allegation of fraud, duress or any of the defences appropriate to the case, has been urged in *partial* defence. Of course we make no allusions now to that distinct class of cases, in which, in actions on certain bonds for instance, under special statute provisions, the plaintiff can recover only the actual damages sustained by breach of the condition.

The precise distinction upon which we rely for separating the present case, in the principle by which it is governed, from the case of notes of hand, is clearly exhibited in *Haycock* v. *Rand*, 5 Cush. 26. Fraud is most certainly a defence in an action on a sealed contract, but it goes to the whole merits of the case. The lease and bond cannot be good in part and bad in part, especially where fraud is involved. "Deeds procured by covin and fraud as between the parties, are as dead as forged deeds." (*Jackson* v. *Somerville*, before cited.)

These distinctions have been suggested, because it was upon the analogy of notes of hand, so far as we are advised, that the instruction to the jury was based. Perhaps, however, they are not necessary for us; for we contend, that the fraud, whether it formed the inducement to the defendants to make the contract, or was only mixed up with its details, wholly annuls the lease, and would have had that effect if the lease had not been under seal. *Irving* v. *Thomas*, 18 Maine, 418.

There can be no legal objection to the admission of the testimony, that it was parol; for the admissibility of parol evidence to defeat a written instrument on the ground of fraud, may be regarded as an axiom in law. *Prentiss* v. *Russ*, 16 Maine, 30; *Browning* v. *Haskell*, 22 Pick. 310; *Holbrook* v. *Burt*, 22 Pick. 546; *Hazard* v. *Irvine*, 18 Pick. 95.

Evidence was admissible to show the false and fraudulent representations made by the plaintiff's agent to the arbitrators, relative to the mode in which the rent should be paid, and to the ploughing and seeding of the ten acres. Both these representations were material.

But if the Judge was correct in his ruling, that the fraud would not avoid the lease, but only constituted a partial defence to the action, then there seems to be a stronger reason why the excluded evidence should have been admitted, as well also as that which was offered to show what would be a fair rent of the premises. For if the question for the jury was in effect, what deductions should be made for the damages sustained by the defendants in consequence of the fraud practiced upon them, then *all the* frauds which operated upon the contract, and a fair standard of rent, seem to be appropriate elements to enter into and help form the estimate; and it is upon this ground, as we contend, that the evidence should have been admitted.

The deposition of Asher Martin, offered by the plaintiff, was objected to, but admitted by the Judge. The caption certified, that the adverse party "was notified," but whether the notice were such as the statute requires, was matter of

inference, and presumption from the language quoted. The defendants offered to prove, that the notice did not conform to what was understood to be the statute requirement; but the Judge, holding that the presumption of legal notice was a conclusive one, and could not be controlled by the evidence, declined to receive the testimony.

The Revised Statutes, among the facts to be stated in the caption, prescribe, that it shall state "whether the adverse party was notified to attend." We should not deny, that under this provision, the statement that the party "was notified," furnishes a sufficient *prima facie* presumption of legal notice; but we do deny, that the presumption is a conclusive one. On the contrary, we still contend, as was maintained at the trial, that the point is open to inquiry.

True, a magistrate must be presumed to have discharged his duty intelligently and with fidelity, and there ought to be a solid foundation in fact for such a presumption. It cannot, however, be unknown to any one, of even a limited experience, that the presumption is sometimes only a presumption; it may arise from error or mistake on the part of the magistrate, or it may arise from deliberate fraud.

In this case it must be regarded as susceptible of proof, that the requisite notice was not given. The defendants were notified as the caption stated, but not legally notified; and the language of the certificate was consistent with either state of facts. It was not proposed to contradict the caption, although we are not quite sure, that the decided cases would not warrant even that. *Homer* v. *Brainerd*, 15 Maine, 54; *Minot* v. *Bridgewater*, 15 Mass. 492.

Certain of the plaintiffs' depositions were taken upon notice served on "Hodgdon & Madigan, supposed attorneys of the defendants." There was no appearance for the defendants at the taking of the depositions. The exceptions find that Hodgdon & Madigan had been attorneys for the defendants, and that their names were then upon the docket, as attorneys in the case, although in fact they had retired from it, and the plaintiff had been expressly notified of the fact, long before

the issuing of the notice for the taking of those depositions The depositions were objected to by the defendants at the trial, but admitted by the Judge.

The statute regulating this subject, R. S., c. 133, after providing in § 6, that the notice may be served upon the attorney as well as upon his client, in § 7, makes this provision: "No person shall, for the purposes of this chapter, be considered the attorney of another, unless he has indorsed the writ, or indorsed his name on the summons left with the defendant, or appeared for his principal in the cause, or given notice in writing, that he is the attorney of such adverse party."

It seems important to note the language of this section; it is negative in its character. It may be said, that the implication is a necessary one, that the persons standing in the positions enumerated, shall be considered as attorneys. But does this necessarily and conclusively follow, except, with many restrictions and limitations? If it does, what is the inevitable result? Under such a construction, no party could ever discharge an attorney, so as not to be bound by a notice served on him. The statute never can have been designed to have such a construction, nor will the Court give it such, leading as it obviously would to the greatest inconvenience and injustice.

It may, perhaps, be said that the defendants' view will lead to embarrassments in the trial of causes, by surrounding them with collateral issues; and this is possibly the strongest argument that can be urged against them.

But collateral issues, to be determined by the Court, are always arising in the progress of trials. Such, for instance, as the question of the interest of a witness, often found to be embarrassing to settle satisfactorily. This is one of the necessities of litigation. But what is more satisfactory is, that it is much more important that causes should be fairly tried, and verdicts rendered upon proper testimony, than that collateral issues should be excluded or made a few less in number.

G. M. Chase, for the plaintiff.

RICE, J. — The writ, pleadings, lease and its counterpart, which make part of this case, have not come into the hands of the Court. The defence is, that the lease was obtained by fraud and that the rent reserved was increased by the fraudulent practices of the plaintiff and his agent.

In answer to interrogatories, put to them in writing, the jury found, that the lease was obtained by false and fraudulent representations, and that neither party had waived their rights to take advantage of such representations.

The defendants' counsel requested the presiding Judge to instruct the jury that if they found the lease was obtained of the defendants by false and fraudulent representations, this action could not be maintained. This was refused.

The rights of a party who has been defrauded in making a contract, are, on the discovery of the fraud, within a reasonable time to rescind the contract, and restore the parties to their former condition, or to affirm the contract, and claim compensation in damages for the injury he has sustained by reason of the fraud.

In the absence of the papers referred to, it does not distinctly appear whether the defendants, by their acts, had lost their right to rescind the contract, though from the time that had elapsed from the date of the lease before the action was commenced, and from the course of remark by the plaintiff's counsel, in his argument, it may be inferred that such was the fact. There is no evidence of any attempt to rescind, or that the defendants did not have the use and occupation of the premises leased, until the expiration of the term, specified in the lease.

But the Judge did instruct the jury that if they should find that the lease was obtained of the defendants by false and fraudulent representations, they might estimate the damages which the defendants had sustained, by such false and fraudulent representations, and deduct that sum from such amount, as they should find due, if any, the plaintiff for the breach in the covenants in the lease, and return their verdict for the balance if there should be any.

Under the state of facts that existed, the requested instruction was properly withheld, and those given were correct.

The terms of the lease were by agreement of the parties to be determined by referees.

The defendants offered to prove, that Timothy Herrin the authorized agent of the plaintiff, represented to said arbitrators that the amount of the rent was to be paid in tavern keeping, and that this representation induced the arbitrators to fix the rent at a higher rate than they otherwise would have done.

Any concealed attempt by either party, by false affirmation or fraudulent concealment of material facts, to influence the judgment of the referees, by which to increase or diminish the amount of rent to be paid, would be such a fraud upon the other party as would entitle them, if thereby defrauded, to relief. It does not, however, appear that the representations of the plaintiff's agent were not true in point of fact, nor does it appear that they were not made in the presence, and with the knowledge of the defendants. The testimony was therefore properly excluded.

The defendants also offered to prove that all that part of the lease which relates to ploughing and seeding down ten acres of the demised premises, was not any part of the award of the referees, though supposed to be so at the time of the execution of the lease. This was properly rejected, as there is no evidence tending to show that they were misled in the matter by the plaintiff or his agent, or that they were not in possession of all the information as to the action of the referees which was in the possession of the plaintiff, or that they in any manner relied upon the plaintiff's representations. The means of information upon that point were equally open to both parties.

The evidence offered, as to what would be a fair rent of the premises, was also rightly rejected. The questions presented to the jury were, first, whether the contract had been obtained by fraud; and second, how much damage had the defendants suffered by reason of the fraud of plaintiff, if any

had been committed by him. On that point, appropriate instructions were given by the Judge.

The depositions were properly admitted. The notice was in conformity to the provisions of sections 6 and 7 of c. 133, R. S., and the requirements of 13th rule of this Court. 9 Greenl. 298. The records of the Court is made the evidence on which parties may rely to determine who are attorneys in a given case. Hodgdon & Madigan were the defendants' attorneys, as appeared by the record, and by the express terms of the rule referred to, notice to them while their names thus stood upon the record, was good and sufficient. *Exceptions overruled.*

Judgment on the verdict.

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

INHABITANTS OF PLANTATION No. 9 *versus* BEAN *& al.*

An action properly commenced under c. 196, § 7, of laws of 1850, and pending in Court at the time of the enactment of c. 29, of laws of 1853, is maintainable, nothwithstanding the 7th § of former Act was repealed by c. 284, of laws of 1852.—RICE, J., *dissenting*,

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

TRESPASS, for cutting timber upon the *public lands* in Plantation No. 9, commenced by virtue and under the provisions of c. 196, § 7, of laws of 1850.

The defence was, that this section had been repealed by c. 284, of laws of 1852.

This cause came on for trial at the October term, 1852, and it was then stipulated, that if the action is further maintainable by the plaintiffs, or if not maintainable by them, yet if the Land Agent can legally and will assume the further prosecution of this suit, then the cause is to stand for trial, otherwise, the plaintiffs to become nonsuit.

Fuller and *Harvey*, for plaintiffs.

Thacher and *Bradbury*, for defendants.

The opinion of a majority of the Court, SHEPLEY, C. J., and TENNEY and HATHAWAY, J., was drawn up by

TENNEY, J. — This action was commenced by virtue of the statute of 1850, c. 196, § 7. While it remained in Court, not disposed of, by statute of 1852, c. 284, § 1, this section was repealed, without any reservation, touching suits, which had been commenced, and which were then pending, the lands reserved for public uses, &c., being transferred to the care and custody of the Land Agent. By the statute of 1853, c. 29, it was provided, that the statute of 1852, referred to, should not operate to defeat any suit or action which was pending at the time of the passage thereof.

The repeal of the 7th section of c. 196, was not intended to take from those, to be benefited thereby, any rights, which had been secured to them; or to relieve trespassers upon public lots in any degree from liability; but only to change the party, in whose name suits could be brought for the recovery of damages, arising from trespasses upon such lots. After the statute of 1852, and before that of 1853, actions commenced prior to the former, if brought to trial, could not have been sustained, because they stood in the name of a party, as plaintiff, not authorized by any existing statute to prosecute such suits. The failure would have been in the remedy, and not in the right. It was competent for the Legislature to make any provision, by which this right could be effectual. This could be done by providing for the maintenance of the actions then pending in the name of the plaintiffs, who instituted the suits, or by substituting therefor the person, who had the charge of the public lots, in trust.

The language of the statute of 1853, will authorize the prosecution of this suit in the name of the plaintiffs as it now stands.

According to the agreement of the parties the action is to remain for trial.

Dissenting opinion by

RICE, J. — This action was commenced under the provision of § 7, c. 196, statute of 1850. Whilst the action was pending in Court, the Act of 1852, c. 284, was passed. By the first section of this last Act, the 7th section of the Act of 1850, was unconditionally repealed. By that repeal, all actions and rights of action depending upon the repealed section, when the proceedings were not concluded, were destroyed.

"I take the effect of a repealing statute to be to obliterate it, (the statute repealed) as completely from the records of Parliament, as if it had never existed, except for the purpose of those actions or suits which were commenced, prosecuted and *concluded*, whilst it was an existing law." TINDALL, C. J., in *Keye* v. *Goodwin*, 4 Moore & Payne, 341.

"The effect of such a (repealing) clause on a previous statute which imposes a penalty, or confers jurisdiction upon a court, even in civil cases, is not denied. In the first case the penalty is gone, though the repeal take place while the prosecution for it is pending. In the latter case, though the party may have instituted his writ, and it be pending at the time of the repeal, the jurisdiction is gone, and with it all his rights." COWEN, J., in *Butler* v. *Palmer*, 1 Hill, 324.

But it is contended that this action is saved by the statute of 1853, c. 29, which provides, that the Act of 1852 shall not operate to defeat any suit or action which was pending at the time of the passage thereof.

It is not perceived how the Legislature could in this way restore rights which had been lost, or bring into being actions which by virtue of this repeal had been extinguished. The attempt to do so by subsequent legislation was simply nugatory. *Ashby, appellant*, 4 Pick. 21.

The foundation on which the action vested having been removed by the repeal of the statute by authority of which it had been commenced, and the right to maintain and prosecute it having been taken away, the fact that it remained on the docket of the Court could not change the rights of the

parties. It remained then only as an unauthorized incumbrance.

(*) THIBODEAU *versus* LEVASSUER.

It is the *lex fori*, and not the *lex loci contractus*, by which the plea of a limitation-bar is to be adjudicated upon.

ON FACTS AGREED.

ASSUMPSIT.

This is an action on a note dated in 1837, executed at Madawaska, a portion of the territory then in dispute between the United States and Great Britain.

The Province of New Brunswick then exercised jurisdiction at this place, on both sides of the river, and continued to do so, till the ratification of the Ashburton treaty.

The note was signed in the presence of an attesting witness. Such an attestation, however, by the laws of the Province of New Brunswick, does not exempt the note from the general provisions of its statute, prescribing six years as the time within which actions may be brought on simple contracts.

The present action was not commenced until more than six years had elapsed from the maturity of the note, and from the date of the last payment. The plaintiff lives upon the left, and the defendant upon the right bank of the river St. John, which at this place was, by the Ashburton treaty, made the boundary. The defendant was in the habit of often crossing the river to attend church and transact business, so that the plaintiff had frequent opportunities to bring his action within six years, either in the Courts of the Province of New Brunswick, or of the State of Maine.

The defendant by brief statement claims the benefit of the Maine statute of limitations.

Taber, for the plaintiff, cited *Blanchard* v. *Russell*, 13 Mass. 1, 5; *Bulger* v. *Roche*, 11 Pick. 36; *Pearsall* v.

Dwight, 2 Mass. 84; *Byrne* v. *Crowninshield*, 17 Mass. 55.

Hodgdon & Madigan, for the defendant.

1. Contracts are subject to the laws of the place where executed, when sued under a foreign jurisdiction, except when against good morals, or to the disadvantage of the State or its citizens. *Pearsall* v. *Dwight*, 2 Mass. 84.

2. Whatever affects the legal remedy, whether giving, withholding, extending or restricting the time within which an action may be brought, is a part of and pertains to the contract. Comyn on Contracts, p. 47; *Homer* v. *Wallis*, 11 Mass. 309; *Stone* v. *Tibbetts*, 26 Maine, 110; *Burnham* v. *Webster*, 19 Maine, 232; *Knill* v. *Williams*, 10 East's Term R. 436.

3. A witness in Maine extends the time within which an action may be brought, and constitutes "a different legal contract from what it would be without." *Smith* v. *Dunham*, 8 Pick. 246; *Brackett* v. *Mountfort*, 2 Fairf. 115.

4. The defendant having come within the jurisdiction of Maine, by treaty stipulation, the present action is not entertained by comity, but by an obligation assumed at the ratification of that treaty, and must, by the laws and usages of nations, be determined in every particular, in the same manner, as if it had been brought in the Province of New Brunswick.

TENNEY, J. — The place where the note was made and where the parties thereto resided, at its date was subject to the jurisdiction of the Province of New Brunswick. By the laws of that Province a suit thereon would have been barred by the statute of limitations in six years, after the cause of action accrued, notwithstanding the note was signed in the presence of a witness, who attested it. It is admitted that more than six years had elapsed after the maturity of the note and the date of the last payment thereon, before the commencement of this suit. The defendant relies upon the same defence here, which would there have prevailed. The ques-

tion presented is, can the plaintiff recover under these facts and the statute of limitations? We think he can. R. S., c. 146, § 7.

The time of limitations of actions, depends on the *lex fori*, and not on the *lex loci contractus*. The case of *Pearsall & al.* v. *Dwight & al.* 2 Mass. 84, was a suit upon a promissory note, and the question discussed and decided in the negative was, whether to an action commenced in a Court in Massachusetts, by the plaintiffs, inhabitants of New York, on the note there executed by the defendants, inhabitants of Massachusetts, the statute of limitations of the State of New York can be pleaded in bar. PARSONS, C. J., in the opinion of the Court, says, — "The law of the State of New York will be adopted by the Court, in deciding on the nature, validity and construction of this contract. This we are obliged to do by our laws. So far the obligation of comity extends, but it extends no further. The form of the action, the course of judicial proceedings, and the time when the action may be commenced, must be directed exclusively by the laws of this Commonwealth."

In *Bulger* v. *Roche*, 11 Pick. 36, the same doctrine was affirmed in a suit upon a note, which was made in Halifax, in the Province of Nova Scotia, between subjects of that Province, who remained there till it was barred by the statute of limitations of that country. It was held, that the statute of limitations of Massachusetts could not be pleaded in bar to an action brought upon the debt within six years after the parties came into that Commonwealth. The subject is very fully discussed in the case of *Le Roy & al.* v. *Crowninshield*, 2 Mason, 151, where the authorities are collected and commented upon; and it was there held, that the plea of the statute of limitations of the State where a contract is made, is no bar to a suit, in a foreign tribunal, to enforce that contract; and the question was treated as one entirely at rest. Judge STORY, in his Commentaries on the "Conflict of Laws," § 581, says, "the common law has firmly fixed its own doctrine, that the prescription of the *lex fori* must prevail in all cases." *British*

Linen Company v. *Drummond*, 10 Barn. & Cres. 903; *Vega* v. *Vianna*, 1 Barn. & Adol. 284; *Lincope* v. *Battelle*, 6 Wend. 475. *Judgment for the plaintiff.*

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

COUNTY OF AROOSTOOK.

INHAB'TS OF MACNAWHOC PLANTATION *versus* THOMPSON *& als.*

An action, properly commenced by authority merely of a statute, cannot be maintained, if at the time it comes on for trial, the statute authorizing it, has been repealed, without any exceptions as to actions pending.

In deciding a question raised at the trial of an action, reference can only be had to the law as then existing, and no subsequent legislative Act can have any effect upon its determination.

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

TRESPASS, for cutting timber on lands in said plantation, reserved for public uses. The writ was dated April 19, 1852, and alleged the trespass to have occurred in Dec. 1851, and in March and April, 1852. The general issue was pleaded.

Chapter 196, § 7, of 1850, enacts, "that the assessors of plantations, for election purposes, wherein lands reserved for public uses have been, or may be hereafter located, be and they hereby are authorized and required to protect the same from trespassers, and are empowered to prosecute any and all persons for trespassing therein, in the name of such plantation," &c.

The statute of 1852, c. 284, repealed this section and transferred the care of such lands to the Land Agent.

This cause came on for trial at the September term of the Court in 1852, when the presiding Judge ordered a nonsuit, to which order the plaintiffs excepted.

Burnham, for plaintiffs.

Washburn and *W. C. Crosby*, for defendants.

TENNEY, J. — This action was commenced in the name of the proper party, plaintiffs, by authority of statute 1850, c. 196, § 7. But when the action was tried, that section had been repealed, without any exception in reference to actions pending at the time of the repeal. No statute giving power to the inhabitants of plantations to commence and maintain suits for trespasses committed upon lots in such plantations reserved for public uses, was then in existence, and the nonsuit was properly ordered. A statute was passed in 1853, chapter 29, providing, that the statute of 1852 referred to, should not operate to defeat any suit or action, which was pending at the time of the passage thereof. But this can have no effect upon the question now presented.

Exceptions overruled.

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

COUNTY OF PISCATAQUIS.

STATE OF MAINE *versus* DRAKE.

In a criminal prosecution, a warrant issued by a magistrate, without a seal, is void.

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

ASSAULT AND BATTERY.

Complaint was made before a magistrate and a warrant issued and an appeal taken from the judgment of the justice.

In the copy of the warrant, were these words, "Given under my hand and seal this fourth day," &c., but there was no seal upon the warrant, nor any sign that the original had been under seal, except in the words quoted.

When the case came on for trial, the counsel for defendant moved to quash the proceedings, because by the copies produced, the warrant did not appear to have been under seal.

This motion was denied.

After trial and conviction of the defendant, a motion was made in arrest of judgment for the same cause, which the presiding Judge overruled.

The defendant excepted to the rulings.

A. Sanborn, for defendant.

1. At common law, a seal to a justice's warrant cannot be dispensed with. American Common Law Reports, 8, 358; *Tacket* v. *The State*, 3 Yerger's Term R. 392; *State* v. *Caswell*, Charlt. 280; *State* v. *Curtis*, 1 Hayward, 471; *Silver* v. *Ward*, N. C. Law. R. 548; Dane's Abr. vol. 6, c. 193, art. 30; Ib. vol. 7, c. 217, art. 3, § 7; Davis' Justice, p. 25.

2. The common law is paramount until it is modified, altered or repealed by statute. Our statute is merely in affirmance of the common law.

3. The necessity of a seal to a warrant has been uniformly held by the highest authorities in England. 4 Black. Com. 290; 1 Hale, 579; 2 Hale, 111; The Dean and Chapter of Windsor, 2 Saund. 305, note 13; 2 Inst. 52, 991, 992. The case of *Padfield* v. *Caball & al.*, Willes, 411, on close examination, is not found to be in conflict with these authorities.

4. In the Commonwealth of Massachusetts, they had as early as 1784, a statute regarding the criminal jurisdiction of justices of the peace, regulating warrants in the language of our own statute. And from that time to the present, the usage has been there to issue warrants under seal, and the universal professional opinion has been that a seal was necessary to their validity. This continuous exposition of the meaning of a statute similar to our own has never been deliberately impugned, invalidated or doubted by the Courts of that State or of this. Whatever may appear to the contrary in *State* v. *McNally*, 34 Maine, 222, was a mere *obiter dictum*, and of no binding authority.

Evans, Att'y General, for the State.

In *State* v. *McNally*, 34 Maine, 222, it has been decided that a warrant issued by a magistrate, need not be under seal unless required by statute.

The case cited from Willes is approved; which says that a "warrant *ex vi termini*, does not imply an instrument under seal, it is no more than mere authority."

The statutes giving jurisdiction to justices of the peace in cases of assault and battery, are R. S., c. 170, § 3, which simply requires the magistrate "to issue his warrant," and c. 171, § 2, which says, "the court or justice shall issue a warrant."

Neither of these require the warrant to be under the seal of the justice. By another statute, all processes from the Supreme or District Court, are to be under the seal of these Courts respectively.

The same decision has been made elsewhere. "In South Carolina there is no statute requiring a seal to be affixed to a warrant issued by a magistrate, and it is therefore unnecessary." *State* v. *Vaughan*, Harper, 313, cited in 3 U. S. Dig. 393, title, "seal," clause 24.

The decision in *State* v. *Coyle*, 33 Maine, 427, is not at variance with this doctrine. The question whether a seal was essential or not, was not presented, nor considered. The opinion was oral and merely went to the fact whether or not there was a seal.

SHEPLEY, C. J. — There can be little doubt, that the common law required, that warrants issued for the arrest or imprisonment of a person, by magistrates, should be under seal. The practice appears to have conformed to it in England and in this country. No case has been presented or noticed, in which a warrant issued without a seal, for such a purpose, has been decided to be valid. To require a seal in such cases, may not be important, only as matter of form. It gives the instrument a higher grade of character, arrests the attention in the hurry of business, allowing a pause for reflection.

The cases deciding, that a warrant may be valid without a seal, do not appear to have been those authorizing an arrest or imprisonment of a person. They might have been correctly

decided, as they were, without asserting the doctrine, that a warrant *ex vi termini* did not imply an instrument under seal. It may be correct, that the word in common parlance signifies no more than an authority. It will not follow, that by usage in the enactment of laws for the punishment of offences, and in judicial precepts, it has not acquired a more definite and limited signification.

The almost unbroken line of judicial precepts denominated warrants, and having seals affixed in conformity to the requirements of the common law, would authorize the conclusion that it had. While courts have admitted and legislatures have enacted, that a scroll, scrawl or scratch, might be regarded as a seal, it is not known that any one has determined, that a seal of some description was not necessary to give validity to instruments, required to be executed or issued under seal.

In the case of the *State* v. *Coyle*, 33 Maine, 427, a seal appears to have been regarded as essential on a warrant issued in a criminal prosecution.

In the case of *State* v. *McNally*, 34 Maine, 210, there was a seal, or what was designed for one, affixed in the form commonly practiced by magistrates issuing warrants and by scriveners in the execution of conveyances.

If a warrant issued without a seal in a criminal prosecution, by a magistrate, may be valid, it would seem that one might be when so issued by any court of justice; and yet all such precepts issuing from a court having a seal, must be issued under the sanction of that seal. This appears to have been admitted by the Lord Chief Justice, in his opinion in the case of *Padfield* v. *Cabell*, Willes, 411, when the precept issued from any court of record.

Whenever it has been held, that a warrant issued in a criminal prosecution might be valid without a seal, it is apparent, that there has been a straining of the law to support the

proceedings. Such a course is unauthorized, and far from being productive of good general results.

Exceptions sustained and proceedings quashed.

TENNEY, HOWARD and APPLETON, J. J., concurred.

COUNTY OF HANCOCK.

(*) DARLING *versus* DODGE.

Though personal property be of such a character, that it cannot be removed immediately, an attachment of it cannot be made by a mere indorsement upon the writ.

The officer must be present and take the articles into possession, in order to justify the return of an attachment upon the writ.

Such return is *conclusive*, that the property therein described has been attached.

Parol evidence is admissible to identify the property attached.

In the business of buying or selling fire-wood, one class is denominated *hard* wood, and another class is denominated *soft* wood.

To which of these classes a particular species belongs, is for the decision, not of the Court, but of the jury.

Until it be shown, that instructions given to the jury, upon the evidence, was erroneous, exceptions thereto must be overruled.

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

[This case, though recently handed to the Reporter, was argued to the Court in 1850, before the passage of the Act, which disqualified a Judge from taking any part in an ultimate decision, by which any of his previous rulings or decisions in matter of law might be overruled or reversed.]

TROVER for a quantity of cordwood.

The plaintiff, an officer, attached, as the property of John Marks, "sixty cords of soft cordwood, more or less, now laying near the eastern end of the bridge leading over McHard's stream," as appears by his return on the writ and by the record of the clerk of the town in which the attachment was made.

It was proved *that* the wood had been cut, hauled and

piled up by John Marks before the attachment, whether done for himself or for another person, was a question in controversy; *that* it consisted of pine and spruce, and white birch and white maple, intermingled together, in proportion of about two thirds of spruce and pine, and one third of white birch and white maple; — *that* it was all cut from the same land and at the same time, and hauled intermingled without separation of one kind from the other, and that it continued so intermingled till it was taken away and sold by the defendant, after the attachment. For that taking and selling, this suit is brought.

It was contended by the defendant, that the attachment would not cover any of the birch and maple.

The Judge instructed the jury *that* the plaintiff could not recover for wood which was not attached and returned upon the writ; *that* if the spruce and pine were intermingled with the white birch and the white maple, when attached, and when the same was taken by the defendant, and the attachment was on the whole wood, without reference to the different species in fact, the jury would be authorized to consider, that the attachment was not limited to the pine and spruce.

To that instruction the defendant excepted.

Tuck and *J. A. Peters*, for the defendant, cited *Leadbetter* v. *Blethen*, 18 Maine, 327; *Hayes* v. *Small*, 22 Maine, 16; *Hathaway* v. *Larrabee*, 27 Maine, 449; *Robbins* v. *Otis*, 1 Pick. 368; 8 Johns. 253; 3 Term R. 67; 4 Term R. 314.

Hinckley, for the plaintiff.

TENNEY, J. — An attachment of personal property, like that in controversy, cannot be made by simply indorsing a return thereof upon the writ. It is the duty of the officer to be present at the place where it is situated, and take it into his possession, in order to justify him to make the return, that it has been attached. Where every thing is done to constitute and to show an attachment, and the property is of such a character, that it cannot be removed immediately, it may be

left in the place where taken and the attachment will continue effectual and valid, by filing in the clerk's office of the town, where the property was taken, a copy of the return and a certificate of other facts prescribed in the statute. R. S., c. 114, § 39.

The return of the officer is the evidence, that property referred to therein has been attached. But parol evidence is competent to show that the property attached, and that in dispute is identical. When the property is such, that the attachment is not dissolved by its being left in the custody of the debtor, there may be a question, whether the property claimed as that, which was returned or some other bearing a resemblance to it, is the subject of litigation. The attachment may be valid, although the return may not be so specific in the description of the property, as to render it certain, what was really taken by virtue of the writ. Parol evidence to settle such a question may with propriety be adduced. Two individuals may have at the same time and place, intermixed, timber and wood taken from trees of the same species. Each may know with perfect certainty, the part belonging to the one, and that belonging to the other. This property, so far as it is owned by one of the proprietors, may be attached on a writ against him, and left in his custody without vacating the attachment. Parol evidence may be the only proof in existence on the question, which was the part actually attached.

In the case at bar, it was essential to the maintenance of the action, that it should appear in some manner, that the wood taken by the defendant was the same which had been attached on the writ. If this fact was disputed, it would have been insufficient to show, that it conformed in its general appearance to that mentioned in the return. There may have been other parcels of wood at the same time and place, to which the return would be equally applicable. And parol proof of the wood which the plaintiff did take into his possession by authority of the writ would be proper.

If it was the design of the plaintiff to attach only the pine

and the spruce wood, and he had attached that and none besides, and so made his return, his claim would be restricted accordingly, notwithstanding it might be mingled with other kinds. But if he really took into possession, intending to attach it upon the writ, the whole of the four different species of the wood, and described it in his return, in such a manner that all could be embraced, no part could be excluded.

The return was of "sixty cords of soft wood more or less." Does the language of the return confine the attachment to the pine and the spruce wood? Goods may sometimes be attached and returned by a name, which will not apply to every minute portion of the article. Grain may be returned as wheat, when there may be in the parcel a few kernels of other grain. Hay may be represented in the return as English hay, notwithstanding there might be found a very inconsiderable part, which when separated, could not properly come within the general description. And if it were contended that these foreign substances were not attached, the objection would be regarded as hypercritical; and when from the nature of the article generally it could not be expected, that such small portion should be separated from the rest, it would not be improper that the return, designed to embrace the whole, should in the description make use of a term, to which the property would generally conform. In the case of the wood however, a separation would not be attended with difficulty, and when the proportions were two of pine and spruce to one of the other kinds, a return of pine and spruce would not with propriety embrace white birch and white maple.

The jury were instructed, that if the pine and the spruce were intermingled with the white birch and the white maple, as the evidence disclosed, when it was attached by the plaintiff, and when it was taken by the defendant, and the attachment was upon the whole wood in fact without reference to the different species, the jury would be authorized to consider the attachment as embracing the whole. The jury were left at liberty to regard the return as applying to all the wood, if

they were satisfied the term "soft wood" would embrace every species intermixed in the pile.

The term "soft wood" was probably intended to represent what in commerce has been applied to certain kinds of wood to distinguish it from other kinds. The precise definition of this term does not appear from the case to have been explained by evidence. The term is not one, to which the law has attached a specific meaning, and therefore the Court cannot with propriety expound it.

The case finds wood had been cut, hauled and piled upon the landing, where it was attached, by John Marks; that it consisted of the different species intermingled; that it was all cut from the same land, and at the same time, and that no separation took place before it was taken by the defendant, and it does not appear that any was made afterwards. If the value of the white birch and the white maple were embraced by the jury in their verdict, they must have found, that that portion was in fact attached with the pine and the spruce. A question involved in the controversy was, whether the property was that of John Marks, who cut and hauled the wood, it being attached on a writ against him, or that of the defendant. No reason was given for an omission to attach one species of wood more than the other; and until it can be shown to the satisfaction of the Court, that the instruction upon the facts reported was erroneous, the party against whom the verdict was returned is not to be regarded as prejudiced thereby.

Exceptions overruled.

HOWARD, J., concurred. — WELLS, J., dissented.

(*) "ASSESSORS OF PLANTATION No. 9 & 10, *in the name of said* PLANTATION" *versus* HUTCHINSON *& als.*

The Act of 1850, c. 196, § 7, authorized Assessors of plantations organized for election purposes, and comprised within the limits of a single township or of half a township, to prosecute, "in the name of the Plantation," for trespass upon the public reserved lots.

But, in case of a plantation comprised of more than a whole township of territory, that Act gave no rights of action either to the plantation, or to its Assessors.

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

Trespass for cutting and taking away standing timber.

A plantation was organized for election purposes, comprising township No. 10 and a part of township No. 9.

In the language of the writ, the assessors, [giving their individual names,] brought this action, "in the name of the plantation," for a trespass upon a public and reserved lot, situated in the township No. 10.

The Act of 1852, c. 284, as repealing the section of the Act of 1850, on which this suit is founded, and also the Act of 1853, c. 29, said to operate as a repeal of the Act of 1852, c. 284, may be referred to.

If in the opinion of the Court the action is not maintainable, a nonsuit is to be entered; otherwise the case is to stand for trial.

Peters, for the plaintiffs.

Herbert, for the defendants.

Tenney, J. — This suit was instituted for the recovery of damages for an alleged trespass by the defendants, in cutting timber on land reserved for public uses on township No. 10, by authority of statute of 1850, c. 196, § 7, which empowered the assessors of plantations organized for election purposes, comprized within the limits of a single township, or one half township, wherein lands reserved for public uses have been, or may be hereafter located, to prosecute any and all persons for trespassing thereon, "in the name of the plantation."

This provision of the statute does not authorize the assessors of plantations, in the name of the plantations, *composed of more than one township each*, to prosecute for such trespasses.

The disability of plantations to maintain such actions, in their names, after the repeal of this provision by statute of 1852, c. 284, was so far removed by statute of 1853, c. 29, that the repeal did not operate to defeat any suit or action,

which was pending at the time of the passage of the Act of 1852. But actions, which were not sustainable under the Act of 1850, § 7, cannot be maintained under the Act of 1853.

It becomes unnecessary to consider other points presented by the defence. *Plaintiffs nonsuit.*

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

(*) BROWN *versus* INHABITANTS OF ORLAND.

In each town, it is the duty of the overseers of the poor to provide for the immediate comfort and relief of all persons residing or found therein and falling into distress and needing immediate relief there, though having a lawful settlement in another place.

If such overseers, after notice that in such a case immediate relief is needed, neglect to furnish the same, any person, (not liable by law to do it,) may furnish such relief and recover for the same in an action against the town.

Such action will not be defeated by proof of knowledge by the plaintiff, that the town or any individual, bound to support the pauper, had made, at another place, suitable provision for that purpose, if the pauper, while supported by the plaintiff, was too sick to bear a removal.

An indebtment by the plaintiff to the pauper, will not preclude a recovery in such action against the town.

It is the province of the Court to give a construction to language employed in a written instrument.

To ascertain the meaning of words used orally between the parties, is within the province of the jury.

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

ASSUMPSIT.

The action is brought to recover for supplies furnished to one Shubael Brown, whose legal settlement was in Bucksport, but who had fallen into distress and needed immediate relief in Orland.

The material facts are all stated in the opinion of the Court.

The defendants offered in evidence a copy, duly certified by the town clerk of Bucksport, of a bill of sale of a yoke of oxen from Shubael Brown to the plaintiff, and proved that

the plaintiff said he had left the original with the town clerk to be recorded, and that he had been seasonably notified to produce the original.

The copy was rejected.

The defendants introduced proof that a Mr. Leach had obligated himself to support Shubael Brown, during his life-time.

The defendants' counsel requested the Court to instruct the jury that, if Leach was under obligation to support Brown, and was willing, and had the ability to take and support him, and that it was a suitable place for him, and was so considered by the overseers of Bucksport, then the plaintiff, if he had knowledge of these facts, ought not to recover in this action. This instruction the Court declined giving, but instructed the jury *that* it was the duty of the overseers of Orland to provide for the immediate comfort and relief of all persons residing or found therein, not belonging thereto, but having a lawful settlement in other towns, when they shall fall into distress and stand in need of relief, until they shall be removed to their place of settlement; *that* the defendants would be liable for all expenses necessarily incurred for the relief of a pauper by an inhabitant, who is not liable by law for his support, upon notice and request to the overseers and until provision should be made; *that* it was for them to determine whether Shubael Brown was in distress and in need of immediate relief, and whether the plaintiff, being an inhabitant of Orland, not liable for his support, gave due notice, and requested the overseers of the defendant town to make necessary provision for his support, or to remove him; *that* the application shows the extent of and limits the plaintiff's claim, and is all that the defendants should regard; *that* if Shubael Brown was in distress and in need of immediate relief, and so being in distress and in need of relief, the plaintiff notified the defendants, the defendants would be liable for his support while, and so long as, he was thus in distress and in need of relief; *that* if thus in distress and in need of relief, the defendants would be liable till provision should be made for

him; *that* if Leach was under legal obligation to support Shubael Brown, and was a fit and suitable person, and had made fitting and reasonable provision under all the circumstances, and had notified the plaintiff thereof, then, after such readiness to receive Brown and notice thereof to the plaintiff, *said Brown being in a fit condition to be removed*, the plaintiff would not be entitled to recover for the supplies furnished. To the foregoing ruling and instructions, and to the refusal of the Court to give the instructions asked for, and to the admission of the testimony objected to, and the rejection of that offered by the defendants, they excepted.

Woodman, for the defendants.

Waterhouse, for the plaintiff.

TENNEY, J. — This action was brought under R. S., c. 32, § 48, to recover for supplies furnished by the plaintiff, an inhabitant of Orland, to Shubael Brown, a pauper, having his lawful settlement in the town of Bucksport, but at the time, when the supplies were furnished, he was residing at the house of the plaintiff in the town of Orland.

Evidence was introduced by the plaintiff tending to prove, that the pauper had been at the plaintiff's house, sometime before any claim was made for compensation, for what the plaintiff had done in his support. But upon the pauper being taken sick, the plaintiff gave notice to the overseers of the poor of Orland, of the same, and of his distress and applied to them to furnish relief. At the time that this application was made, there was proof that the plaintiff said he was willing to take care of the pauper, while well, but when sick, he wanted help, and that the supplies were furnished from Sept. 1850, till the following May, and that the pauper's sickness continued about four weeks. Evidence was introduced by the defendants tending to prove, that the pauper had conveyed a farm and other property to one Leach, and had taken from him a bond for his maintenance, that Leach was a suitable man for the charge, and had provided a suitable place; and the overseers of the poor of Bucksport so considered it;

and before the pauper fell into distress, and supplies were furnished by the plaintiff, that Leach and the overseers of the poor of the town of Bucksport, notified the plaintiff of these facts; but the pauper being dissatisfied left the house of Leach and came to the house of the plaintiff, who is his brother. It further appeared, in Sept. 1850, Leach came to the plaintiff's house and offered to remove the pauper, (at which time he was sick and unable to be removed,) and notified the plaintiff, that he was ready to remove him. To show that Leach was not a suitable man to take charge of the pauper, evidence was offered by the plaintiff, though objected to, that about two years before the trial, the pauper left the plaintiff's house, saying, he was going to Leach's to put a lock on his door; he retnrned with a cut or wound on his head and face, somewhat bloody. The defendants offered a copy of a bill of sale, from the pauper to the plaintiff, of a yoke of oxen, valued at $75, dated Aug. 29, 1850, duly certified by the town clerk of Bucksport, and as duly recorded, with the records of that town, and proved, that the plaintiff had been seasonably notified to produce the original, which he failed to do, and that the plaintiff said he left the bill of sale with the town clerk of Bucksport to be recorded.

After the defendants attempted to prove, that Leach was a suitable person to take charge of the pauper, it was competent for the plaintiff to prove that it was otherwise. For such a purpose, proof of personal abuse from Leach to the pauper was pertinent. It was however necessary to prove the injury to the pauper, and that Leach was its cause. One without the other could not properly influence the minds of the jury. In order of time, proof of one might be introduced before that of the other. It was not for the Court to direct the manner in which the evidence should be marshalled. Where proof of injury was offered, it could not be known to the Court that it would not be shown, that it was caused by Leach; and the testimony was not improper at that time, but without other proof it was immaterial.

The exclusion of the copy of the bill of sale was correct.

The original, at most, would have shown the indebtedness of the plaintiff to the pauper; but under the provision of the statute invoked in support of this action, such indebtedness does not preclude him from maintaining this action; and he could not compel the pauper to set off one claim against the other, if the supplies had been furnished on his credit.

The defendants' counsel requested the Judge to instruct the jury, that if the application to the overseers was for aid while the pauper should continue sick, that the town would not be liable for any expense incurred after his recovery, without a new notice and application. The instruction was not given in the terms requested, but the Judge submitted to the jury the language and meaning of the request, and instructed them, if the application was for aid, while the pauper should continue sick, and it was so understood by the parties, that the defendants would not be further liable without a new application after his recovery. It is not the business of the Court to put a legal construction upon language, which appears to have been used verbally between parties, as in the case of a written instrument. But the jury are to find the intention of one and the other from what was said and done at the time by them, under all the circumstances of the case. *Copeland* v. *Hall*, 29 Maine, 93.

It is insisted, that the instruction given, left it to the jury to determine the understanding of the plaintiff and of the overseer, notified by him of the pauper's sickness, touching the application for relief, *whether it was to be limited to the continuance of the sickness or not;* and that this was erroneous, as the defendants' liability is not to be tested by such understanding. It is quite immaterial, what language was employed by the plaintiff in giving the notice and making the application. If he used terms, for that purpose, which were understood, as they were designed, it is sufficient. The import of the instruction in this particular is, that if the plaintiff intended to apply for relief only during the continuance of the sickness, and such was received by the overseer as the intention, the defendants were not liable for supplies furnish-

ed after the recovery. The idea was clearly expressed, was correct as a legal proposition, and it is believed would not have been misunderstood by an intelligent jury.

The Judge was also requested to instruct the jury, that if Leach was under obligation to support the pauper, was willing, and had the ability to do it, that it was a suitable place for him, and so considered by the overseers of Bucksport, and if the plaintiff had knowledge and notice of these facts, he ought not to recover.

Instead of this instruction, the jury were instructed, with other things not objected to, that if Leach was under legal obligation to support the pauper and was a fit and suitable person, and had made fitting and reasonable provision, under all the circumstances, and had notified the plaintiff thereof, then, after such readiness to receive the pauper, and notice thereof to the plaintiff, the pauper being in a fit condition to be removed, the plaintiff would not be entitled to recover for supplies furnished. It is not denied that the instructions requested, were substantially the same as those given. But it is contended, that the Judge erred, in not instructing the jury, that if a suitable place had been provided for the pauper as stated in the instruction requested, there being proof thereof, that the plaintiff having full knowledge and notice of the same, in receiving him into his own house, took upon himself the liability for his support, and had no right to call upon the town. The exceptions present no such question. The defendants' counsel made no request for the statement of such a legal proposition, and they cannot complain, that it was not given. *Exceptions overruled.*

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

(*) HAMLIN *& al. versus* OTIS.

Commissioners, appointed by Court to make partition of lands upon several petitions pending between different parties, under an agreement by all concerned, that certain extra services connected with the partition should be

rendered by them, cannot maintain suit for their services against one alone of all the parties.

Where such an agreement provided, that the commissioners should apportion among all the parties all expenses under the commission, they cannot recover for their services until such apportionment be made.

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

ASSUMPSIT.

The inhabitants of Dedham, formerly township No. 8, had petitioned for a location of public lots.

Several individuals had petitioned for partition of lands.

On some other petitions, for partition, judgments had been entered, and upon those judgments the original *petitioners* had applied for reviews.

Upon two other petitions, judgments had been entered, and the *respondents* therein had petitioned for reviews.

In these two last named cases, this defendant and others were the original petitioners, and are the respondents in the applications for review.

All the foregoing processes related to lands in Dedham. All the parties above referred to entered into a written agreement, that the Court should appoint the present plaintiffs to be commissioners thereon; with directions and power *to* locate the public lots; *to* make partitions; *to* render divers specified duties connected with such partitions; "*to* apportion the cost and charges (of executing the commission) among the several parties as they should deem just and equitable;" and *to* make report of their doings to the Court.

The plaintiffs were accordingly appointed and acted as commissioners, and returned the reports of their doings to the Court, which reports are yet pending, never having been accepted. The case does not show, that the commissioners made any apportionment of the expenses.

This is an action brought jointly by the commissioners to recover compensation for their services rendered under the commission; and is brought against one only of the parties to said agreement.

The case was submitted to the Court for default or nonsuit, as the law may require.

T. Robinson, for the plaintiffs.

J. A. Peters, for the defendants.

TENNEY, J. — By the agreement, which makes a part of the case, the plaintiffs were appointed commissioners by the several parties to divers petitions for partition, and for reviews of divers other cases of petition for partition, the petitions being pending in Court, to perform certain services, under these petitions, and by virtue of the statute applicable to the subject. The plaintiffs acted and returned the reports, which have not been accepted. This suit is for the recovery of compensation for the services rendered by them under the agreement. Whether the plaintiffs did all which was designed under the agreement, or not, does not appear. Whether so much was done by them as was sufficient to enable the Court to make a final disposition of the subjects submitted to them, cannot be known so long as the reports are not accepted. Consequently there is one uncertainty at least, of a right in the plaintiffs to maintain any action, in their names jointly, or severally, against one or all the parties to the agreement.

It is deemed quite clear, that one only of the many parties named in the petitions cannot be legally bound to pay all the costs, attending the execution of the commission, provided that every thing has been done by the commissioners, which they undertook. The parties to the agreement, did not understand that this expense could fall upon one of them entirely, so that the plaintiffs could recover of that one, and turn him over to his actions against the others for contribution. *Abbott* v. *Butman*, 2 Greenl. 361. The agreement gives the power to the commissioners to apportion the costs and charges, which should arise under the commission, among the various parties as they should deem just and equitable. Until this apportionment is made, the plaintiffs have omitted a duty which devolved upon them under the agreement. O ne party is under no liability to the plaintiffs, till they have determined the proportion which should fall upon him, in justice and equity, and given him notice thereof. The case does not

find that this has been done or attempted, and consequently he has been guilty of no neglect, and has broken no promise made by him. Other grounds of defence, it is not necessary now to consider further. *Plaintiffs nonsuit.*

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

(*) PEARSONS *versus* TINCKER.

A party who, at the request of the debtor, advances money to pay to a third person his lien claim for services, in building a vessel does not thereby acquire a right to enforce the lien in his own name for a reimbursement.

A lien claim for such services cannot be enforced in the name of an assignee.

The taking of a judgment which includes both a lien claim and also a non-lien claim, is a waiver of the lien.

The inability of an officer to deliver property which he had attached on a writ does not dispense with the rule, that in order to fix his liability, a demand of the property should be made within thirty days from the judgment by an officer holding the execution.

The fixing of such liability upon the attaching officer cannot be facilitated by any waiver which the *receipter* for the property may make of a legal demand upon *himself*.

ON FACTS AGREED.

CASE.

J. & S. Snowman built a brig by contract. The plaintiff, a ship carpenter, labored for them upon the brig. For that labor the law gave to him a lien.

One Mudgett was the master builder, who also had a similar lien of $150.

At the request of the Snowmans, the plaintiff paid Mudgett that sum, and took from Snowmans their negotiable note therefor.

To avail himself of his lien, the plaintiff brought a suit against the Snowmans and seasonably attached the brig. Their writ contained a count upon the note and also one upon an account for the plaintiffs personal labor. The defendant, Tincker, was then sheriff, and the attachment was made by his deputy, Wardwell, who immediately permitted the vessel

to go into the hands of one Woodman upon his accountable receipt for a re-delivery. The brig soon afterwards sailed upon a voyage, and has never since been within the jurisdiction of the State. Prior to the recovery of the plaintiff's judgment against the Snowmans, Wardwell admitted to the plaintiff's attorney that the vessel was beyond the limits of the State, and that he should not be able to deliver her upon the execution.

Before that judgment, (in which the plaintiff included the amount due upon Snowman's note as well as upon the account for his own personal services,) one Redman had been appointed sheriff, in room of Tincker, this defendant.

Within thirty days from the judgment, execution was issued, but it does not appear to have been placed in the hands of any officer. Before the thirty days expired, Redman, though having neither the execution or the receipt, made a demand upon Woodman for the vessel. Upon this demand, which was made by Redman at the request of Wardwell, Woodman said "he would take no advantage of Redman's not having the execution in his hands."

This action is to recover for the fault of Wardwell in not keeping the brig to be sold on the execution.

John A. Peters, for the plaintiff.

The plaintiff had a valid lien under the statute for labor upon the brig. That labor was rendered partly by himself and partly by Mudgett. The payment of Mudgett's claim immediately transferred his lien rights to the plaintiff.

The plaintiff was subrogated to *all* the rights of Mudgett. You may say that the plaintiff labored in the person of Mudgett; or at least that Mudgett was laboring for him. It is not apparent why the labor of another, procured in that way, is not entitled to as much favor as one's own labor.

But if it should be the opinion of the Court that our lien claim was defeated by being united with a non-lien claim in the same judgment, we urge that, irrespective of our lien claim, we had a demand, sued in the usual form, which was valuable to us, and which we had a right to vindicate by the

attachment and sale of the vessel. The defendant or his deputy was bound to keep her for that purpose. Not having done so, the defendant is clearly liable, unless there be some objection to the sufficiency of the demand made on the receiptor.

The attaching deputy and his principal, this defendant, were both out of office, when the judgment was recovered and the execution obtained. Ordinarily it would have been necessary to demand the brig within thirty days. Was it necessary to do so here? After thirty days the officer has a right to restore to the debtor the property attached, unless notified to retain it for sale on execution. A demand operates merely as a notification not to return it to the debtor. In this case there was no need to demand it, inasmuch as the property was not in the defendant's hands, nor in the State. A demand therefore could have had no effect, either upon the defendant or any body else. The default did not consist of a neglect to give it up when demanded on execution, but in allowing it to go back to the debtors when attached.

This point is clear upon principle, and is decided in *Phillips & al.* v. *Bridge*, 11 Mass. 242.

In *Higgins* v. *Kendrick*, 14 Maine, 87, the Court say, "if not called upon for the property within thirty days after judgment, unless the officer had put it out of his power to produce it, he might have a claim to be discharged," and they cite the case of 11 Mass. approvingly. See also *White* v. *Bagley*, 7 Pick. 288.

The officer had placed it out of his power to produce the property. In this case, however, there *was* a demand, or at any rate a valid waiver of a demand. The defendant's deputy had notice of the execution within the 30 days, and himself made answer to the demand, by requesting the new sheriff to make the demand upon the receipter. Any further demand would have been useless. His answers and directions are the best evidence that a demand was made. He knew of the execution; knew a demand would be useless; or else considered that a demand was already made on him,

and requests that we would make a demand on the receipter, instead of making it on him.

Woodman, for the defendant.

APPLETON, J. — The lien given by R. S. c. 125, § 35, is only for the benefit of the person performing labor upon or furnishing materials for a vessel. The plaintiff might have enforced this lien for his own but not for the labor of another. The note given for the labor of Mudgett by Snowman, the defendant, in the suit on which the vessel was attached, cannot be regarded as labor performed or materials furnished by the plaintiff. The claim in either case is personal, and must be enforced in the name of the party to whom it accrued. Mudgett could neither directly nor indirectly assign his lien so that it could be enforced in the name of an assignee. The plaintiff by uniting in one suit his claim for labor and the note given him by Snowman, and taking judgment for both demands, has lost the lien to which he was otherwise entitled. *Bicknell* v. *Trickey*, 34 Maine, 273.

The vessel attached in the suit against Snowman, was receipted for by Mr. Woodman, and was permitted to go to sea, without the jurisdiction of this State. When judgment was entered up in that suit and execution issued thereon, the present defendant had ceased to be sheriff, and Mr. Redman had been appointed his successor. No demand was ever made on the defendant, or on any deputy of his, within thirty days after the rendition of judgment. The plaintiff's execution against Snowman, is not shown within that time to have been placed in the hands of an officer, for the purpose of preserving the lien created by attachment. Nothing whatsoever has been done to fix the liability of the defendant. *Bicknell* v. *Hill*, 33 Maine, 297.

The fact, that the vessel was out of the jurisdiction of the State, does not relieve the plaintiff from the necessity of seasonably placing his execution in the hands of an officer, by whom a demand might be made upon the deputy sheriff, who made the attachment in the original writ. In *Phillips*

v. *Bridge*, 11 Mass. 242, the execution was duly delivered to an officer, by whom a demand was made on the attaching officer. In that case the liability of the officer, who made the attachment, is made to depend on the plaintiff's diligence "in obtaining their judgment and execution and delivering the latter to the officer, who made the attachment, or to any other deputy of the same sheriff, or to the sheriff himself." In no case has an officer been held, when the execution has remained during the thirty days, next after judgment, in the office of the clerk, or in the hands of the plaintiff or his attorney.

The fact, that Mr. Redman, the sheriff of Hancock county, called on Mr. Woodman for the vessel, in consequence of the directions of Wardwell, the defendants' deputy, to him, and that Mr. Woodman said "he should take no advantage of Redman's not having the execution in his hands," cannot affect the rights of this defendant. Mr. Woodman could make any waiver he might judge expedient for himself, but he was in no way authorized to compromise the interests of the sheriff. If the vessel had been delivered to the defendant or to his deputy, it must have been surrendered to the owners, for no officer within thirty days from judgment had the execution in his hands or could legally demand and receive the property attached. *Plaintiff nonsuit.*

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

(*) CHAMBERLAIN *versus* LAKE.

A defect in mesne process, if not apparent upon the record, can be taken advantage of only by *plea in abatement.*

Such defect, if apparent upon the record, can be taken advantage of by *motion.*

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

This action was entered at the Oct. term, 1852. At that term, the defendant's attorney appeared specially. At this (January) term, he moved, that the suit be dismissed for the

reason, that the writ was dated on the sixth day of October, 1852, and made returnable "on the fourth Tuesday of October *next.*" On inspection of the writ, it was found to be returnable on the fourth Tuesday of October *inst.*, the word *next*, having been erased. The defendant introduced the plaintiff's attorney to prove, that the writ had been altered since the service, by erasing the word "next," and by substituting the word "inst." The attorney stated, that the writ was in his handwriting, but that he had no recollection of making any alteration since the service. The defendant then introduced the officer who served the writ, who swore that it had been altered, as above stated, after its service and after its delivery to the plaintiff's attorney.

Upon this testimony, the Court refused to grant the motion, to which refusal the defendant excepted.

Wiswell, in support of the motion.

S. Waterhouse, contra.

Shepley, C. J. — By an inspection of the writ it would appear, that it was made returnable at the proper term, and that the Court had jurisdiction of the case. It was only by evidence, *dehors* the record, that the writ could be abated. When a defect is apparent of record, advantage may be taken of it by motion, and a decision upon that motion will present a question of law arising upon the sufficiency or insufficiency of the record.

When the defect is not thus apparent, advantage of any alleged defect can only be taken by plea in abatement; for the plaintiff has a right to traverse the allegations and to have an issue formed to be tried by a jury. Com. Dig. Abatement, K and H, 1; *Mitchell* v. *Starbuck*, 10 Mass. 5; *Purple* v. *Clark*, 5 Pick. 206; *Upham* v. *Bradley*, 17 Maine, 423.

In the case of *Purple* v. *Clark*, it was decided that it was only when a decision was made upon a motion to dismiss for a defect of process apparent of record, that a question of law would be presented by it.

In this case, a question, not of law but of fact, was pre-

sented by the motion, and to a decision of it exceptions will not lie. *Exceptions dismissed.*

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

(*) INHAB'TS OF TREMONT *versus* INHAB'TS OF MT. DESERT.

An arrival at the age of twenty-one years does not emancipate a child, resident in his father's family, and *non compos mentis*.

Supplies furnished by a town for the support of such child, though more than twenty-one years of age, render the father constructively a pauper.

ON FACTS AGREED.

ASSUMPSIT to recover $\frac{44}{100}$ of the expense, incurred by the plaintiffs in supporting one Robinson and his wife as paupers.

By an Act of 1848, the town of Mount Desert was divided, and one part of it was incorporated into the town of Tremont.

The Act contained a provision, that the latter town should "assume the support of such proportion of all persons supported as permanent or occasional paupers, by said town of Mount Desert, as the last valuation of that portion hereby set off, bears to the whole valuation of the town of Mt. Desert." That proportion was found to be forty-four one hundredths.

At the time of the division of the town, Robinson and wife had their settlement in Mount Desert, and resided, and had resided for many years, in that part which was set off into Tremont.

After the division of the town, they, in Feb'y, 1851, fell into distress in Tremont, and there received the supplies, to recover the forty-four one hundredths of which this suit is brought.

In support of the action, the plaintiffs contend, that at the time when the town was divided, Robinson and wife were supported, either as permanent or occasional paupers, by Mount Desert.

It was agreed, that Robinson and wife had a son, born about the year 1806. This son was *non compos mentis*, and

always resided at his father's house, until after the incorporation of Tremont. His support was furnished by his father, until about the year 1843; after which time, (his father not being of sufficient ability to support him any longer,) he became a pauper, and his support was paid for to his father, at first by Mt. Desert, and then by persons, who from time to time contracted with the town of Mt. Desert to support all or a part of the paupers of that town; and since the organization of Tremont, he has been supported by the plaintiffs and defendants jointly, his father receiving for his support about $1, per week, until Feb'y, 1851, since which time said Robinson and wife are admitted to have been paupers within the meaning and intent of R. S. c. 32.

Whether, at the division of the town, Robinson and wife were themselves paupers, in consequence of the receiving the compensation for supporting their idiot son, is the question to be decided.

Robinson, for the plaintiffs.

Stephen always made one of his father's family, and for his support Mount Desert had, for years, made some provision, by payments, as agreed, to the parent. The son, so far as appears, had no estate. Though he had long passed the years of childhood, he was still in the infancy of mind, and from the guardianship of his parents, no law, human or divine, had ever emancipated him. *Wiscasset* v. *Waldoboro'*, 3 Greenl. 388; *Upton* v. *Stockbridge*, 15 Mass. 237; *Milo* v. *Kilmarnock*, 2 Fairfield, 455.

Supplies furnished by the town for the support of the family under such circumstances, must be considered as supplies indirectly furnished to the father, thereby having the effect to constitute him a pauper. *Green* v. *Buckfield*, 3 Greenl. 136; *Hallowell* v. *Saco*, 5 Greenl. 143; *Garland* v. *Dover*, 17 Maine, 441; *Dover* v. *Garland*, 23 Maine, 410; *Clinton* v. *York*, 23 Maine, 167; *Sanford* v. *Lebanon*, 31 Maine, 124.

And this effect had been produced long before the incorporation of Tremont. The town of Mount Desert is, therefore,

bound to contribute to the support of the pauper, as claimed in this suit.

Herbert, for the defendants.

After the son became of age, there was no obligation upon his father to support him, until adjudged of sufficient ability. *Loomis* v. *Newhall*, 15 Pick. 159, 163. But the case itself finds the father had no such ability. He had provided for his children so long as he was able, and until they had all arrived at twenty-one years of age, and until this unfortunate son was thirty-six. He had supported him 14 years longer than he was bound to do; and having been impoverished by that very proceeding, is he now to be punished for it by disfranchisement?

The case of *Garland* v. *Dover*, cited by counsel, extends no farther than to say that supplies, furnished to a *minor* child, are supplies furnished to the father, and may thus constitute him a pauper. *There*, however, it did not appear that the father had no ability to support the child.

But that doctrine has never been carried further than to the cases of *minor* children. The only liability as to others, is after an adjudication, under R. S., c. 32, § 6, that the father was of sufficient ability for their support. *Mills* v. *Wyman*, 3 Pick. 207; *Loomis* v. *Newhall*, 15 Pick. 162, 163.

This suit is brought, as well for the supplies furnished to Robinson's wife as for those furnished to himself. But she was not a pauper. Supplies to the husband have never been held to constitute his wife a pauper.

Shepley, C. J. — The suit has been commenced to recover for supplies furnished to David Robinson and wife. It is agreed, that Robinson had a legal settlement in Mt. Desert before that town was divided by the Act of June 3, 1848, and that he was not a pauper at that time, unless he became so by supplies furnished to his son, who resided in his family, being *non compos mentis*, and more than twenty-one years of age. That son had been supported by the town for about five years, the father being poor, but having a little property.

It has been decided, that a *non compos* child residing in his father's family, and more than twenty-one years of age, is not emancipated, and that he will acquire a new settlement derived from the father, and by him gained after the child is of age. *Upton* v. *Northbridge*, 15 Mass. 237; *Orford* v. *Rumney*, 3 N. H. 331; *Wiscasset* v. *Waldoboro'*, 3 Greenl. 388.

The relations of a father to his minor children being in such cases continued, the obligations which arise out of them must be continued, and the father must be as liable to provide for such a child as he would be if he were under age.

Such being the relations and obligations of David Robinson to his *non compos* son, he must be regarded as a pauper by supplies furnished for the support of that son.

Defendants defaulted.

TENNEY, HATHAWAY and APPLETON, J. J., concurred.

RICE, J., dissented.

(*) PECK *versus* INHABITANTS OF ELLSWORTH.

The statute imposes upon a town no liability for any defect or want of repair in its public roads, so long as they are kept in a condition safe and convenient for travel.

The sections fifty-seven and eighty-nine of R. S., c. 25, entitled "of Ways," are in harmony. They are counterparts to each other.

If, from an omission on the part of a town to keep in repair its culvert under a public road, an injury accrue to the neighboring land from a flowing back of the water, the remedy, if any, against the town, is only at the common law.

When such back-flowing arises from an obstruction placed in the culvert *by a mere wrongdoer*, the town cannot be held liable for the injury either by statute or the common law.

ON FACTS AGREED.

CASE.

A small brook flowed through a culvert made by the defendants under one of their public highways. The culvert was of ample size to discharge all the water. One Webber erected a stone wall, upon the line of the highway, for one end

of his cellar. He left an aperture in the wall for discharging into the culvert the water of the brook, which ran through the cellar, and he placed in the cellar a timber forty feet in length, intended to constitute there one side of the brook. This timber extended through the aperture in the wall toward the entrance of the culvert. In a freshet, it was moved by the force of the water, down the stream a few feet, so that the lower end of it entered into the culvert. Rubbish and mud soon accumulated, and the water, in its course through the culvert, was thereby obstructed. This obstruction, of which the defendants had seasonable notice, forced the water of the brook back into several of the neighboring grounds, and particularly into the plaintiff's cellar, and injured his goods therein deposited. It is to recover for this injury to his goods, that he brings this action against the town.

Wiswell, for the plaintiff.

The defendants do not deny their obligation to keep the highway in repair, nor that they were bound to make a sufficient culvert. It was equally their duty to keep the culvert unobstructed and in repair. This they did not do. They allowed it to be choked up, so as to force back the water upon the plaintiff's goods. Having been seasonably notified of the obstruction without removing it, they are liable to make compensation for the injury sustained by the plaintiff. R. S. c. 25, § § 89 and 57.

It does not follow, from Webber's occupation of the adjoining land, that he was the owner of the soil to the middle of the street. The fee of land, bounded on a street, may be limited to the side lines of the street. *Bangor House* v. *Brown*, 33 Maine, 309.

But admitting that Webber, or some private individual, was the owner of the soil to the middle of the street, it is not easily seen how such ownership would give him any authority to obstruct the culvert of the defendants.

The liability of a town for defects in a highway is not discharged by their permitting individuals, though owners of the fee, to raise the premises above or below the easement

for private purposes, not consistent with the rights of the public. *Bacon* v. *Boston*, 3 Cush. 174.

Whether the obstructions were caused by Webber or not, it would make no difference; in either case the town would be liable. The party injured is not bound to look to the individual who caused the nuisance, but to the town whose duty it is to remove it. *Frost* v. *Inhab'ts of Portland*, 2 Fairf. 271, and cases cited.

It was the duty of the town, however the obstruction might have been caused, to remove it, and keep the way in repair. *Jones* v. *Percival*, 5 Pick. 485.

It is not contended that the plaintiff was in fault, or that there was any negligence on his part, whereby his property was destroyed and injured. The overflow and damage were caused solely by the stick of timber, and the rubbish which had accumulated, and which the defendants suffered to remain in their culvert.

If the brook had been left in its natural state, and no street been built by defendants, it will not be pretended that the overflow and damage would have taken place.

What right had Webber, or any other individual, to obstruct the culvert by contracting the space for the passage of the brook? If he had a right to obstruct the culvert, by making the space smaller, he would have the same right to close up the passage entirely. Should this be done, would it not be the duty of the town to cause a passage to be opened? And if by neglecting to open such passage, an individual should be damaged in his property, would not the town be liable for such damages? The authorities are numerous and uniform, I believe, in making towns responsible to individuals for all damages received by reason of such defects. The person who caused the nuisance may not be known, and if known, may not be responsible. *Snow* v. *Adams*, 1 Cush. 443; *Frost* v. *Portland*, before cited.

Drinkwater, for the defendants.

The only interest which the defendants have in the premises, through which the culvert is made, is a right of way

over the same. All other interests not inconsistent with the enjoyment of this right, are in the owner of the soil. *Robbins* v. *Borman*, 1 Pick. 122.

The defendants had no interest in the brook. They could not lawfully change its natural course or obstruct it, but were bound to allow its passage by means of a watercourse or culvert. *Perley* v. *Chandler*, 6 Mass. 454.

Webber being in possession of the land adjoining the highway, is presumed to be the possessor of the soil *ad medium filum viæ*. 2 Greenl. on Ev. § 616; *Johnson* v. *Anderson*, 18 Maine, 76.

The brook and soil beneath the highway being private property, or in other words, belonging to Webber, it follows that he had a right to the use of the water, in any manner not inconsistent with the easement of the public, either by obstructing the brook or changing its course; and it is immaterial whether he does this *within* or *without* the limits of the highway.

The case finds, that Webber did obstruct the passage of this brook, but it nowhere appears, that he, in the least, interfered with or incommoded any right of way pertaining to the public. The *road* was safe and convenient, and that is all that the law required of the town.

True, Webber may not have designedly obstructed the brook, but so far as the liability of the defendants is concerned, it can make no difference whether his acts were intentional or negligent.

Had there been no road of defendants here, Webber would of course have a right to the use of the water, being responsible for any damage he might cause to plaintiff. Now can the locating of defendants' way, give to the plaintiff any new rights? If Webber's right to the use of the water remains, after a way has been located, and if he causes damage, shall defendants suffer for his acts in doing what he had a right to do?

Again, the case nowhere finds that the obstructions and consequent damage were caused by the insufficiency of the defendants' culvert alone. To entitle the plaintiff to recover,

the case should find that it was the culvert alone and of itself which created the obstruction and the damage.

According to the statement of facts, the culvert was abundantly large and sufficient to vent all the water which would naturally run in the brook; if so, the defendants are not liable unless the culvert not only was obstructed, but itself produced or aided in producing the obstruction.

The defendants were not bound to make a wider or deeper channel for the brook than nature had done, and if it became obstructed within its limits or would have been obstructed, had no culvert been there, the defendants are not chargeable.

The defendants had no right to interfere with Webber, so long as he did not by his acts injure their highway, and they should not be made responsible for his acts which were injurious to others. Suppose Webber had dammed the brook below the road and thus caused the water to flow back through the culvert into plaintiff's cellar, will it be contended that defendants would be answerable? But what difference can it make, whether Webber chose to build his dam at the lower or upper end of the culvert?

The 89th and 57th sects. of the 25th chapter of the R. S. obviously refer to damage sustained by travelers within the limits of highways, and the remedy referred to in the 89th sect. is not given for other damages occurring out of the highway.

For consequential damages thus arising, no action lies against the town. *Green* v. *Portland*, 32 Maine, 431.

This road was all that is required by the 57th section of said chapter, "safe and convenient for travelers, and their horses, teams, carts and carriages." Consequently no indictment would lie against it, and if no indictment would lie, then no action for damage. *Merrill* v. *Hampden*, 26 Maine, 234.

Shepley, C. J. — It is contended, that the culvert, in which the free flow of the water was obstructed, occasioning it to flow into the plaintiff's cellar, constituted a part of the high-

way; and that the defendants, as the owners of that highway, are liable for the damage thus occasioned by the water, by the provisions of the statute, c. 25, § 89.

Such a construction of that section must be made, that when considered in connexion with the fifty-seventh section, they may be in harmony, as they were clearly intended to be, with each other and counterparts of the same enactment. The latter section requires the ways named to be kept in repair, so that they may be safe and convenient for travel. When the former section provides for the recovery of damage suffered "through any defect or want of repair" of the ways; the meaning is, when he shall suffer it, through any defect or want of repair, that will prevent the way from being safe and convenient for travel. It was not intended to render towns liable in that mode for damages occasioned by the construction of ways or bridges, which were in a safe and convenient condition for travel. Nor for damages occasioned by any subsequent defect or want of repair, while the ways continued to be safe and convenient for travel. Towns are made liable for injuries by the statute, only to the extent of its provisions. *Reed* v. *Belfast*, 20 Maine, 246. The present case is not embraced by those provisions.

Towns may by the common law be liable for injuries occasioned by their acts, under such circumstances as would render an individual liable, if he had performed the acts. *Thayer* v. *Boston*, 19 Pick. 511. To render towns liable in such cases, the injury must be occasioned by the fault either in acts or neglects of the corporations. *Green* v. *Portland*, 32 Maine, 431. In this case the injury does not appear to have been so occasioned. *Plaintiff nonsuit.*

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

COUNTY OF WALDO.

(*) Spring *& al. versus* Davis.

By R. S., c. 32, § 33, an execution-creditor, after discharging the debtor from imprisonment, may still, under some circumstances, have a remedy against his estate to be reimbursed for the expenses of supporting him while in prison.

The claim, however, for such reimbursement arises, under the statute, not for expenses paid directly to the jailer, but only for payments made to the town to reimburse them for supporting the debtor upon his complaint of inability to support himself.

By the rules of the common law, no person, without his own consent, can be made debtor to another.

In order to constitute the relation of creditor and debtor, it is not essential that the consent of the latter be given *expressly*. It may be established by inference.

If an imprisoned debtor, assert that he is unable to support himself in prison, and that the creditor will be obliged to pay for his board, and the creditor does in fact pay for the same, it is inferrable that the debtor assented to such payment, and promised the creditor to refund the same.

Such an inferred promise is sufficient to support an action by the creditor for the repayment.

In a case submitted to the Court, upon facts agreed, the Court has power to infer other facts, though such power be not expressly given.

On Facts agreed.

Assumpsit.

The defendant was arrested on an execution in favor of the plaintiffs, and gave a six months relief bond.

Before the expiration of the six months, he surrendered himself into the custody of the jailer, and went into close confinement on Sept. 28, 1850. He then complained of his inability to support himself in prison; and the jailer thereupon procured a magistrate to prepare a statement and affidavit of that fact, which was presented to the defendant, but he utterly refused to sign it or swear to it.

In Feb'y or March, 1851, the jailer applied to the overseers of the poor of the town of Belfast, in which the prison

was situated, to be paid by them for the defendant's board. The plaintiffs having been notified of that application, paid to the *jailer* the board, which had then already accrued, and for that which afterwards accrued while the defendant continued in prison, and until he was finally discharged by the plaintiffs' own order.

While in prison, the defendant frequently complained to the jailer of his inability to support himself, and asserted that the plaintiffs would be obliged to pay his board while there.

If the action is maintainable, the defendant is to be defaulted, and judgment is to be rendered for the amount claimed in the writ with interest from its date and cost. Otherwise, a nonsuit is to be entered, in which event the defendant moves, that cost may be allowed to him.

J. Williamson, for the plaintiffs.

We submit that the action is sustainable upon the authority of *Plummer* v. *Sherman*, 29 Maine, 555.

But, however that may be, the plaintiffs having paid for the defendant's board, when he was unable himself to pay it, have rendered for him a meritorious service, for which the law will raise a contract to pay. His frequent expressions, that the plaintiffs would be obliged to pay, were admissions, that their paying would be by his consent. They clearly recognized his assent; and from that assent a promise to pay will be implied. In *Plummer* v. *Sherman*, already cited, the Court say: — "By the reception of support from the creditor, the parties are to be viewed in the same relation as if no confinement existed. There is no difference in the liability arising from a support furnished in prison or out of it." "Generally the law implies a promise where one pays money or performs a beneficial service for another."

W. G. Crosby, for the defendant.

There is no *implied* promise on the part of a creditor to pay the board of his imprisoned debtor. His liability so to do arises from statutory provisions only; and there is but one statute by which he is made *absolutely* liable. Every town which shall "incur and *pay*" any charges for the sup-

port of a poor debtor in jail, may recover the same from the creditor. R. S., c. 32, § 32, p. 242. If the plaintiffs then claim to recover under this provision of the statute, on the ground that they were holden to the town of Belfast for the board of the defendant, our answer is, that they were *not* so holden. The town of Belfast had never "*paid*" those charges, and therefore had no claim against the plaintiffs. In paying, as they did, the plaintiffs paid what they were under no obligation to pay; it was a gratuitous act on their part.

But, although a creditor is made absolutely liable to pay for the support of his imprisoned debtor by no other law than the statute just referred to, yet by the provisions of another statute, (Act of 1842, c. 23, § 1,) he may be made liable, provided the debtor takes the preliminary steps pointed out by that statute, and if his creditor sees fit to prolong his imprisonment. By the provisions of this statute, the debtor may make his written complaint, under oath, and thereupon, and not until then, the creditor can be required to provide for his support; in default of his so doing the debtor may be discharged. That complaint was never made in the present case, and *that* law therefore imposed no liability upon the plaintiffs.

It might be suggested, that the plaintiffs were at liberty to *waive* their rights, and pay the board of their debtor, although not "required" so to do upon his written complaint and oath. A man may waive his own rights, but he cannot thereby deprive another man of *his*. The debtor had a right to elect who should be responsible for his board; himself, his creditor or the town. He had a right to pay it himself; of that right his creditors surely could not deprive him. He had a right to make his written complaint, and thereby throw the burden upon them; and of that right they could not deprive him. He had a right to do neither of these acts, to *refuse* to do either, and thereby render the town liable for his support; and of this right his creditors could not deprive him. It was his privilege to elect, and he might have good and sufficient reasons for throwing the burden upon the town. It would

have been soon enough for his creditors to pay when the town had, by *paying*, placed itself in a position to call upon them to refund. *Non sequitur* that the town *would* have paid; or that the plaintiffs would have been called upon to pay the town. The existence of a right does not necessarily imply its exercise.

Furthermore, the case finds, that the town was not notified to provide for the support of the debtor until some six months after his imprisonment began; the liability of the town did not commence until notice, and of course the liability of the creditors to the town would not commence until that time. In their anxiety to add to the weight, already laid upon the shoulders of their debtor by imprisonment, they not only assume the liability to pay for his *future* support, but actually pay for his support for the six months preceding, for which neither *they nor the town could in any event be made liable;* and this they are seeking to recover from defendant in this action.

The plaintiffs found their claim upon a statutory provision, and the defendant has a right to require of them a strict compliance with its conditions.

The plaintiffs rely upon the case of *Plummer* v. *Sherman*. That case was unlike this. In that case the debtor complained in the manner and form required by statute, and thereby, as the Court remarked, "laid the foundation for the call upon the creditor." Not so in the case at bar.

It is true, that "the law generally implies a promise where one pays money for another." But there are exceptions to this rule, one man cannot pay another's debts and thereby make him his debtor, unless there is some request, implied or express, so to do.

In this case there was no *express* request; neither did the defendant do any act from which a request can be *implied*.

Shepley, C. J. — The plaintiffs do not appear to be entitled to maintain their suit, by virtue of any statute provisions. They did not become liable to pay for the board of the de-

fendant in prison, by the provisions of the Act approved on March 17, 1842, for the defendant refused to comply with them.

Upon the application of the keeper of the prison, to the overseers of the poor of the town of Belfast, the plaintiffs were not made liable to pay for the defendant's board directly to the keeper. They were made liable to repay to the town the amount, which it might have been legally required to pay. The town was not liable to pay for the defendant's board before it had received notice.

The plaintiffs are not entitled to recover by virtue of the provisions of statute, c. 32, § 33. By the use of this language "all sums, which the creditor may have paid for the support of the debtor under imprisonment," was intended only sums so paid by virtue of the statute provisions; not all sums which the creditor might choose voluntarily to pay for that purpose.

It remains to consider, whether the plaintiffs are entitled to recover, upon a promise to be inferred from the facts agreed, by the rules of the common law. By its rules no person can make another his debtor contrary to his pleasure or without his express or implied consent. The case agreed states "while in prison the defendant frequently complained of his inability to support himself, and asserted that the plaintiffs would be obliged to pay his board while there." They would have been obliged to do so in part by the course which the defendant pursued, if the town had first paid and then called upon them for repayment. His intention to have his board paid by them is apparent. He probably supposed, that intention would be made effectual by the statute provisions. His intention and assent that they should pay his board is not the less clearly to be inferred because they were not by law compelled to do it. By insisting, that they could not by law avoid it, his expectation and consent that they should do it may justly be inferred. Having received a support from them under such circumstances, he is liable to pay for it. *Defendant defaulted.*

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

PARKHURST *versus* JACKSON.

If, at the time of paying the debt for another, a surety shall receive from a third person, a note or contract to pay him the amount, so paid as surety, that such note or contract was received in payment, is a presumption of law.

And if the surety would avoid that presumption, he must show by proof, that it was received as collateral security.

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

ASSUMPSIT, for money paid for defendant.

It appeared that plaintiff was surety for defendant, to one Johnson, in two promissory notes, which he paid.

The defence was, that he paid them for Isaac Lunt, and not for defendant.

It appeared, that while these notes were outstanding, the defendant conveyed his property to Isaac Lunt, taking a bond from him for his maintenance, and a mortgage to secure the conditions of the bond, and Lunt was also to pay all of defendant's debts.

In Nov. 1848, Lunt gave to plaintiff a quitclaim deed of the land conveyed to him by defendant, and took an obligation from the plaintiff to re-convey the same upon payment being made to him of $407,18, in yearly installments of $100.

There was also a contract by plaintiff, to convey a parcel of land to defendant on the discharge of all sums due to him.

The defendant introduced testimony, tending to show, that the debt to Johnson was paid for Lunt, and that Lunt was to give plaintiff his notes and a deed of his farm therefor, and that the arrangement was perfected, by including the sum paid to Johnson in the obligation of Nov. 1848.

The presiding Judge instructed the jury, that if they should be satisfied that the amount paid by plaintiff to Johnson was reckoned and constituted a part of the same, upon payment of which, the plaintiff by his contract was obliged to convey the farm to the defendant, that would not necessarily constitute a payment by Lunt of that amount, because the farm appeared to have been conveyed as security, taking the deed and contract together as constituting one contract; that they

would consider whether the testimony satisfied them, that the farm was conveyed in payment, or as security; and if as security, that conveyance would not prevent a recovery by the plaintiff; but if satisfied that Lunt at that time gave to the plaintiff a note or contract to pay him the amount paid to Johnson, the presumption of law was, that such note or contract was received in payment, and not as collateral security, and the plaintiff could not recover unless he should satisfy them by proof that such note or contract was not received in payment, but as collateral security only.

The verdict was returned for the plaintiff.

Knowles, for defendant, maintained that the facts in the case undisputed, constituted a valid and legal defence, and that it was immaterial whether the notes were given or not, and that such should have been the instruction of the Court, and on this point the charge was erroneous.

The instruction to consider whether the farm was conveyed in *payment* or as *security*, and, if as *security*, that conveyance would not prevent a recovery by the plaintiff, was incorrect.

This instruction was calculated to mislead the jury, for that question had no applicability to the case between these parties.

Jackson had nothing to do with that conveyance. It was between Parkhurst and Lunt, so that conveyance could neither operate as payment or as security from Jackson to Parkhurst.

W. Kelley, for plaintiff.

Rice, J. — The defendant, Jackson, had borrowed money of Johnson to the amount of about two hundred dollars, for which he gave his note, on which the plaintiff was surety. Jackson had also made an arrangement with Lunt, by which Lunt, was obligated to pay all his debts, and also a contract in which Lunt, among other things, obligated himself by bond, to support the defendant during his natural life, and as security for the fulfillment of the conditions of this bond, Lunt gave the defendant a mortgage of his farm. In this condition of things the defendant contends, that the plaintiff paid

the notes to Johnson under an agreement with Lunt, and for Lunt, whose duty it was to discharge these notes.

The case, then, presents but a single question of fact, to wit, whether the plaintiff paid the notes of Jackson to Johnson, for Lunt, or on his own account, as surety for Jackson. If they were paid for Lunt, they were thereby discharged, absolutely, as against Jackson, and this action cannot be maintained. If the payment was as surety for Jackson, then the plaintiff is entitled to recover for money paid for defendant.

The jury were instructed, that if Lunt at that time (when notes to Johnson were paid) gave the plaintiff a note or contract to pay him the amount paid to Johnson, the presumption of the law was, that such note or contract was received in payment, and not as collateral security, and plaintiff could not recover, unless he should satisfy them by proof, that such note or contract was not received in payment, but as collateral security.

The defendant contends, that this instruction was too narrow, and calculated to restrict and mislead the jury; that it was wholly immaterial whether Lunt gave the plaintiff a note or other contract to pay this money or not; that the true and only question was, whether the money was paid *for Lunt.* This may be so. But before we can determine, that the instructions were erroneous, we must look at the state of facts upon which they were based. Mary Lunt, a witness, introduced by the defendant, testifies that the arrangement between the plaintiff and Lunt was, that the plaintiff was to pay Johnson, and Lunt was to give him his notes and a deed of his place therefor. Lunt, a witness also introduced by the defendant, testified, that he did give the plaintiff his note or agreement in writing, payable in installments of one hundred dollars yearly, for a sum in which the money paid to Johnson was included. There is no suggestion of any other arrangement, or that the money was paid in any other manner. In view of the facts presented, the instructions were sufficiently

broad to cover the whole case, and as favorable to the defendant as the law would admit.

As to the motion, it is objected that the case is not certified by the Judge as containing the whole evidence, which was presented at the trial.

The law as it then stood did not require such a certificate of the presiding Judge. The case seems to have been presented to the jury by the presiding Judge with great care, and their attention was particularly called to the real point in issue between the parties. There was evidence on both sides, and it is manifest, that the jury did not place full reliance on the testimony of Lunt. Looking at the whole evidence in the case, the Court cannot say, that it clearly appears, that therein they were in error. *Exceptions and motion overruled.*

Judgment on the verdict.

TENNEY, APPLETON and HATHAWAY, J. J., concurred.

BROWN *versus* NEAL *& als.*

Of involuntary trespasses and those committed by negligence or mistake.

Chapter 115, § 22, of R. S. as amended by the Act of amendment, authorizing a tender of amends for trespasses committed by *negligence* or *mistake*, has reference to the *act of trespass*, and not the reasons or motives of the trespasser. — HATHAWAY, J., dissenting.

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

TRESPASS *quare clausum.* The question was one of costs.

The defendants, while the action was in Court, tendered the plaintiff a sum of money for his damages and costs, and brought the same into Court and deposited it with the clerk.

After verdict, the defendants contended, that if said sum was sufficient to pay the damages the plaintiff had sustained and costs, up to the time of the tender and the bringing it into Court, then, from that time, the defendants were entitled to costs, and that none after that time could be taxed for the plaintiff.

A special verdict was also found by the jury, "that the

defendants committed the acts complained of by the plaintiff in his writ and declaration, in the construction of a road which had been laid out and accepted by the town of Palermo, and by a mistake as to the legality of the proceedings of the town in laying out and accepting said road, and by the negligence of the defendants in not ascertaining the legality of the proceedings aforesaid, it being admitted by the defendants that the laying out and accepting said road was defective and void."

The presiding Judge ruled, that the trespass, found by the jury in the special verdict, was not such, as the statute authorizes a tender, or bringing money into Court, to satisfy.

The defendants excepted.

N. Abbott, for defendants.

Keen, for plaintiff.

SHEPLEY, C. J. — The rights of these parties will depend upon a construction of the provisions of the statute, c. 115, § 22, as amended by the Act of amendment. When is a trespass committed, to be regarded as "involuntary, or by negligence or mistake?" It may be involuntary or committed by mistake when a person believes that he is doing an act upon his own land, or upon the land of another by permission, when in fact he is not, but is doing it upon land on which he had no right to enter. It may be committed through negligence, when a person designs to do an act upon land, on which he might lawfully do it, and from want of proper care or attention he passes on to the land of another, claiming no right and having no intention to do so.

It cannot be involuntary or by mistake, when one knowingly enters upon the land of another, claiming right to do so. If there be neglect or mistake in such case, it must arise from want of care to ascertain whether he had any legal right to do so, or from a mistake of the law respecting it.

The neglect or mistake referred to in the statute, has refer-

ence to the act of trespass, not to the reasons or motives urging its commitment. *Exceptions overruled.*

TENNEY and HOWARD, J. J., concurred; HATHAWAY, J., did not concur, and submitted his views as follows:—

The opinion states correctly that a trespass may be involuntary or by mistake, "when a person believes he is doing an act upon the land of another by permission, when in fact he is not," &c. If a man get over the line between him and his neighbor by mistake, and cut a tree, supposing he is on his own land, or if he suppose he has permission when in fact he has not, the *act* is voluntary; the *trespass* is involuntary. He did not *intend* to do wrong. In this case the defendant made the road *supposing* he had lawful permission; he was *mistaken*. True, he neglected to inform himself that the road was not legally laid out; and so, the man who got over the line neglected to inform himself where the line was, and he who cut without permission, supposing he had one, neglected to ascertain the fact; there is a distinction in the cases, but too shadowy, I think, to make a difference.

BURRILL *versus* SAUNDERS *& als.*

If the obligee, in a poor debtor's bond, release the sureties and discharge the bond, by a writing under his hand, not under seal, a consideration may be proved, though none is mentioned in the writing.

And evidence that such obligee said the bond was *settled* or *arranged*, imports a valid transaction.

So a waiver of the conditions in such bond by the obligee, before the time appointed for a disclosure, is effectual without a consideration.

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

DEBT, on a poor debtor's bond.

The execution of the bond was proved by a witness, who testified on his cross-examination, that subsequent to the date of the bond he met the parties, and plaintiff told him the bond was settled or arranged, and that there would be no disclosure upon it. He was at the place to perform some

act as an officer, to serve a citation or something in relation to the matter.

A paper signed by plaintiff was also read, of the following tenor: —

"Whereas, John L. Saunders of Swanville, has been arrested, on an execution issued by Benjamin Noyes, Esq., on a judgment in favor of me, the subscriber, William P. Burrill of Searsport, and has given a jail bond, signed by Benjamin Batchelder as his surety, and said Saunders having cited the creditor, I, the said creditor, do agree with said Saunders that said bond, (the same not being now within my reach to deliver,) is hereby made void, said Saunders discharged from said arrest, and his said surety and said bond released and discharged from any and all liability growing out of his said suretyship, leaving said judgment still unsatisfied and in full force, in favor of said Burrill against said Saunders."

The case was then taken from the jury and submitted to the full Court, for a decision according to the law applicable to the facts.

Palmer, for plaintiff.

The plaintiff is entitled to judgment unless barred by the writing introduced in the defence. That paper is not under seal and recites no consideration, nor does the testimony show any knowledge of any consideration having been paid. The writing is therefore merely void. Chitty on Contracts, 8 Am. Ed. p. 25 and 26.

There was no mutuality in the writing as a contract and cannot bind the plaintiff for that cause. *Cook* v. *Conley*, 3 T. R. 684.

Can it avail as evidence of a waiver? The writing negatives any presumption of payment in part or in whole. It expressly stipulates that the judgment is to stand in full force.

Will it avail the surety? Nothing was done or forborne by either principal or surety as a consideration for the contract to waive the condition of the specialty.

The rule as to principal and surety which obtains in promissory notes and other simple contracts does not apply to

bonds; as regards the plaintiff both are principals. 17 Johns. 169; 9 Wend. 336; 4 Greenl. 421; 24 Maine, 534.

N. Abbott, for defendant.

A poor debtor's bond is conditional, and no absolute liability accrues upon it, until after a failure to perform some one of its conditions within the time specified; hence, before the liability becomes absolute, by non-performance, (if not after,) it is competent for the obligee, without consideration, to give up the bond, or cancel it, or waive the performance of its conditions.

But if the conditions of the bond in suit, could not have been waived, without consideration, a sufficient consideration was proved.

If there is no consideration expressed in the paper introduced in defence, there is in the testimony of the witnesses; and the consideration for an agreement in writing, may be proved *aliunde*. Staples testified that the plaintiff admitted that the bond had been settled or arranged. That admission is equivalent to an admission that the bond had been settled or arranged, by the payment of a specified consideration. If a man admits that he has sold an article, the word "sold" carries by implication every thing necessary to constitute a legal sale.

So the admission, in this case, that the bond was settled or arranged, carries by implication whatever is necessary to a valid settlement or discharge of the bond.

The plaintiff by his agreement, induced the principal defendant not to disclose, and now seeks to take advantage of the omission, which he himself occasioned, and thereby charge the surety in the bond. Such an effort is manifestly in violation of the plainest principles of moral honesty; and, if sanctioned by our courts of justice, would be a reproach to our laws.

TENNEY, J. — By a written memorandum signed by the plaintiff after he was notified by the principal obligor, of the intention of the latter to take the poor debtor's oath in fulfill-

ment of one of the conditions of the bond, and before disclosure, it was agreed that the bond, which was not within the reach of the plaintiff to be delivered up, should be made void, the debtor discharged from arrest, and the surety released and discharged from all liability growing out of said suretyship, leaving the judgment still unsatisfied and in full force against the debtor. This memorandum was not under seal and no consideration is expressly stated therein to have been received by the plaintiff; and of itself is insufficient as a release. But the agreement, notwithstanding, may be effectual to cancel the bond, if a consideration is proved *aliunde.* Statutes of 1851, c. 113. [213.]

The case finds, that after the service of the citation upon the plaintiff, he said no discloure would be made, that the bond was *settled* or *arranged.* This, unexplained, imports a valid transaction; and the written agreement does not tend to show it otherwise. Although the judgment was to remain unsatisfied, yet other considerations than that of partial payment thereof may have passed from the debtor to the creditor. The language used by the latter will authorize such an inference.

On another ground, the defence must prevail. An express waiver of the condition may be as effectual without a consideration as the performance of that condition. Such is the case of an indorser upon a promissory note or bill of exchange. He is discharged ordinarily, unless demand is made upon the maker or accepter, and notice thereof seasonably given to him. If however he waives the right of demand and notice, without consideration, he is absolutely holden.

The express agreement of the plaintiff, that the bond was void, made after he was cited by his debtor, and before the time appointed to make the disclosure, must be treated as a relinquishment of the right to hold the obligors upon the bond on account of the failure to fulfil the conditions, and the waiver became effectual, without consideration.

A different construction would make the plaintiff guilty of

a successful attempt to practice a gross moral fraud, in order to fix by law, the liability of the surety.

Plaintiff nonsuit.

NICKERSON *versus* SAUNDERS.

An agreement, made by the grantee at the time of the sale and conveyance of the land, to pay a sum additional to that expressed in the deed, is valid and binding.

Nor is its validity impaired, if the additional sum rests in contingency.

And such contract may be enforced, though made by parole.

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

ASSUMPSIT, for money had and received.

Plaintiff, in 1846, sold to the defendant a piece of land and gave him a warranty deed. The consideration named in the deed was paid.

At the time of the sale, a petition was pending before the county commissioners for an alteration or discontinuance of a road which passed by the land. Subsequently the road was discontinued and damages allowed therefor, and paid to defendant to the amount of fifty dollars.

The plaintiff proved, that at the time of the sale of said land, it was agreed by parole between them, that in case the road should be altered or discontinued and damages allowed therefor, the plaintiff should have the same as a part of the consideration of said sale. The admission of this testimony was objected to, but admitted by the Court. A verdict was returned for plaintiff and the defendant excepted.

N. Abbott, for defendant.

A. T. Palmer, for plaintiff.

TENNEY, J. — Though it has been held in this State, that a grantor in a deed of conveyance of land, is estopped to deny that he has received the consideration, which he has expressly acknowledged in the deed ; it is well settled, that it is competent for him to prove an additional consideration not expressed.

Tyler v. *Carlton*, 7 Greenl. 175, and cases cited. With as great propriety, may he receive a sum of money, in the hands of a third person, which by the agreement, made and completed, when the deed was executed and delivered, was set apart and agreed to belong to him. This tends in no degree to contradict the deed; as between the parties it becomes the property of the grantor, and if it should afterwards be paid to the grantor, the latter would hold it in trust for the former. If the additional sum rests in contingency, the principle is no less reasonable and is equally applicable.

In this case the grantor received the full sum agreed upon, as the value of the land, situated as it was at the time of the conveyance. But there was a petition pending for an alteration, or discontinuance of a road, which passed by the land; and it was agreed that whatever sum should be allowed as damages for the alteration or discontinuance of the road, the plaintiff should have as a part of the consideration. The sum was allowed, and received by the defendant. It was at the time of its receipt, the money of the plaintiff, by virtue of an agreement, which was in all respects valid; and he is entitled to recover it in the equitable action of money had and received. *Exceptions overruled.*

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

Brown *versus* Weymouth.

Chapter 564, special laws of 1839, provides, "that the property and affairs of said corporation, (Georges Canal Company) shall be managed by a board of directors," and the "treasurer is authorized to receive the assessments due from stockholders."

The treasurer has no authority to pay the debts of the company without the order of the directors.

Nor can he set off the debts due *from*, by those due *to* the company.

Thus a note, given by a debtor to a creditor of the company, by an agreement with their treasurer to cancel the indebtedment of the one by the credit of the other, the act being done without the authority or ratification of the directors, is without legal consideration and cannot be enforced.

On Facts agreed.

Assumpsit, on a promissory note for one hundred dollars.

At the time the note was given, defendant owed the "Georges Canal Company" $100, for an assessment on his shares, and the company owed the plaintiff $100. The treasurer agreed with the parties, that the defendant's debt to the company might be discharged by giving the note in suit to the plaintiff, and thereby pay to him what the company owed him. The plaintiff took it and gave a receipt to the company for that amount of his claims against them, and the treasurer gave to defendant a receipt for what he owed the company.

A nonsuit or default is to be entered, as the Court should find the law to require.

W. G. Crosby, for plaintiff.

The defence here probably is, that there is no valid consideration for the note.

Whether the treasurer of the company had authority, by virtue of his office, to pay a creditor of the company in money or choses in action belonging to them, is not a proper matter for consideration in the present case. If the treasurer has paid to the plaintiff the amount of his claim against the company, and in so doing misappropriated company funds, that is a matter with which this defendant has nothing to do. It is immaterial to him what became of his note, so far as his legal rights are concerned.

The treasurer, as the very title of his office implies, was authorized to receive payment for all debts due the company, and to give the proper acknowledgment therefor. The defendant was indebted to the company in the sum of $100; that sum he *paid* by giving the note in suit; the mode of payment was satisfactory to the treasurer, who thereupon gave him a receipt. His debt then was paid to the company and the discharge from that liability constituted a good and valuable consideration for the note.

But without this, and apart from it, there is a valuable consideration for the note. The plaintiff was a creditor of

the company, and in consideration of defendant's promise to pay him $100, discharged the company from their indebtedness to that amount. The relinquishment of his claim constituted a good consideration for the note, even if defendant reaped no benefit from it. *Chick* v. *Trevett & als.* 20 Maine, 462.

Abbott and *Howes*, for the defendant.

The note is void for want of consideration. A treasurer of a corporation has no authority, by virtue of his office, to pay, much less to compromise the liabilities of the corporation, without special authority. He has no authority, by virtue of his office, to receive any thing in payment of debts due the corporation, except money. His official duty does not extend beyond receiving money due the corporation and paying it out in obedience to votes of the corporation, or orders drawn or given by the directors.

The treasurer of the Georges Canal Company, by virtue of his office, had no right or authority to enter into the agreement and arrangement he did with the plaintiff and defendant. Hence, he acting without the scope of his authority, his acts did not bind the corporation. His receipt, given to the defendant, acknowledging the receipt of one hundred dollars, the defendant owed the company, is only *prima facie* evidence of payment, subject to explanation; and as the case finds that no money, or even other property was actually paid, but that the receipt was given under an unauthorized agreement with the treasurer and plaintiff, it is very obvious that the receipt does not discharge the defendant's liability to the corporation, unless the corporation subsequently ratified the doings of the treasurer, which fact does not appear.

The defendant's liability to the corporation, is the same now as it was before the note was given; and if he should be compelled to pay the note to plaintiff, he would have to pay his assessment to the corporation, the same as if the note had not been given.

RICE, J. — The only question in the case is, whether the treasurer had authority by virtue of his office to bind the company by the acts which he performed.

The ordinary duties of a treasurer are to receive, safely keep, and disburse under the supervision of the directors, the funds of the company.

The charter of the company, c. 564, special laws of 1839, § 10, provides "that the property and affairs of said company shall be managed by a board of directors, not less than three nor more than seven."

The treasurer by the charter was authorized to receive assessments due from stockholders, but he had no authority to pay the debts of the company unless by order of the directors, nor to cancel, compromise or off-set, claims due from the company by those due to it. Any attempt on his part thus to control the business of the company would be to assume powers specifically conferred by the charter upon the directors, and all such acts, unless ratified by the company, would be void.

The arrangements out of which the note in suit originated, are to be viewed together, as constituting one transaction, in which the treasurer very clearly exceeded his authority. There is no evidence that his acts have been ratified by the company. They are, consequently, without validity, and no legal rights could spring from them to the parties thereto. The note in suit is therefore without legal consideration.

A nonsuit is to be entered.

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

(*) NICKERSON *versus* NICKERSON.

A motion to dismiss a suit for an alleged insufficiency of service, must be made within the time prescribed by the rules of Court for pleading in abatement.

Upon the party who urges the allowance of the motion, rests the burden of proving that it was presented within the prescribed time.

If such proof be not made, the motion will be disallowed.

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

Bill in Equity.

The defendant moved that the bill be dismissed for want of a sufficient service. The motion was resisted by the plaintiff, but was sustained by the Judge who ordered that the bill be dismissed.

To that order the plaintiff excepted.

N. Abbott, for the plaintiff.

Sprague, for the defendant.

Appleton, J. — This Court are authorized by R. S. c. 96, § 9, to "establish and record all such rules and regulations as may be necessary, respecting the modes of trial and the conduct of business, not being repugnant to law, whether in relation to suits at law or in equity." These rules and regulations have the authoritative force of law and while they continue the Court can no more dispense with their requirements, than if they had been enacted by the Legislature. By rule 18, pleas in abatement must be filed within two days after the entry of an action. By § 10 of the statute before referred to, the bill or complaint in equity process may be inserted in a writ of attachment and served on the adverse party like other writs or summonses in civil actions. The bill in this case is alleged not to have been served in compliance with the third rule in equity. 18 Maine, 444. The defendant moved its dismissal for want of service, but it does not appear when his motion was filed.

If the defendant would avail himself of any defect in the service, he must show affirmatively that he is entitled, according to the rules of Court, to take advantage of the defect for which he seeks to abate the process of the plaintiff. If it be by plea in abatement, it must appear that it was seasonably filed. Nothing must be left to presumption. If it be uncertain when it was filed, it may be treated as a nullity or the plaintiff may demur to it.

Instead of resorting to a plea, the defendant in this case

has filed a motion, but the form in which he attempts to accomplish his purpose cannot increase or enlarge his rights. The motion must be filed within the time allowed for pleas in abatement, else it must be overruled. To decide otherwise would be to repeal the rule. *Trafton* v. *Rogers*, 13 Maine, 315; *Maine Bank* v. *Harvey*, 21 Maine, 38. As it does not appear when the motion was filed, from any proof in the case, it may have been long after the time, in which, by the rules of Court, it should have been done.

Exceptions sustained.

Motion overruled.

SHEPLEY, C. J., and TENNEY and HATHAWAY, J. J., concurred.

(*) HATCH *& al. versus* NORRIS *& al.*

It is not a joint relief bond, given by all the execution-debtors, as principals, but it is a separate bond given by each, which, under the statute, entitles to a release for arrest.

Such joint bond, however, though not a statute bond, is valid at the common law.

Each principal obligor, in a joint bond, is a surety for his co-obligor.

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

DEBT on a joint relief-bond, given by two joint debtors as principals, with sureties to procure their release from arrest on execution. One of the principals and one of the sureties were defaulted. The other principal and the other surety defended. They introduced a certificate of two justices of the peace and quorum, that one of the principals had been discharged upon taking the poor debtors' oath. They also introduced evidence, though objected to, showing that the other principal was without property.

The case was submitted to the Court, with power to draw inferences from the admissible testimony.

Williamson and *Palmer*, for the plaintiffs.

The bond being in form usually taken under the statute

and in all things according thereto, is a statute bond, if it is competent to join the two debtors in one bond.

Does the joining them divest the bond of any essential qualities or add to it any stipulation not authorized by the statute?

The Court is to draw all necessary legal inferences from such of the testimony as is legally admissible in the case.

The principal debtors were *the* party defendant in the execution, and there can be no pretence, that the arrests were illegal. It was no part of the officer's duty to furnish a bond for them to sign, neither is it the fact or the presumption, that he did so. The bond was tendered by them to the officer, and upon it they claimed to be discharged, and the form, whether joint or several, was a matter of their own choosing. It entitled them to be discharged from the custody of the officer. To have detained them after would have been illegal on the part of the officer; it would have been a duress. Having chosen this mode they are estopped to complain. *Whitefield* v. *Longfellow*, 13 Maine, 146.

A strong analogy to this case will be found in *Dwinel* v. *Soper*, 32 Maine, 119.

If the bond by statute is a joint and several one, then at least, the sureties are holden for the principals severally or jointly. The principals might join or sever in their efforts to obtain the benefit of the relief law. At any rate the execution creditors could not hinder them.

The true rule is to consider both debtors as one party, and so they are in the bond; the condition being, that *they* both, not one of them alone, shall perform, though one might discharge himself in one mode, and the other in another.

C. P. Brown, for the defendants.

Appleton, J. — It appears that Norris and Crosby, judgment debtors in an execution, in favor of the plaintiffs, having been arrested thereon, gave a joint bond, conditioned that if they should in six months from its date cite the creditors before two justices of the peace and quorum, and submit themselves

to examination, and take the oath prescribed in the twenty-eighth section of c. 148, of R. S., or pay the debt, interest, cost and fees arising in said execution, or deliver themselves into the custody of the keeper of the jail in Belfast, and go into close confinement within said six months, then their obligation was to be void, otherwise to remain in full force. It is in proof that Crosby, one of the principals in this bond, so far as related to himself, performed its conditions and obtained a certificate of his discharge as a poor debtor.

The two judgment debtors are described in the bond as principals, and such is their relations to their creditors and sureties; but as between themselves, each is principal for the performance of the condition, so far as relates to himself and surety for his co-principal obligor, that he will duly perform the conditions to be by him performed. This is the law in all cases between principals. As between them, each is principal for his share, and as to the rest, a surety for his associates. *Goodall* v. *Wentworth*, 20 Maine, 322; *Craft* v. *Mott*, 4 Coms. 603. The performance by Crosby of his part of the conditions of the bond cannot relieve him from his obligations as surety for Norris.

The bond in this case having been signed by more than one debtor, cannot be regarded as a statute bond. By R. S., c. 148, § 20, the debtor arrested or imprisoned on execution, to procure his release, shall give a bond conditioned "that *he* will, within six months thereafter cite the creditor before two justices of the peace and of the quorum, and submit *himself* to examination, and take the oath prescribed in the twenty-eighth section of this chapter, or pay the debt, interest, costs and fees arising in said execution, or deliver *himself* into the custody of the keeper of the jail into which *he* is liable to be committed under said execution." All the acts to be done and performed in the condition are personal acts, to be done and performed alone, and not jointly. Every stipulation in the condition looks to a performance by the obligor alone. The various provisions of the statute have reference to a several bond and a several performance. The arrest of each

debtor is a separate and distinct act of the officer. The citation to the creditor, the selection of the justices, are the individual acts of the debtor thus citing and selecting. The examination of the debtor, and the oath to be administered, and the certificate of discharge which may be given by the magistrates, are all several in their nature, as well as by the language of the statute. If there be fraudulent concealment, the person so fraudulently concealing is to be deemed guilty, and to be punished for his own acts. From the arrest to the final conclusion by discharge or imprisonment, every provision of the Act specially applies to several acts of each debtor and to several bonds to enforce their performance, and to several disclosures and certificates by which each is to be relieved from the penalties attached to the non-performance of the conditions therein specified.

It is the duty of the debtor to furnish his bond. The principal defendants having been arrested, have procured their discharge in consequence of giving the bond in suit. They have not performed its conditions. There is no evidence that it was not voluntarily given. It is therefore good at common law. From the proof the plaintiff is entitled only to nominal damages. Judgment is to be rendered for the penalty of the bond and full costs, and execution to issue for one cent, as damages. *Howard* v. *Brown*, 21 Maine, 385; *Wallace* v. *Carlisle*, 20 Maine, 374. *Defendants defaulted.*

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

COUNTY OF PENOBSCOT.

(*) Huckins *versus* Cushing.

By the charter of the Penobscot Boom Corporation, a toll or boomage is allowed upon logs catched and rafted in the boom.

To secure such toll, there is given to the corporation a lien on the logs.

This lien is dissolved by a voluntary and unconditional delivery of the logs to the owner.

Logs, after being so delivered, were sold by the owner, to whom, among other compensations, the vendee gave a note to pay to *him* the amount of the boomage; — In a suit by the vendor upon the note, — *Held*, that a payment of the boomage made by the vendee to the *boom corporation*, without request of the vendor, was a voluntary act and constituted no defence.

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

Assumpsit.

The plaintiff had 172 mill-logs in the Penobscot boom. They were entered on the books of the boom corporation as the property of the plaintiff, and the boomage was charged to him. They were subject to the lien for boomage, $26,13.

On the 15th of May, 1851, the treasurer of the corporation, by his written order, directed the boom agent to deliver them to the plaintiff, and the plaintiff, by written order, directed the agent to deliver them to M. Woodman, which was accordingly done, Woodman being the man commonly employed to receive logs at the boom and to run them to a place where they could be secured below. Woodman's charge was $8,16. At that time there were large charges by the boom corporation against the plaintiff for booming other logs, and the plaintiff had unsettled counter claims. The plaintiff sold the 172 logs to the defendant and, among other compensations for them, received the following paper, signed by the defendant: —

"June 17, 1851. For value received, I promise to pay John Huckins the amount of the Penobscot Boom Company's charge for boomage on the logs, [described,] and also the

amount of Woodman's charge for dropping away said logs from the boom."

It is upon this promise that this suit is brought.

On Sept. 20, 1851, the bill for the boomage was presented by the boom treasurer to the defendant for payment, and it was paid by him.

The case was submittted to the Court with jury powers as to inferences of fact.

Rowe & Bartlett, for the plaintiff.

A. W. Paine, for the defendant.

Does the payment made by the defendant to the boom corporation, for the boomage, discharge him from paying again the same amount for the same thing? The intent of the parties obviously was, that the defendant should pay the boomage. This he has done. On the best view for the plaintiff, he owed for the boomage to the corporation, and the defendant owed him for the same. On this view there is a presumption of promise from the defendant to the corporation, on which a suit was maintainable. *Dearborn* v. *Parks*, 5 Greenl. 81.

Further, it was necessary for the defendant to make the payment in order to protect his logs from the boomage lien.

HATHAWAY, J. — The plaintiff had one hundred and seventy-two logs in the Penobscot boom, and on the fifteenth day of May, 1851, John Winn, treasurer of the boom company, gave him an order for them, and the plaintiff thereupon gave an order for their delivery to Woodman, "who made it his business to drop away logs from the boom."

It appears by the testimony of Winn, that the logs were delivered before he got his pay for the boomage, and that one hundred and forty-four of them were delivered prior to June 17, 1851, on which day the defendant gave the plaintiff his obligation for value received, promising to pay *him* the company's charge for boomage on the logs, and Woodman's charge for dropping them away from the boom, upon which obligation this action was brought.

There seems to be no controversy as to the amount of the boomage and Woodman's charge, which are specified in a bill of particulars annexed to the writ; but the defendant resists the claim for boomage upon the ground that he paid it to the boom company, 20th September, 1851, and Mr. Winn, the treasurer, testifies that he did call and pay it to him on that day.

If the boom company had a lien on the logs for boomage, the order given to the plaintiff by Winn, the treasurer, (which was unconditional,) and the voluntary delivery of the logs had dissolved it.

The plaintiff did not request the defendant to pay the boomage to the company, nor does the case find that he ever promised to pay it to them as a condition of getting the logs.

The defendant could not thus, by his unauthorized interference with the unsettled business of the plaintiff with the boom company, change their relations to each other as debtor and creditor, without the plaintiff's consent.

The payment of the boomage to Winn, was entirely voluntary on the part of the defendant, and cannot legally avail him in defence of the plaintiff's claim.

The plaintiff is entitled to recover the charge for boomage and Woodman's bill, amounting in the whole to thirty-four dollars and twenty-nine cents, with interest from April 4, 1852, when a demand was made by Mr. Bartlett, as testified by him, and a default must be entered.

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

(*) HANSON, on *Habeas Corpus*.

The penalty for illegally selling spirituous liquor may be recovered by action of debt or by complaint.

When recovered by action before a justice of the peace, the judgment is to be enforced by execution in the common form.

In such a case, the issuing a mittimus by the justice for a commitment to the jail is unauthorized.

From an imprisonment upon such a mittimus, the prisoner may obtain a discharge by writ of *habeas corpus*.

On Habeas Corpus.

The inhabitants of the town of Dexter instituted an action of debt, against Hanson, before a justice of the peace, to recover the penalty for having sold spirituous liquor in violation of the statute. In that suit they recovered a judgment for $10, forfeiture, and $8,62, costs.

He claimed an appeal, and was thereupon ordered by the justice to recognize, and also to give bond, with sureties, as prescribed in the statute of 1851, c. 211, entitled an Act for the suppression of drinking houses and tippling shops. He however failed to recognize and also failed to give the bond. After twenty-four hours from the rendition of the judgment, the justice issued a mittimus, commanding the officer to commit Hanson to the public jail, and also commanding the keeper of the jail to detain him until he should pay said penalty and costs or be otherwise discharged in due course of law.

Upon that mittimus, Hanson was committed to the jail. He there applied for a writ of *habeas corpus*. The writ was granted, and was addressed to the jailer, and Hanson was thereupon brought into Court. Whether he was entitled to be discharged, was the question submitted for decision.

Knowles, for the petitioner.

The suit against Hanson was merely a civil action. The judgment recovered against him was to be enforced, not by a mittimus, but by an execution in common form. Upon such an execution he might have paid the money and been discharged without being carried by an officer through several towns and committed to close prison. By the mittimus, which unconditionally and peremptorily required a commitment, his rights were invaded, and the imprisonment was illegal, and he is therefore entitled to be discharged.

J. Crosby, contra.

The selling of prohibited liquor is called in the statute an "offence." The penalty may be by action or complaint. In each form of proceeding, the penalty is the same. Pun-

ishment should be the consequence of the offence. It is absurd to suppose that any difference in the punishment was intended, whether the proceeding was by action or by complaint. The word conviction, in the 6th section of the Act, applies as well in cases by action as by complaint. An execution could not have enforced the punishment. The debtor might have given the poor debtor's relief bond, and thus have defeated the salutary purposes of the statute.

Appleton, J. — The fourth section of statute of 1851, c. 211, entitled "an Act for the suppression of drinking houses and tippling shops," imposes a forfeiture of ten dollars and cost for each and every sale of spirituous and intoxicating or mixed liquors, a part of which are intoxicating, made contrary to its provisions. It is provided by § 5, that "any forfeiture or penalty arising under the above section may be recovered by an action of debt, or by complaint before any justice of the peace or judge of the municipal court, in the county where the offence was committed. The prosecutor has his election, which of these remedies he will pursue. The defendants in this case brought an action of debt against the plaintiff for a violation of the Act referred to, and successfully prosecuted the same to judgment, from which the plaintiff appealed, but failing to furnish the security required by statute for the prosecution of his appeal, the magistrate before whom the cause was heard issued his mittimus upon which he was committed, whereupon this writ of *habeas corpus* was sued out at his instance, by virtue of which he was released from his imprisonment.

The question raised is, whether a magistrate is authorized to issue a mittimus in an action of debt brought to recover a penalty under the Act of 1851, c. 211. The forms of process are established by the statute of 1821, c. 63. By § 3 of that chapter, the forms of writs and process to be used in civil cases triable before a justice of the peace, and applicable to the different forms of action, were given. By R. S., c. 114, § 1, the sixty-third chapter of the statutes of 1821 remains unrepealed. The magistrate is bound to conform to

the forms then established until they are changed by an Act of the Legislature or altered by the Supreme Court under the provisions of that section. The respondents elected to proceed by action of debt. Neither the Legislature nor the Supreme Court have made any alterations in the forms of writs or other process. If, as is insisted by counsel, it was the design of the Legislature that judgments in actions of debt should be enforced by a mittimus, they have made no provisions by which such intention can be carried into effect. The old mode of enforcing judgments remains unaltered. The mittimus is applicable only to criminal procedure and was improvidently issued by the magistrate. The writ of *habeas corpus* was properly granted, and the plaintiff is to be discharged.

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

(*) INHAB'TS OF BREWER *versus* INHAB'TS OF LINNAEUS.

A domicile, being once fixed, is deemed to continue until proved to have been actually changed.

The residence of the wife, (her husband being more than twenty-one years of age,) is *prima facie* evidence of his domicile, and in the absence of controlling proof is conclusive.

Absences for longer or shorter periods, for temporary purposes, do not change the domicile.

Thus an enlistment and service for five years in the army, do not necessarily show a change of domicile.

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

ASSUMPSIT for the support of two poor persons, whose settlement was alleged to be in the defendant town, and the question to be settled related wholly to the place of their settlement.

Testimony upon the stand and also several depositions were introduced.

The case was submitted to the Court upon the testimony.

Fessenden, for the plaintiffs.

Cutting and *Palmer*, for the defendants.

HATHAWAY, J. — Assumpsit for the support of two paupers, the wife and child of Calvin G. Cookson.

By the report of the case and the depositions therein referred to, it appears that Calvin was born in Belmont, Sept. 19, 1821; that about two years after his birth, his father abandoned his family and never cared for them since; that Calvin was provided for by his mother; that she lived at sundry places, among her relatives, till June, 1836, when she went to Linnaeus and he went with her, and she continued to reside there until April, 1848; Calvin resided there with her, excepting one year, till April 15, 1839, when he enlisted as a soldier for five years, and entered the United States' service at the barracks in Houlton. He was married September 21, 1841, and his wife went to Linnaeus and resided there with her husband's mother and brother, on a farm which Calvin and his brother had bargained for and had a bond of in 1840; and she continued to reside there constantly, from the time of their marriage till they came to Brewer, excepting that she was with him at Houlton, in one year, from September to May. When he enlisted he left his citizen's clothes at Linnaeus and kept them there, and left two heifers there on his place. He always considered Linnaeus as his home and had no intention of leaving it; and while at Houlton, where he was stationed till Sept. 12, 1843, he got leave of absence as often as once a month, and went to Linnaeus as to his home, and while there used to work upon his land; felled trees and hired them felled. His company was ordered to Rhode Island Sept. 12, 1843, and he went with them; got a furlough Jan. 15, 1844, and returned to Linnaeus, where he continued to reside till he removed to Brewer, April 1, 1848.

The single question presented by the facts in this case is, whether or not Calvin G. Cookson gained a settlement in Linnaeus, before he removed to Brewer with his family. By the sixth mode of gaining a settlement, as provided by statute, c. 32, § 1, a residence of five years together of a person twenty-

one years of age is required. The "residence" required by the statute means the same thing as "having his home" there, *Kennebunk-port* v. *Buxton*, 26 Maine, 67–8, and when the home is once fixed it continues till it is actually changed. Absences, of longer or shorter duration, often occur, and the domicile remains unchanged. Domicile depends on residence and intention. *Wayne* v. *Greene*, 21 Maine, 357. Calvin testified as to his intentions, and his conduct seems to have concurred with his testimony. His situation and conduct are facts in the case. He had no actual home before he enlisted but at Linnaeus. So far as a minor could do it, he manifested the intention of making that his home, by contracting for a farm in 1840. He *continued* to manifest that intention while at Houlton, by working and hiring the labor of others upon it. When he married, his wife lived upon it, and when discharged from the army he returned to it. His wife lived in Linnaeus more than six years after her marriage, and more than five years after her husband was twenty-one years old. The residence of the wife is *prima facie* evidence of the domicile of the husband. *Greene* v. *Windham*, 13 Maine, 225. In the absence of any proof to the contrary, it is conclusive.

The case at bar presents no testimony to control or impair the full effect of the residence of the wife, as evidence of her husband's home. His being in the army, and her being with him at the barracks a few months, had no more effect to prevent his gaining a settlement than any other temporary absence at service would have had. Opinion of the Judges, 1 Metc. 580.

The conclusion is, that Calvin G. Cookson had a residence in Linnaeus, within the meaning of the statute, for five years together, after he was twenty-one years of age, and gained a settlement there, and that his wife and child had a settlement there derived from him, and, as agreed by the parties, a default must be entered.

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

(*) Dennison *versus* Mason *& al.*

On an appeal by a respondent from a judgment on process of forcible entry and detainer, the statute requires him to recognize to pay such costs as may be adjudged against him, and to pay such reasonable intervening rent, as the justice shall adjudge, in case his judgment shall not be reversed on the appeal.

A recognizance, given upon such an appeal, is void, if it be conditioned for any performance or payment not prescribed by the statute.

Thus it is void, if it require the appellant to prosecute his appeal with effect; — or to pay all costs that may arise in the suit after the appeal; — or to pay the intervening rent.

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

Debt on Recognizance.

The plaintiff, in a process of forcible entry and detainer, recovered a judgment in the Police Court of Bangor, against Joseph C. Mason, one of the defendants, for possession of the land and for costs $3,38. From that judgment Mason appealed to the District Court, and jointly with Leighton, the other defendant, entered into a recognizance to the plaintiff, the condition of which was, that "he shall and do prosecute with effect an appeal by him made [from the judgment, which is recited,] at the next District Court to be holden, &c., and shall pay all costs that may arise in this suit after the appeal, and pay the intervening rent, adjudged to be one hundred and twenty-five dollars per year.

Upon that recognizance, this suit is brought.

The case was submitted to the Court.

J. Godfrey, for the plaintiff.

Cutting, for the defendants.

Appleton, J. — The defendant Mason, having been brought before the Police Judge of the City of Bangor, on a complaint made by the plaintiff under the statute of forcible entry and detainer, was by him adjudged guilty of the offence set forth in the complaint, from which judgment he appealed, and entered into a recognizance to the plaintiff, among other things, to "prosecute *with effect* an appeal by him

made, from a judgment given against him in the Police Court for the City of Bangor, on Monday, &c., for the possession of lands and tenements of the said Mary C. Dennison, unlawfully held and detained by the said Mason," &c., to "pay all costs that may arise in this suit after the appeal, and to pay the intervening rent of said premises, adjudged to be one hundred and twenty-five dollars per year."

By the latter clause of R. S., c. 128, § 4, "either party may appeal from the judgment of the justice, upon issue joined, to the next District Court, recognizing as aforesaid, to pay such *costs as may be adjudged against him;* and if the defendant appeal, he shall recognize to pay such reasonable intervening rent for the premises as such *justice shall adjudge, in case his judgment shall not be reversed on* such appeal."

The provisions of the recognizance, as taken by the magistrate, are entirely at variance with those required by the statute. That does not authorize it to be taken to prosecute the appeal "with effect." *Owen* v. *Daniels*, 21 Maine, 182.

By the statute recognizance the liability of the principal is, to pay "such costs as may be adjudged against him." By the one under consideration, he is to pay "all costs that may arise in this suit after the appeal." But *all costs* that may arise in the suit after the appeal may not be adjudged against him, nor should he be required to pay them.

The obligation to pay such reasonable intervening rent as such justice shall adjudge accrues by the statute only "*in case his judgment shall not be reversed on such appeal.*" But in this recognizance the words "in case his judgment shall not be reversed" are omitted. Now to pay the reasonable intervening rent, and to pay the reasonable intervening rent in case the judgment of the magistrate appealed from shall not be reversed, are very different obligations. The one is an absolute undertaking, the other a conditional one. In the latter case, the liability of the party recognizing may never attach, while in the former it arises at once upon his entering into the recognizance. The magistrate had no legal authority to require of a party claiming an appeal, and as a preliminary to

granting it, a recognizance upon conditions so materially different from those which the statute prescribes, and so opposed to the just rights of the defendant.

If this recognizance should be sustained, it is difficult to perceive any conditions which a magistrate may not impose.

Plaintiff nonsuit.

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

(*) MARTHA BARKER *versus* PRENTISS M. BLAKE.

An action of dower may be maintained upon a demand made of the tenant's grantor, such grantor being, at the time of the demand, tenant of the freehold.

A sale of land for the non-payment of a tax upon an inhabitant, in which he was assssed not only for his own land but for land which he never owned, or occupied, or claimed is merely void.

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

DOWER.

In 1832, Richard Treat took a conveyance of lot No. 10, Summer street, Bangor.

In April, 1832, he conveyed to Baldwin, who owned the adjoining lot, "four feet off south side of No. 10."

A divisional fence was put upon the line, by which the four feet were fenced off to Baldwin, who has ever since occupied the same as a part of his enclosure.

In Sept. 1832, Treat conveyed to Taylor the lot No. 10, "excepting four feet off south side."

In 1836, the title of Taylor, through mesne conveyances, became the property of John Barker, jr., the demandant's husband, who resided thereon from that time till his death in 1851.

In that year, after his death, a demand of dower was made by the demandant upon *S. H. Blake.* The demand was in writing, and described the land, in which dower was demanded, to be "all that part of lot No. 10, on Summer street,

except a strip of four feet in width off the southerly side thereof."

The tenant, as a defence to the suit, set up a title in himself under two deeds from the collector of taxes, upon sales made by him for non-payment of the taxes of 1840 and 1841. The tax of both years was on an inventory as follows: —

"John Barker, jr., house and lot No. 10, Summer street."

The taxes were upon Barker as a resident. Assessment books showed, that the same description of the property had been adopted by the assessors for all the years since 1836.

The said sales by the collector were made in 1842, to Reuben Ordway, of *the house and lot No.* 10, *Summer street.*

Ordway, in 1843, deeded to S. H. Blake lot No. 10, Summer street, excepting four feet off south side.

In 1852, after the demand of dower had been made on S. H. Blake, and before the commencement of this suit, he conveyed to the tenant, lot No. 10, Summer street, excepting four feet off the south side.

The case was submitted to the Court for a decision according to the legal rights of the parties.

A. W. Paine, for the demandant.

The assessments against Barker were for the *whole* of lot No. 10. Upon those assessments, the land was sold, and it is under those sales, that the tenant claims title. But Barker never owned or occupied any more than a *part* of the lot. Four feet of it had long been owned and occupied by Baldwin. It is only of the residue, that dower was demanded or is now sought.

No argument can be necessary to show, that a sale is void, when made upon an assessment against an inhabitant for land which he never owned or occupied or claimed.

Blake, for the tenant.

The land owned and occupied by Barker had acquired the name of lot No. 10. This had long been its designation. By this description it was taxed from the year 1836. By this name it was well and commonly known and recognized.

Barker, by paying so many years' assessments, made upon it by that name, recognized the name.

And who shall object to the name, given by a man to his own land; whether he chooses to call it Elmwood or Ashland or Monticello; Black lot or White lot; lot A. or lot W., lot No. 10 or No. 50? And it can make no difference by what means his lot had become so small or so large.

The land was clearly described by a generally understood, and well recognized designation. It was enclosed by itself and no misapprehension could arise.

No plan of lots was shown, or even referred to in any of the title deeds, used at the trial. If some former proprietor had given to the land, including the four feet strip, the name of No. 10; surely a subsequent owner might give the same name or any other name to a lot reduced by four feet. He might have cut his land into smaller divisions, giving to each of them some numerical designation.

I submit then, that the description in the list of assessments was well enough.

HATHAWAY, J.—The demandant, the widow of John Barker, jr., sues for dower in a lot of land, being part of lot number ten, Summer street, Bangor, and the buildings thereon. The demand before the commencement of the action was duly proved. The case finds that the plaintiff's husband had title to the premises during her coverture, by deed from John Barker, dated March 11, 1836, which conveyed "lot number ten, Summer street, excepting four feet off of the south side;" in which land the demandant claims dower in this suit.

The defendant resists, under claim of paramount title, by collector's deeds, on sale of the land for taxes. The taxes, for which the land was sold, were assessed "on John Barker, jr., on house and lot number ten, Summer street," and by this description the land was sold and conveyed by the collector.

The case finds that E. P. Baldwin became the owner of a part of lot number ten, April 21, 1832, of which he took possession, which he has ever since that time retained. The

plaintiff's husband, therefore, never owned or possessed the whole of lot number ten, and it is quite clear, that the assessors had no right to assess to him, his neighbor's land, jointly, with that which he owned in severalty, and such assessments and the collector's sales and deeds in pursuance of them were utterly void, as affecting the rights of the plaintiff.

Judgment for the demandant; damages to be assessed by R. S. Prescott, as agreed by the parties.

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

(*) ALLEN *versus* BICKNELL.

A mortgagee of land, even before condition broken, may take the same into possession, if he have made no stipulation to the contrary.

Such entry may be made without consent of the mortgager; and even if made *manu forti*, it gives to the mortgager no legal cause of complaint.

If the mortgager have personal property upon the land, the mortgagee, in order to perfect his entry, may, upon the mortgager's neglect after reasonable notice, remove the same, provided the removal be made in a careful manner and to a safe and convenient place.

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

TROVER, for goods removed from a store occupied by the plaintiff.

Allen had goods, and traded in a store which he had hired of Bicknell. On August 13, 1849, the parties agreed in writing that Allen should purchase the store and its lot, by giving Bicknell fifty dollars more than the same should be appraised by referees, agreed upon. In the same agreement it was stipulated that Bicknell should have the store for fifty dollars, and should remove it from the land so soon as Allen should have erected a new one. Several other matters were submitted to the referees, who, on August 15, 1849, awarded, among other things, that the value of the lot with the store was $425. The same was accordingly conveyed to Allen, who on a settlement of all matters according to the award, gave his note for $402, the balance due to Bicknell, and

mortgaged back the land to secure the note. In that settlement the fifty dollars were allowed to Allen, as the price of the store, which Bicknell was afterwards to remove.

Allen's new store was completed and occupied by him a few days prior to April 13, 1850. But he had not taken all his goods from the old store. Bicknell was then desirous to take the old store away, and notified Allen to remove the goods from it. This not having been done, Bicknell, on said April 13, 1850, removed the goods a short distance to a building of his own, notifying Allen that he could receive them there at any time. No part of the mortgage debt of $402 had then become payable. It is for this removal of the goods, that this action of trover was brought.

Some days after that removal, Bicknell undertook to deliver the goods to the plaintiff's attorney; but after a part of them had been arranged for delivery, the plaintiff replevied that part, and no delivery was effected.

The case was submitted to the Court for a nonsuit or default according to the rights of the parties.

J. S. Peters, for the plaintiff.

A. W. Paine, for the defendant.

Appleton, J. — It appears from the evidence, that on the 13th August, 1849, the plaintiff in this action agreed to purchase of the defendant a lot of land, on which was a store he then occupied as his tenant. By the same agreement the value of the store and lot, and other matters in dispute, were submitted to three referees, who, on the next day, made their award, in which the lot and store were appraised at four hundred and twenty-five dollars. In the agreement of purchase, it was stipulated that the defendant was to "have the store, and move it off," and the plaintiff was to be allowed towards his purchase fifty dollars for it. A deed bearing even date with the agreement before referred to, and conveying the lot without any reservation to the plaintiff, was made and subsequently acknowledged, but it appeared by a comparison of the consideration of the deed, with the agreement to purchase,

and the award of the referees, that the agreed price of the store had been deducted from the appraised value of the lot and store. A mortgage was at the same time executed to secure to the defendant the balance thus found due. The plaintiff, therefore, if he should hold the store, will do so contrary to the written agreement of the parties, and not merely without having paid any consideration therefor, but when its value has been deducted from the price of the lot conveyed. Whether under such circumstances the equitable rights of the defendant to the store would not be protected by a Court of Chancery, it is not necessary now to consider, as the *legal* rights of the parties only, are before us for adjudication.

The defendant, holding a mortgage which was in force, though no part of the sum thereby secured was due, entered the store which the plaintiff had been occupying, gave him reasonable notice to remove his goods, and, upon his refusal, removed them in a safe and prudent manner to a store near by, from whence, it would seem from the evidence, that the plaintiff might at any time have taken them. The law is well settled that the mortgagee may at any time enter upon the mortgaged premises, before breach of the condition, and without notice, and dispossess the mortgager, unless there be some stipulation to the contrary in the mortgage. *Blaney* v. *Bearce*, 2 Greenl. 132; *Wilder* v. *Houghton*, 1 Pick. 87; *Lackey* v. *Holbrook*, 11 Metc. 458. Even if he enter forcibly, and under circumstances which might render him criminally liable for a breach of the peace, still such entry will be rightful against the mortgager, and he may retain the possession for the purpose of taking the rents and profits equally, as if his entry had been peaceable and under legal process. *Brown* v. *Cram*, 1 N. H. 169. Indeed, the authorities all concur in the doctrine, that where a party has a legal right of entry upon land, he may enter by force and turn out the person in possession, who cannot maintain trespass therefor against him. *Hyatt* v. *Wood*, 4 Johns. 150; *Miner* v. *Stevens*, 1 Cush. 485.

The defendant having a right of entry as mortgagee, might legally remove the goods in the store, and would not be liable for so doing, if after reasonable notice, the plaintiff should neglect or refuse to cause their removal, provided it were done in a careful and prudent manner and to a safe and convenient place. *Rollins* v. *Mooers*, 25 Maine, 192.

"A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own." 2 Greenl. Ev. § 642. A surveyor of highways may lawfully remove wood which encumbers the highway, and if he give notice to the owner where he has put it, he will not be held liable in trover, though he claim the costs of its removal. *Plumer* v. *Brown*, 8 Met. 578. So if a ferryman wrongfully put the horses of a passenger out of a boat, without further intent, it may be a trespass, but it is not a conversion. *Fouldes* v. *Willoughby*, 8 M. & S. 340.

In the case last referred to, L'd ABINGER says, "in order to constitute a converson, it is necessary either that the party taking the goods should intend some use to be made of them by himself or those for whom he acts, or that, owing to his acts, the goods are destroyed or consumed, to the prejudice of the lawful owner." In *Heald* v. *Carey*, 2 J. Scott, 977, it was held, that to constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them inconsistent with such right.

It seems that, after the removal of the goods, the defendant with the attorney of the plaintiff, went to the place where they were stored for the purpose of delivering them up, and that he was then ready to surrender them, but the attorney of the plaintiff preferred to take them, or a portion of them, by a writ of replevin. At another time there was some conversation about the goods, but no demand was made. The de-

fendant requested a discharge, but did not impose it as a condition upon which alone he would surrender the goods. The original removal of the goods was legal, and since that time there has been no denial of the rights of the plaintiff, no refusal to deliver the goods in dispute on demand, and no claim of ownership on the part of the defendant. The action, consequently, is not maintainable. *Plaintiff nonsuit.*

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

(*) LARRABEE *versus* LUMBERT.

To entitle a demandant to recover for rents and profits in a writ of entry, he must set forth a claim for them in his declaration.

In such action, the rents and profits, though specially declared for, are recoverable only up to the date of the writ.

Rents and profits accruing before that date, cannot be sued for and recovered in any subsequent action of any form.

For rents and profits accruing *subsequently* to the date of the writ of entry, and prior to the time when possession is taken by the demandant, a recovery may be had in trespass for mesne profits.

ON FACTS AGREED.

TRESPASS, for mesne profits of a store.

The defendant conveyed to the plaintiff the store in 1846, by an absolute deed, but continued to occupy it till July 10, 1850.

On April 12, 1849, the plaintiff in writing notified the defendant to quit. It was admitted that the defendant could prove, if admissible against the plaintiff's objection, certain recited facts, in substance as follows: —

At the time of conveying the store, the defendant procured of the plaintiff a loan of notes, of $5000, signed by the plaintiff, which the defendant negotiated for his own benefit. To secure the plaintiff for that loan, the defendant conveyed to him in mortgage certain mills, and at the same time gave to him the unconditional deed of the store, the plaintiff agreeing to take it only for additional security against the loan.

Except for such security there was no consideration for the deed. The plaintiff refused to give any bond for reconveyance, but stated *that*, if the defendant paid the notes, the store should be reconveyed; *that* he wanted the deed absolute, in order that the defendant might be prompted to punctual payment; *that* he did not wish any thing to do with the store, but *that* if he had to pay the notes and wait three years, "he was to have the store."

The plaintiff had to advance the money to pay the notes, and the defendant afterwards repaid a part of the amount. To recover the residue, the plaintiff sued the mortgage and obtained the conditional judgment for the balance due to him for his advancements, which judgment was fully paid in October, 1851.

On June 4, 1849, the plaintiff brought a writ of entry to obtain possession of the store. In that writ was inserted a claim for rents and profits, but it was afterwards stricken out under leave to amend, and the plaintiff obtained judgment for possession on June 29, 1850, and took possession by virtue of an execution on July 10, 1850. In that suit no recovery was had for rents or profits.

This suit is brought to recover mesne profits, and was commenced on December 9, 1852.

If the plaintiff is entitled to recover, the damages are to be assessed by the clerk. Nonsuit or default is to be entered as the law upon the facts shall require.

Peters, for the plaintiff.

The proof, as to the plaintiff's verbal promise to reconvey, was inadmissible. *Heald* v. *Jewett*, 7 Greenl. 435; *Ellis* v. *Higgins*, 32 Maine, 34; R. S., c. 91, § § 30, 31.

If there was a tenancy without obligation to pay rent, that tenancy was terminated by our notice to quit, on April 12, 1849.

But our recovery against the tenant *in a writ of entry*, proves that he was holding possession by wrong from the beginning. *Birch* v. *Wright*, 1 T. R. 379; *Monroe* v. *Luke*, 1 Metc. 465.

The case in Massachusetts, *Raymond* v. *Adams*, 6 Cush. 255, is offered to show, that this suit for mesne profits is not sustainable. But that decision was based upon a rule adopted there, that mesne profits are recoverable in the writ of entry, *without setting forth the claim specially.*

In this State the opposite rule has been adopted. *Pierce* v. *Strickland*, 12 Shepl. 440; *Haskell* v. *Eaton*, unreported.

The Massachusetts case, therefore, can have no influence here. The case of *Pierce* v. *Strickland*, is a clear and decisive allowance of this action.

The Court, in Cushing, comment on the 31st § of their statute, which is the same as § 18 of our statute, and they say, "the 31st section expressly provides, that nothing in this chapter shall prevent the demandant from having his action of trespass for mesne profits or for damages against any person, except the tenant in the writ of entry. This is a strong implication, that against him the proceedings are conclusive."

It strikes me, such a conclusion or implication is forced. The only meaning and extent of that section is this; to wit, that a demandant in a writ of entry, who chooses to take damages in that mode, shall not by so doing be prevented from still another recovery against a co-trespasser.

That Court intimates, that the new mode of recovery, is an abolishment of the old form of action. But it cannot be so here, because now in every case here, where a writ of entry would lie, the process of forcible entry and detainer will. Stat. of 1849, c. 98; Stat. of 1850, c. 160.

We sue for rents and profits up to the time when the defendant was actually removed under the writ of possession. The jury pass upon the rents and profits. —

How could they determine those, which accrued subsequent to the date of the writ? How could a demand accruing subsequent to the date of suit be legally determined in that proceeding?

How could the jury assess damages which accrued subsequent to the verdict, and before judgment? *a fortiori*, how assess the damages which accrued subsequent to the judg-

ment, and before the defendant was actually removed? Lumbert was in several days between the date of the execution, and his removal. *There seems no possible way to avoid an action here for something*, even if we give the fullest authority to the decision in Massachusetts. I cite *Larrabee* v. *Lumbert*, 34 Maine, 79; *Gooch* v. *Stephenson*, 1 Shepl. 371; 15 Mass. 205.

Rowe & Bartlett, for the defendant.

APPLETON, J. — It was held in *Pierce* v. *Strickland*, 25 Maine, 440, that to entitle the demandant to recover for mesne profits in a writ of entry, under the provisions of R. S., c. 145, § 14, he must set forth his claim for them in his writ. Of the correctness of this decision we have no doubt. Under this section the demandant may recover for mesne profits and waste. Whether he will claim either or both is uncertain. If he claim either or both, the same reasons exist for giving the defendant notice of his several claims and of their extent, so that he may know to what he is called to answer, as in any other case; and this notice should be furnished by the declaration. The verdict of a jury is based upon and is their response to the several counts in the writ. It would be an anomaly in judicial proceedings for a plaintiff to recover for damages not declared for, and when the record would not disclose the grounds of action, for and on account of which damages have been rendered. Although a change is made in the remedy, it could hardly have been intended that a recovery should be had for that which is not set forth in the declaration, any more in this than in any other action.

But whether it be necessary that the demandant's claim for mesne profits or waste, or both, should be specifically set forth in his writ, is a matter purely formal and upon which the decision of this case does not turn. The true and material inquiries are, whether the statute does or does not prohibit the maintenance of any suit for such damages as might have been recovered against the tenant in a writ of entry, and if it does,

whether the demandant may not recover for such damages as may have arisen since the institution of such suit.

The action for mesne profits is an action of trespass, and during the continuance of a disseizin cannot be maintained by one disseized. Hence a recovery in a writ of entry is necessary to reïnvest the owner with the seizin of his estate. When possession is regained, the owner is deemed to have been seized from the time of the unlawful entry of his disseizor, and, except so far as he may be barred by the statute of limitations, may recover for mesne profits to the time of his entry under his writ of possession. *Dewey* v. *Osborn*, 4 Cow. 329; *Emerson* v. *Thompson*, 2 Pick. 473.

The R. S., c. 145, make important changes in the law of real estate and in the modes by which rights may be enforced or wrongs redressed. By § 14, it is enacted that the demandant in a writ of entry "shall be entitled to recover in the same action, damages against the tenant for the rents and profits of the premises, from the time when the demandant's title accrued, subject to the limitations hereinafter mentioned." By § 16, the rents and profits for which the tenant shall be liable "shall be the clear annual value of the premises for the time during which he was in possession thereof," after making certain equitable deductions. It will be perceived, that the measure of damages to which the demandant would otherwise be entitled, is by this provision limited and restrained. At common law the possession of the tenant was treated as tortious, and vindictive damages were allowed. In *Goodtitle* v. *Tombs*, 3 Wils. 118, Gould, J., says, "the plaintiff in this case," (which was trespass for mesne profits,) "is not confined to the very mesne profits only, but he may recover for his trouble, &c. I have known four times the value of the mesne profits given in this sort of action of trespass; if it were not to be so, sometimes complete justice could not be done to the party injured." In the same case, Wilmot, C. J., says, "damages are not confined to the mere rent of the premises, but the jury may give more if they please, as my brother Gould hath truly observed." In *Dewey* v. *Osborn*,

4 Cow. 338, SUTHERLAND, J., says, "the action of mesne profits is an action of trespass; and is founded in the principle of possession by relation of reëntry. The damages in that action are not limited to rent. Extra damages may be given." A new rule for the estimation of damages is established by the statute, favorable to the tenant, yet just to the demandant. The tenant, by § 16, is not to be assessed for the value of any improvements made by himself. By § 17, provision is made by which the rents and profits may, in certain cases, be allowed by way of offset to the tenant's claim for improvements, an offset, which could not be enforced unless the various rights of the parties were to be settled in the writ of entry.

That the claim for mesne profits, so far as they have accrued, must be enforced in the writ of entry, if at all, is abundantly manifest from § 18, which provides, that "nothing contained in this chapter shall prevent the demandant from maintaining an action of mesne profits, or for damages done to the premises against any person, *except the tenant in a writ of entry*, who may have had possession of the premises or who may be otherwise liable to such action." Let the words "*except the tenant in a writ of entry*," be stricken out of this section, and the right of the demandant at common law, to maintain this action, remains unaffected by the enactments of the statute. The new provisions of § 14 would then be merely cumulative. Let them be inserted, and is not the meaning of the section changed? Are they not to have some effect upon its construction, and can there be any doubt, that they are to a certain extent inhibitory? The only apparent object of this section was to prevent the impression, which seems to have been anticipated as likely to arise, that the action of trespass for mesne profits had been prohibited, in all cases, by the sections which precede. The obvious purpose was to prevent the misconstruction of previous provisions of the statute. It then authorizes the recovery of damages against all persons, "except the tenant in a writ of entry." The necessary and unavoidable inference is, that as against him no action should be maintained for mesne profits, which

might have been included in such suit. The intention of the Legislature appears to have been, that the title and all incidental and derivative rights, should, as far as practicable, be determined in one suit, as in this mode the conflicting rights of the parties might be better adjusted, in pursuance of the new rules introduced, and might be sooner determined, and with diminished expense. *Raymond* v. *Andrew*, 6 Cush. 265.

But while the writ of entry is progressing to its termination, the trespass of the tenant on the demandant is continued. The resistance to his claim, if it be a just one, is a continuing invasion of his rights. The demandant recovering seizin is deemed by relation to have been in possession from the first wrongful entry of the tenant, and is entitled to his mesne profits during the progress of the suit till his entry under his writ of possession. The plaintiff insists, that if barred as to all mesne profits for which a recovery might have been had in the writ of entry, he is at all events entitled to recover those, which could not have been thus included, and we think his claim to this extent is well founded.

In real actions, the rights of the parties are to be determined upon the state of the title at the time of the demandant's suing out his writ. Neither the plaintiff, for maintaining his title, nor the tenant in sustaining his defence, can invoke the aid of a subsequently acquired title. In assumpsit the plaintiff can only declare for what is due. In trespass the plaintiff cannot set forth claims for prospective wrongs. As it is required, as has been seen, that the demandant in his writ of entry should set forth his claim for mesne profits in his writ, it must show the extent and limits of his claim. He can only demand damages for the past. He cannot by an anticipatory count set forth future contingent and uncertain or unknown damages. The demandant therefore in a writ of entry can only recover for damages which accrued before the commencement of his suit. *Starr* v. *Pease*, 8 Conn. 541.

The fourteenth and eighteenth sections of R. S., c. 145, relate to the same subject matter, and are to be construed together.

To ascertain the Legislative intention the whole statute must be regarded. By § 14, no new rule is given, as to the time to which damages are to be computed. The general rule of the common law consequently remains, by which the demandant is limited in his recovery to those accruing before the purchase of his writ. By § 18, a prohibition is imposed against bringing an action for mesne profits "against the tenant in a writ of entry." But this prohibition is to be construed in connection with the preceding section and is only coëxtensive therewith. In the fourteenth section new rights are granted, and so far as regards those rights, to the extent of what the demandant might have recovered, he is inhibited from commencing a new suit, and no further. The tenant is not relieved from his liability for mesne profits arising after the suit against him had been commenced or judgment obtained. Ample provision is made for the trial in the writ of entry for all claims which had then arisen, and for all within the purview of § 14, no subsequent suit can be brought; as for all other claims the rights of the parties remain as at common law. A suit may continue an indefinite number of years before final judgment without fault on the part of the demandant, and unless he can recover *mesne profits* in a subsequent suit, he is deprived of what is justly due him, and a premium is offered to dishonesty. Any other construction of the statute will fail to do equal and exact justice to the parties. The result is, that the plaintiff must recover for the mesne profits since the date of his writ of entry.

The testimony introduced to show that the deed to the plaintiff, though absolute in form, was intended as security for a loan, is not admissible. *Hale* v. *Jewell*, 7 Greenl. 435. The judgment in a writ of entry is evidence of the demandant's title to recover from the tenant such mesne profits as have been received from the premises of which a recovery was had in such suit. *Withington* v. *Corry*, 2 N. H. 115.

Defendant defaulted.

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

PRATT *versus* PIERCE.

In proving title to real estate by descent, a legal marriage may be established, by proof of facts from which it may reasonably be inferred.

When the fact of a marriage by a settled, ordained minister of the gospel has been proved, the legal presumption is, that it was done in accordance with the law.

The common law doctrine, that a disseizee of land could not convey, has been abrogated by statute.

A disseizee, if he have a right of entry, may convey.

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

WRIT OF ENTRY.

The controversy involved the title to seven acres of land described in the pleadings, being a part of lot No. 20.

In 1805, the land was conveyed to Hezekiah Wright, who, as was proved by a witness on the stand, was married, in 1810, to Charlotte Sewall, in Monmouth, in the county of Kennebec, by Rev. Dr. Gillett, who resided in Hallowell, and was then, and for many previous years had been a minister of the gospel, ordained and settled as pastor of the South Parish Church. And after that marriage the said Hezekiah and Charlotte lived together as husband and wife until the death of the husband, who died in 1815, leaving Hezekiah Hartley Wright his only son and sole heir. Hezekiah Hartley Wright died in 1840, leaving his mother, Charlotte Wright, his sole heir, who on Feb. 22, 1850, conveyed to the demandant all her right in lot No. 20.

The only compensation paid for that deed was the demandant's own bond, stipulating to pay her three hundred dollars, if her title should prove to be a valid one, in such suits as he would immediately bring to recover possession of the land.

The tenant was in possession, claiming through several successive conveyances, under a deed, made by a collector for the payment of taxes assessed in 1837. What warranty, if any, was contained in the collector's deed, the case does not show. To establish the tax title, it was necessary for the tenant to prove that the collector had advertised, in some

newspaper printed in the county, that the land was assessed and would be sold at auction for the taxes.

Upon this point, a witness testified that he had made search for a long time for a copy of a newspaper printed in Bangor, called the Bangor Post, but without success.

The tenant then offered, as a witness, the collector, by whom the tax sale was made, to prove that he duly published in the Bangor Post the auction sale for the payment of taxes.

The witness was objected to on the ground of interest, and was excluded.

It appeared *that* the demandant owned the adjoining lot, No. 21, and had claimed that it embraced a part of the demanded premises, and had erected a small house upon it; *that*, for that occupation, Thomas Mitchell, one of the grantees under the tax sale, brought an action of trespass against the demandant; *that* said action was referred to a referee, whose award, rendered in 1849, was in favor of Mitchell, and required the demandant to remove the house; — *that* the demandant, both before and after the reference, said he had a deed of the whole of lot No. 20; and, that if Mitchell would not let him alone as to the piece in dispute, he would not allow Mitchell to have any of the land; and *that* the demandant claimed to own the strip which was disputed in that action, as a part of lot No. 21.

Upon such of the foregoing evidence as was lawfully admissible, the Court, having power to draw inferences of fact, are to order a nonsuit or default as the law may require.

Cutting, for the demandant.

The marriage between Hezekiah Wright and Charlotte Sewall, in 1810, was valid. The statute of 1786, § 2, then in force, provided, that "when any religious society shall be destitute of a settled and ordained minister of the gospel, in case there shall not be such a minister within the town, district or plantation, in which such religious society is, it shall be lawful for any such minister within the same county, to join any person of such town, district or plantation in marriage," &c.

Now the presumption of law, in the absence of proof, is, that the doings of the minister were under the contingency provided for, and were therefore legal.

"Proof, by witnesses who saw the marriage, is *prima facie* sufficient, and whoever would impeach it, must show wherein it is irregular.

"If it appears there has been a marriage in fact, by a witness present, that saw the parties stand up and go through the usual ceremonies of marriage, directed by one who usually married, or usually appeared to marry persons, the Court will presume it was a legal marriage till the contrary is proved." *Damon's case*, 6 Maine, 148, and cases cited.

In this case the contrary has not been proved, but the legal inference is, that one of the parties lived in Monmouth, that in that place there was a religious society destitute of a minister, and therefore "*it was lawful for any such minister within the same county to join any person of such town, district or plantation in marriage.*"

In the case of *Ligonia* v. *Buxton*, 2 Maine, 102, the contrary was proved; "he resided in Palermo and she in Montville," the marriage was in Knox, the minister and parties residing in different counties, all of which facts that case discloses, and the objection was, "because solemnized in *that* town in which neither of the parties then resided."

The testimony of the tax collector was properly excluded, for he was interested as warrantor in the tax deed.

All pretext of title under that sale therefore vanishes away.

But the tenant undertakes to avoid the plaintiff's title on the ground of *champerty*.

By R. S. of 1841, c. 91, § 1, it is enacted, that — "When any person shall make a deed of any lands or other real estate, owned by him in severalty or in common with others, acknowledged and recorded in the manner prescribed in this chapter, whether at the time of the execution and delivery of the deed he is seized, *or not seized*, of such lands, or estate, but to or for which he has a right of entry, such lands or

estate, or all the title or interest, which the grantor has in or to the same, *shall pass* by such deed of conveyance, as effectually as if the grantor was, at the time of the conveyance, seized of the same."

In this section new provisions are introduced, abrogating all common law or previous statute decisions, and placing every man, as he ought to be placed, upon *the strength of his own title.*

All then, that can be said, is, what Chancellor Kent said, as to the abrogation of the rule in Shelley's case: — "The juridical scholar, on whom his great master, Coke, has bestowed some portion of the gladsome light of jurisprudence, will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning, devoted to destruction by an edict, as sweeping and unrelenting as the torch of Omar."

A. W. Paine and *J. H. Hilliard*, for the tenant.

The Act of 1786 restricts the authority of a minister from solemnizing marriages, except in the town where he resides.

The act of Dr. Gillet in marrying Hezekiah Wright and Charlotte Sewall, *in Monmouth*, was unlawful and of no validity. *Ligonia* v. *Buxton*, 2 Greenl. 102.

The 3d section of that Act, on which the tenant relies, provides that "every stated and ordained minister, *in the town* where he resides, shall be authorized to marry between persons, when one or both belong to or are residents in the town where such minister resides.

But the demandant's counsel urges that the law raises a presumption, from the very act of the minister, that he had authority to do it, and that the contingency named in the second section existed. But the facts necessary to impart to him the authority are matters not of presumption, but of proof.

In taking the conveyance from Charlotte Wright to the demandant, there was champerty, by which the transaction became a nullity.

The land had long been occupied adversely to her, and

under a claim of title had passed through several successive owners for a full consideration, actually paid. This was well known both to the demandant and to his grantor. By the terms of the conveyance, the demandant was to pay, only on condition that he should hold the land. Such a conveyance is unsustainable. Bac. Abridg. E, Title Maintenance; Title Grant, letter D; *Wolcott* v. *Knight*, 6 Mass. 118; *Everenden* v. *Beaumont*, 7 Mass. 76; *Swett* v. *Poor*, 11 Mass. 549; *Brinley* v. *Whiting*, 5 Pick. 348; *Preston* v. *Hunt*, 7 Wend. 53; *Wickham* v. *Conklin*, 8 Johns. 170; *Arden* v. *Patterson*, 5 Johns. Ch. Cases, 44; 4 Black. Comm. 134; *Jackson* v. *Ketchum*, 8 Johns. 374; 4 Kent, 446, 449; *Etheridge* v. *Cromwell*, 8 Wend. 629; *Jackson* v. *Demont*, 9 Wend. 55; *Wandych* v. *Van Buren*, 1 Wend. 344; *Tomb* v. *Sherwood*, 13 Wend. 289; *Williams* v. *Jackson*, 5 Wend. 503; 20 Wend. 386; 7 Wend. 251; 13 Johns. Cases, 289; Stearns on Real Actions, 29.

Such an act of maintenance is a criminal offence, and from such an act of crime, no rights could be acquired. It is *contra bonos mores*. The provision of R. S., c. 91, § 1, was intended only for cases where there is an adverse possession of wild lands unknown to the parties to the conveyance. It never was intended that, when the parties to the conveyance knew all the facts, how the land is occupied and the nature of the adverse claim, that such mere right of action should be made a subject of barter, speculation and strife. The intention in this as in other cases, stamps the transaction as innocent or guilty. And this intention is an essential element in the offence of maintenance.

The difference therefore between this offence and the inconvenience that the statute proposes to remedy, is too obvious to be mistaken, and such are the views of Smith in his Leading Cases, vol. 2, p. 514, and to support his position he cites *Stephen* v. *Bagwell*, 15 Ves. 139.

There is another difficulty in regarding the statute as abolishing the offence of maintenance. All the authorities that treat upon the subject, and all the decisions of the courts, re-

gard maintenance as an offence, not only *malum prohibitum*, but *malum in se*. Stearns on Real Actions, 29; 4 Bl. Com. 132; 2 Justin. 208, 212; 1 Hawk. 255; 22 Wend. 403.

In *Phelps* v. *Decker*, 10 Mass. 274, the Court say such deeds are void *ab initio*, and may be avoided by evidence under the plea of *non est factum*. The same is decided in *Dale* v. *Rosevelt*, 9 Cow. 307, and in *Everenden* v. *Beaumont*, 7 Mass. 77–8; 15 Ves. 140. The same principle is affirmed by the S. C. of U. S. repeatedly. *Craig* v. *Missouri*, 4 Pet. 431; *Bartel* v. *Coleman*, 4 Pet. 184; *Hannay* v. *Eve*, 3 Cranch, 242, (1 Cond. 512); *Armstrong* v. *Tolu*, 11 Wheat. 258, (6 Cond. 298); S. C. 4 Wash. 297; 2 Phil. Ev. 367.

As between the parties, or either party to it, such a deed will not operate even as a basis for an adverse possession. 9 Wend. 511. Hence parol evidence is always admissible to prove such facts, and when proved will have the effect of vacating the deed *ab initio*. 4 Phillip's on Ev., Hill & Cowen's notes, 612, note 304 to p. 367.

Charlotte Sewall, at the time of giving her deed, was disseized. Until revested with a seizin she could not convey. At the common law her deed could therefore pass no title to the demandant. This rule of law is wholly a different one, and based on reasons entirely different, from the rule that a champertor's deed conveys nothing. 2 Smith's Lead. Cases, 548.

The deed from Charlotte Sewall to the demandant contained no covenant of any description. It was simply a release. But neither of them even have possession. Such a release, in such a case, conveys nothing.

Again, it was without any consideration, the bond not being payable unless the obligor should hold the land. Where there is no consideration, the conveyance merely operates as a trust for the use of the grantor. Co. Litt. 23 a; *Welch* v. *Foster*, 12 Mass. 93.

The R. S., c. 91, in its utmost extent, authorizes a conveyance where there is a right of entry. But Charlotte Sewall had no right of entry. It was more than thirty-five years, after the

descent had been cast upon Hezekiah H. Wright. In all that period there was no entry by him or any one claiming under him. The right of entry, therefore, had been lost by lapse of time, and the statute gives no relief.

Shepley, C. J. — To establish the title of the demandant, it is necessary that he should prove, that Hezekiah Hartley Wright was the legitimate child of Hezekiah Wright. Positive proof of a legal marriage is required upon the trial of persons indicted for polygamy and adultery, and in actions for criminal conversation. In other cases, proof of facts, from which a legal marriage may be reasonably inferred, will be sufficient. It cannot be inferred from proof of facts, which show, that there could not have been a legal marriage. Such were the facts in the case of *Ligonia* v. *Buxton*, 2 Greenl. 102.

In this case, the facts proved, do not show, that there could not have been a legal marriage. If either of the parties resided in Hallowell, or if there was no ordained minister then residing in Monmouth, the marriage by the ordained minister residing in Hallowell was a legal one, although the ceremony was performed in Monmouth. The presumption of law, from the facts proved, is, that the ceremony of marriage was legally performed there being no proof, that it was not. *Damon's case*, 6 Greenl. 148. The presumption being that the minister did not violate the law, the marriage must be regarded as legal.

It is contended, that the demandant acquired no title by the deed made by Charlotte Wright to him, on Feb. 22, 1850, because he purchased the title knowing that person was disseized, and that another person was in possession, claiming title. By the common law, no title could have been thus acquired. In this respect, the common law has been abrogated in this State, by the provisions of the statute, c. 91, § 1, which declare, that all the title or interest of the grantor shall pass by a deed of conveyance, if he had a right of entry, whether he was seized or not, at the time of the conveyance.

But it is said, that the statute should receive a construction, that would permit such conveyances to be valid, when made under circumstances, that would not show, that the grantee had been guilty of maintenance, and decide them to be invalid, when made under circumstances, that would show it. The statute makes no such distinction or qualification. It appears to have been the intention, so to alter the law, as to permit the titles of persons disseized, and having a right of entry, to be as openly and freely sold and purchased, as they might have been, had there been no disseizin.

When a person had been wrongfully deprived of a part of his title by disseizin, the Legislature may have considered it hard, if not unjust, to make him submit to a loss of the remainder or encounter the risk, loss and trouble of litigation.

Charlotte Wright had therefore a right of entry, when she conveyed it to the demandant, and her title passed to him.

As the counsel for the tenant admit, that the title derived from the collector of taxes was presented only to prove, that those claiming under it had been in possession under a claim of title, it will be sufficient to observe, that there is no proof, that the land was advertized in the manner prescribed by the statute then in force.

It is not insisted, that the deposition of the collector was not properly excluded. *Tenant defaulted.*

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

(*) REED *versus* PIERCE.

Of the covenant of freedom from incumbrances, in a conveyance of land, an outstanding, unpaid mortgage constitutes a breach.

For such a breach, a right of action immediately accrues. In such an action, if the plaintiff had extinguished the mortgage, the measure of damage would be the sum rightfully paid thereon; if he had not extinguished it, the damage would be but nominal.

In either case, the damage being thus ascertainable, the plaintiff's claim, if previously existing, would have been provable in the court of bankruptcy, on the defendant's application there for a discharge from his debts.

The plaintiff's pre-existing claim *upon such a covenant* would therefore be barred by a discharge in bankruptcy of the covenantor.

Upon a conveyance of land, it is in contingency whether a paramount title will ever be established or set up, and the covenant of warranty against the lawful claims of all persons is not broken until eviction by paramount title.

Until such eviction, therefore, no right of action arises upon such a covenant.

In the proceedings of a court of bankruptcy, upon the covenantor's application for a discharge, the claim of the covenantee upon such a covenant was not proveable, unless a rightful eviction had previously occurred.

To a claim founded upon such a covenant, and proved by an eviction which occurred subsequently to the proceedings in bankruptcy, the discharge in bankruptcy is no defence.

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

Covenant Broken.

In 1833, the defendant mortgaged a lot of land to Thornton M'Gaw, to secure the payment of $2400, by installments, the last pay-day being in 1836. Notwithstanding the mortgage, the defendant, in 1835, conveyed the same land to the plaintiff, with covenant that it was free from all incumbrances, and that he would warrant and defend the same against the lawful claims and demands of all persons. The plaintiff entered upon the land under his deed and held quiet possession until 1851, when the mortgagee entered and took possession for condition broken. The amount then due upon the mortgage was $1169,86, which the plaintiff paid to discharge the same. This action is brought upon both the above recited covenants.

As a bar to the suit the defendant introduced his discharge in bankruptcy, dated in 1842, together with the schedule A, of his indebtedness, as used in the court of bankruptcy, which embraced among other demands, "several notes of Thornton McGaw, $800."

The case was submitted to the Court, with power to assess the damage, if the decision should be against the defendant.

Cutting, for the plaintiff.

1. The plaintiff is entitled to recover upon the covenant of freedom from incumbrances. The plaintiff took possession at the date of his deed, and continued in possession until long

after the defendant's discharge was given. Though he might, at any time have maintained suit for the breach of *that* covenant, yet so long as he had not been obliged to pay the mortgage, he was entitled to no more than nominal damage; and in the court of bankruptcy could have proved no more. Nor could it then appear that his claim would have ever been more, inasmuch as the defendant might pay the notes and thus extinguish the mortgage.

The defendant cannot then invoke to his aid the 5th section of the Bankrupt Act, for, at the time he received his discharge under that Act, the plaintiff was not a creditor. It was not a debt due and payable at a future day. Consequently it was not proveable under said Act. The relation of debtor and creditor did not exist, except for a nominal amount, and that upon a technical principle of law.

I then confidently rely upon the determination of this Court, in *Dole* v. *Warren*, 32 Maine, 94, wherein the Court say, "the facts reported in the case, bring it within the principle of *Woodman* v. *Herbert*, 24 Maine, 358;" *Ellis* v. *Ham*, 28 Maine, 385.

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

2. The plaintiff is entitled to recover upon the covenant for quiet enjoyment. Upon this covenant there was manifestly no breach until the eviction by McGaw, which was long after the defendant obtained his discharge.

No action, therefore, could have been maintained upon this covenant until after that time. That covenant extended to all future time, and was broken *only* when the plaintiff was ejected. *Mechanic's Bank* v. *Capron*, 15 Johns. 467, and cases cited in the note; *Buel* v. *Gordon*, 6 Johns. 126; *McDonald* v. *Bovington*, 4 T. R. 825; 2 Dall. 236.

Knowles, for the defendant.

The covenant against incumbrances was broken as soon as given. The plaintiff had *then* a right of action, and the measure of damages was as certain then as at any time since, being within the control of the plaintiff. *Bean* v. *Mayo*, 5 Maine, 94.

The defendant contends, that this claim is barred by his certificate of discharge in bankruptcy.

The Bankrupt Act provides, that such discharge and certificate, when duly granted, shall, in all Courts of Justice, be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are proveable under the Act, and shall be and may be pleaded as a full and complete bar to all suits, &c. Bankrupt Act, § 4.

The fifth section of the Bankrupt Act further provides, that all "creditors whose debts are not due and payable until a future day, or other persons having *uncertain* or *contingent demands* against such bankrupt, shall be permitted to come in and prove the same."

This claim then was proveable in bankruptcy, and the defendant's certificate of discharge is a bar to this suit. § 5; *Murray* v. *DeRottenham*, 6 Johns. Ch. 61; Smith's Leading Cases, 686. It was a claim which the plaintiff could enforce, and which the defendant was bound to meet *at some time*, though upon a contingency, and it was capable of a reasonable, equitable and even mathematical estimation.

If this action had been commenced without the plaintiff's having paid the incumbrance, the question would have been the same as now; the payment by the plaintiff does not go to the cause of action; nor is the cause of action at all dependent upon that payment, which could only affect the amount of damages. The action might be maintained as well without the payment as with. It is the breach of the covenant, that is the cause of action, and not the payment of the incumbrance.

The case is not like that of a surety upon a bond or note, where there is no liability or cause of action till after pay-

ment. Here was a direct contract between the plaintiff and defendant, an engagement by deed, by which the defendant engaged to pay an amount certain to clear the premises. He failed to fulfil, and the plaintiff had his claim for the failure.

The plaintiff surely had a "*claim*," and whether certain or contingent, the law provided, that it might be proved. It was one or the other. The defendant had made an "*engagement*," which is the term the law applies, and from which it provides his certificate shall be a discharge.

In *Woodard* v. *Herbert*, 24 Maine, 358, the Court say, "contingent demands are those which were in existence as such, and in such a condition that their value could be estimated at the time when the party was decreed to be a bankrupt;" and further, that "it is necessary to distinguish between a contingent demand and a mere contingency whether there ever will be a demand."

If there can be said to be any contingency about the plaintiff's claim, it is certain, that neither of these conditions apply to it. The defendant had done all he ever could do to fix his liability by having broken his covenant. He was liable, and the demand or claim of the plaintiff stood against him; the amount was fixed and certain, and there was no contingency whether there ever would be a demand. The demand was proveable, and the only contingency remained with the plaintiff as to the way, and manner, and time in which he would proceed to enforce his claim. The cases of *Ellis* v. *Ham*, 28 Maine, 385, and *Dole* v. *Warren*, 32 Maine, 94, are put upon the same principle as *Woodard* v. *Herbert*, that no debt or obligation existed between the parties capable of estimation; that in each of those cases there only existed the contingency, that there might be a claim in future, which mere possibility could not be estimated. *Dusar* v. *Murgatroyd*, 1 Wash. C. C. 13; *Marks & al.* v. *Barker & al.* 1 Wash. C. C. 178; *Murray* v. *DeRottenham*, 6 Johns. Ch. 61; *Woodard* v. *Herbert*, 24 Maine, 358.

Appleton, J. — The defendant conveyed to the plaintiff by deed of warranty, premises, which at the time were sub-

ject to mortgage, and has since received his discharge in bankruptcy. At the time of his application and discharge, the notes secured by mortgage were outstanding and no entry had been made by the mortgagee for the purpose of foreclosure. Subsequently the mortgage was foreclosed and the plaintiff was evicted by the paramount title of the mortgagee. This suit is brought on the several covenants of the defendant's deed, in bar to the maintenance of which the defendant has pleaded his discharge.

The covenant against incumbrances was broken at the time of the conveyance. The damages to which the plaintiff was entitled were readily ascertainable. If he had paid the mortgage notes, the sum paid would have been the measure of damages. If the incumbrances had not been removed and there had been no action on the part of the mortgagee to enforce his mortgage, the plaintiff's damages would have been nominal. To this covenant, as it was broken before the defendant's bankruptcy, and as the plaintiff might have proved his claim for its breach, the discharge is a bar.

The several covenants in a deed of warranty are distinct; their breach arises at different times; is established by proof of different facts, and damages therefor may be enforced by different suits and recompensed by different rules of assessment. It is obvious then that what may be a discharge of one is not necessarily that of another and distinct covenant.

The breach of the other covenants was long after the discharge in bankruptcy. So far as the claims now in suit could have been proved and the plaintiff have received his dividends upon their proof, the discharge is a bar, and no farther.

The defendant, to show that they might have been proved, relies on the sixth section of the Bankrupt Act, by which persons having uncertain and contingent demands are permitted to come in and prove such debts or claims.

The meaning of the phrase contingent demand, and the corresponding expression in the English bankrupt law, debt payable upon a contingency, has been definitively settled by repeated adjudications in this and in other States, as well as by

the English Courts. In *Woodard* v. *Herbert*, 24 Maine, 360, the distinction between a contingent demand and a contingency whether there ever would be a demand, was recognized and adopted. "The contingent or uncertain demands provided for," says SHEPLEY, J., "in the Act of Congress, are the contingent demands, which were in existence as such, and in a condition, that their value could be estimated at the time when the party was decreed a bankrupt." The same construction was reäffirmed in *Ellis* v. *Ham*, 28 Maine, 385, and in *Dole* v. *Warren*, 32 Maine, 94. In *Goss* v. *Gibson*, 8 Humph. 199, it was held that a discharge in bankruptcy would not relieve one surety from the claim of another surety who had paid money for the principal after the decree. "At the time these defendants were declared bankrupts," says GREEN, J., "the complainant had no debt or demand against them. The complainant had no demand that could be proved at the time the defendants were declared bankrupts. The possibility of the demand that now exists was incapable of valuation." It was decided in *Cake* v. *Lewis*, 8 Barr. 493, that the liability of a principal to his guarantee was not discharged by bankruptcy. In *Boorman* v. *Nash*, 9 B. & C. 145, the defendant, who had contracted for a certain quantity of oil to be delivered to him at a future day at a certain price, became bankrupt before the day arrived and obtained his certificate. "The right of the plaintiff," says Lord TENTERDEN, "to maintain this action, depends upon the question whether he could or could not have proved his demand under the commission of bankrupt issued against the defendant. It appears to us impossible that he should so prove it; for at the time when the commission issued, it was uncertain not only what amount of damage, but whether any damage would be sustained." A similar decision was made in *Woolley* v. *Smith*, 54 E. C. L. 610.

In *Thompson* v. *Thompson*, 2 Scott, 266, it was decided that the installments of an annuity, for the payment of which a surety expressly covenanted in default of the grantor, are not proveable under a *fiat* against the surety, when such install-

ments do not become due until after the bankruptcy of the surety. "Before the days of payment arrive," said TINDAL, C. J., in delivering his opinion, "these installments are not only no debt, but can never become a debt from the surety, except in the event that the grantor of the annuity shall make default in such payments. The value of such a contingency it is impossible to calculate. *Exparte Davis*, 1 Dia. 115; *Toppan* v. *Field*, 4 Ad. & El. N. S. 387; *Henlen* v. *Adaman*, 2 Man., Gran. & Scott, 369.

In the *South Staffordshire Railway Co.* v. *Burnside*, 2 Eng. Law & Eq. 418, the holder of shares in a corporation, who became bankrupt, and received his certificate, was held not to be discharged from his liability for subsequent calls.

In *Hankin* v. *Bennett*, 14 Eng. Law & Eq. 403, the defendant executed a bond, whereby he became liable as surety to pay the plaintiff such costs as the plaintiff should in due course of law be liable to pay in case a verdict should pass for certain defendants in an action of *scire facias*, in which the now plaintiff sued as a nominal party. "We think, however," says MARTIN, B. "this liability was not a debt at all within the meaning of the section. It was a contract to indemnify a nominal plaintiff whose name was used by a third person, against such costs as the plaintiff would become liable to pay if the defendants should obtain judgment in their favor. It seems to us impossible to consider that this is a debt. It is a contingent liability, but not a contingent debt."

The plaintiff could not have proved any claim for breach of the covenant, that the defendant would warrant and defend the premises against the lawful claims and demands of all persons, for it had not been broken. Whether there were any such claims and demands outstanding, and whether they embraced the whole or a part of the premises conveyed, was uncertain. If any such existed, their enforcement was dependent on the will of those having such claims. The plaintiff could not have presented any present claim or existing demand. The possibility that one might arise, is not enough. In all sales of personal property the title of the vendee may

be defeated by adverse and superior rights. In such sales there may be a breach of the implied warranty of title by subsequent eviction. The vendee of real or personal property, in the undisturbed enjoyment of his purchase and without any breach of the covenants, express or implied, of his vendor, can hardly be considered as having a contingent claim, because of the possibility that some unknown claimant may at some indefinitely remote period of time interpose a superior title, by means of which he may be deprived of the property purchased. If the unbroken covenants of a deed, or the possible breach of the implied warranty of title in sales of personal property, were to be deemed claims within the statute, then every grantee or vendee might present his claim before the commissioner, and the estate of the bankrupt would remain unadjusted till all possibility of a breach should be barred by the statute of limitations, for it could not before such time be known that they might not arise. Such a position would be entirely at variance with the provision of § 10, which requires that all proceedings in bankruptcy shall be brought to a close within two years after the decree declaring the bankruptcy, if practicable, for it would lead to an indefinite postponement of the settlement of estates. It was adjudged in *Bennett* v. *Bartlett*, 6 Cush. 225, in relation to personal property, that a discharge in bankrupcy was no bar to the creditor's right of action against the debtor, on the implied warranty of title, when the breach occurred after such discharge. The reasoning of the Court in that case is equally applicable to the case at bar.

The result is, that the discharge affords no defence, except as to the covenant against incumbrances, which alone could have been proved. *Defendant defaulted.*

Shepley, C. J., and Tenney, Rice and Hathaway, J. J., concurred.

(*) LOCK *versus* JOHNSON.

The statute protects from the trustee process the avails of one month's personal labor of the principal defendant.

A trustee, indebted to the principal defendant for his personal labor, is bound to disclose not only the indebtedness, but also that it accrued for such labor.

If he do not disclose that it accrued for such labor, a judgment against him as trustee will furnish no protection in an action against him by the laborer for the services.

ON FACTS AGREED.

ASSUMPSIT.

Lock labored for Johnson at $12,50, per month. On settlement, May 3, 1852, the balance due to Lock for his services was $12,17.

On June 5, 1852, Johnson was summoned as trustee in a suit against Lock, which was subsequently defaulted. He disclosed his indebtedness of $12,17, without showing that it was for labor done, and was adjudged trustee, and subsequently paid $5, upon the judgment.

This suit is brought by the laborer to recover the $12,17.

The case was submitted to the Court.

Simpson, for the plaintiff.

Briggs, for the defendant.

The plaintiff relies upon the statute provision, c. 119, § 63, that no person shall be adjudged trustee by reason of any amount due from him to the principal defendant, as wages for his personal labor for a time not exceeding one month.

We reply, 1st, the agreed facts do not show, that the indebtment was for "personal labor," but for "services."

2d. Between the settlement of May 3, and the issuing of the trustee writ, more than a month had elapsed, so that another month's wages may have been earned by the plaintiff. It is the *last* month's labor only which is protected.

3d, It is nowhere made the duty of a trustee to disclose unasked, upon what account an indebtedness accrued, which he admits to exist against him.

HATHAWAY, J. — The plaintiff had been at work for the defendant for twelve dollars and fifty cents per month, and on the third day of May, 1852, they settled and found due to the plaintiff twelve dollars and seventeen cents, for which the defendant gave to the plaintiff his due bill not negotiable.

The action is assumpsit on an account annexed for one month's labor, and also on the due bill which was given "for the labor embraced in the account annexed." On the fifth day of June, 1852, the defendant was summoned as the trustee of the plaintiff and appeared and disclosed his indebtedness for the amount of the due bill, and was charged as trustee. He made no disclosure concerning the consideration of the due bill. By R. S., c. 119, § 63, it is provided that "no person shall be adjudged trustee by reason of any amount due from him to the principal defendant, as wages for his personal labor, for a time not exceeding one month."

The statute secures to the laborer his claim of payment for one month's labor, and places it beyond the reach of his creditors; and his debtor cannot deprive him of it, by his neglect to disclose the whole matter, when summoned as his trustee.

That the trustee did not discharge himself was no fault of the plaintiff.

The defendant could not, by his own act or neglect, transfer the plaintiff's claim to a third person.

The due bill was no payment for the labor; it was not negotiable.

As agreed by the parties, a default must be entered for the amount of the due bill and interest from the date of the writ.

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

(*) True *& ux. versus* Plumley.

If, in a bill of exceptions, presented at *Nisi Prius*, for allowance, the Judge make wrongful alterations to the injury of the excepting party, a correction cannot be had by motion to the Court. It can be had by writ of mandamus only.

In the caption of a deposition, the magistrate's certificate, that the adverse party has been notified, is conclusive evidence that such notice had been given, and given in the season and mode prescribed by the statute; and no affidavit or testimony is admissible to controvert it.

In a civil suit, on an issue received and discussed by the jury on Saturday, their verdict may be affirmed and recorded on the next Court day, though it was finally agreed upon and sealed up on the morning of Sunday.

A jury, after sealing up their verdict and separating, cannot be sent back to reconsider it, except by consent of parties.

By pleading the general issue to the declaration, the defendant waives all benefit from a demurrer previously filed.

In a suit for slander, a count setting forth that the defendant had charged the plaintiff with the commission of a crime, *by its general designation*, is sustainable, though specially demurred to.

Under such a general count, the Court may, on motion, order a specification of the words, which the plaintiff proposes to prove.

From words, in themselves actionable, the law implies malice, and that some damage arises therefrom.

In addition to this *implication of malice*, a plaintiff may prove *express malice*, whereby to increase the amount to be recovered as damage.

For this purpose, he may prove that the defendant *after action brought*, repeated the slander. In such case, however, the repetition of the slander is not to be viewed as a substantive ground of recovery. It can go only to illustrate the motive of the former speaking, for which the action was brought.

In a subsequent suit for such repetition of the slander, it is no defence that the repetition was proved in the former suit, if it was so done for the sole purpose of showing malice in the original speaking.

To assert that A. B. "committed the crime, or he would not have done that other act," is a charge that A. B. committed the crime.

A charge that a married female is "a bad woman, and has dealings with other men besides her husband, and is not very particular with whom," — does not amount to the charge that she "is a whore."

In slander, brought by a married female, one count was for charging upon her the crime of adultery, another for charging that she was a whore; — *Held*, that proof of the adultery would defeat a recovery upon the first count, and would mitigate, but not defeat, a recovery of damage upon the other.

True *v.* Plumley.

In an action of slander, it is indispensable that the Judge present to the jury the rule of law by which their assessment of damage should be made.

In such an action, it is proper that the jury, in assessing the damage, should regard the *probable future* as well as the *actual past*.

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

Action for defamatory words spoken of Mrs. True.

Randall, for the defendant, having read the exceptions, offered to read and to support by proofs a written motion for an amendment of the exceptions, on the ground that alterations made in them by the Judge, after they had been drawn up and filed by the counsel, present the case wrongfully, and do injustice to the defendant.

Shepley, C. J. — "It is unnecessary to read the motion. The Court has no power to grant it. This has often been decided. A remedy in such a case can be had upon a writ of mandamus only.

The declaration contained three counts. The first and third are of the same import, alleging that the defendant spoke of the female plaintiff the slanderous words, "she is a whore." The second count alleged, that the defendant charged her with the crime of adultery. To the first and third counts the general issue was pleaded.

To the second count the defendant demurred specially, alleging for cause, that the "plaintiffs have not stated therein, as they ought, the words or other foundation upon which their allegation is predicated, by means whereof they artfully endeavor to prevent the defendant from making a just defence."

The demurrer was overruled, and the defendant then, (no objection being taken thereto,) pleaded the general issue to the second count, and also, by brief statement, justified the words therein sued for, as true.

The evidence in the case was all reported. It shows the facts stated in the opinion of the Court, and those stated and relied on in the argument of the defendant's counsel.

The plaintiffs offered the depositions of Timothy Fuller and six others, the captions to which were regular in form,

certifying that the adverse party was notified, and did not attend.

They were objected to by the defendant, who offered to prove, *that* he had been notified by the plaintiffs to attend the taking of the deposition of one Dorr, on the Saturday previous to the sitting of the Court, and that the magistrate having been employed to a late hour of Saturday evening, without having completed that deposition, adjourned the further proceedings therein to Monday morning at eight o'clock, at which time the defendant attended, and was engaged in that proceeding; finding it essential to his rights to do so; *that* the depositions now offered, were taken upon the same morning, upon a notice served upon the defendant at half past seven o'clock for his attendance upon such taking at the same half past seven o'clock; and that, for that reason, he did not and could not attend, to put cross-interrogatories.

The depositions were further objected to because not taken until the day next before the sitting of the Court. They were, however, admitted.

For the purpose of showing *express* malice, the plaintiffs offered the depositions of Samuel Whielden and Peter Whielden, showing that the defendant reiterated the slanderous words, but not showing whether such reiteration was before or after the bringing of this suit. These depositions were objected to, because the words they testified to, if spoken at all, might have been spoken subsequently to the bringing of this suit; and might therefore be the foundation of another suit. They were, however, admitted.

The depositions of Richard Libbey and Jonas C. Spooner are specially adverted to in the Judge's charge to the jury, and commented upon in the opinion of the Court. The former shows, that the defendant said "Mrs. True is a bad woman, decidedly bad," to which the deponent answered, that he thought "Mr. B." had more regard to his own family than to take a bad woman there; whereupon the defendant replied, "she is a damned whore, or she would not ride with J. B."

The deposition of Jonas C. Spooner states that "the de-

fendant expressed himself strongly that she was a bad woman, that she had dealings with other men besides her husband, and was not very particular who."

The defendant introduced evidence tending to show that the reputation of Mrs. True was bad; also evidence tending to show that she had committed the act of adultery.

Other matters, urged by the defendant, so far as the decision of any legal question depended upon them, will sufficiently appear in the argument subjoined.

The Judge charged the jury *that* they should, in the first place, see if the evidence satisfied them, that the defendant had charged the female plaintiff with being a whore, as alleged in the declaration; *that*, if they believed the testimony of Richard Libbey and Jonas C. Spooner, the precise time when the words were spoken was immaterial; *that* it was sufficient to maintain the first and third counts; *that* the testimony of Peter Whielden and Samuel Whielden was admissible to show express malice; *that* the proof, if believed, is sufficient to sustain the first and third counts, and the words proved being actionable of themselves, the plaintiffs are entitled to recover, at all events, nominal damage; *that* the reputation of Mrs. True, if bad, would go in diminution of damage on said counts; *that* whether she had a good or a bad character, was for the jury to ascertain; *that*, if the defendant spoke of Mrs. True the words testified to, they should give her such damage as she was entitled to on the first and third counts; *that*, in regard to the second count, the defendant's plea, justifying the charge of adultery as true, is to be considered evidence, though not conclusive, that he had made the charge sued for in that count; *that*, if adultery was proved, it would go in mitigation of damage on the first and third counts, and defeat any recovery upon the second; *that*, as to damages, the jury might consider the pain and anguish, the cost and trouble, and the suffering occasioned by the slander; her prospects in life, as affected thereby; the wealth and disposition of the defendant, and his power therefrom to injure, and give such damage as she was entitled to.

The defendant's counsel handed to the Judge the following requests in writing: —

1. If the jury believe there was no damage to the plaintiffs, the verdict should be for the defendant.

2. If the jury believe that the defendant, in any thing he said, had no malice or intention to injure the plaintiffs, the verdict should be for the defendant.

3. That if the jury find the justification proved, which had been set up to the second count, the verdict should be for the defendant on all the counts.

The Judge said that, as to the first and third requests, he had already given the requisite instruction. He declined to give the second, and told the jury *that*, in order to maintain the suit, it was not necessary the defendant should have any malice against the plaintiffs, or intention to injure them; *that*, if the defendant's malice was entirely towards another person, in slandering whom, he uttered the slanderous words against the plaintiff, the action was maintainable, and the damages should be just as great, as if the malice of the defendant had been towards the plaintiff; as if A threw a stone with malice, intending to kill B and killed C, against whom he had no malice, his guilt would be the same, as if he had killed B.

The counsel for the plaintiff verbally requested the Judge to instruct the jury, that the plaintiffs were entitled to recover for all future damages that might arise from the defendant's slanders. The Judge said to the jury, in reply, that he had already charged upon that point, and that they had very large discretion upon that question.

The case was submitted to the jury on Saturday evening, and they were directed to seal up their verdict and bring it in on Monday afternoon at the opening of the Court. On Monday afternoon, upon inquiry being addressed to the jury by the clerk, whether they had agreed, and before their answer, the counsel for the defendant requested the Judge to say to the jury that, if any of them wished to retire again to consider the case further, it was their right to do so. This the Judge declined to do. The counsel for the defendant

then requested the Judge to ask, or let them ask, the jury, if any of them wished again to retire to reconsider the case; and this request was renewed, after the reading and before the affirmance of the verdict. But the Judge refused to grant the request. The verdict was for $3,000.

To all the rulings against the positions taken by the defendant, &c., he filed exceptions.

Blake, for the defendant.

The depositions of Fuller and others ought not to have been admitted. The circumstances under which they were taken, as we offered to prove, show a gross attempt to overreach the law itself. To pretend that the law designs to give notice to attend, and then to practice a strategy by which such attendance is virtually prevented, illy becomes the administration of justice.

It has long been lamented that the deposition system has been systematically perverted, to the outraging of justice and truth. The hope was, that the practice under it would, by some rule of the Court, be corrected. Unhappily the decision in *Cooper* v. *Bakewell*, has but presented new encouragement to the tactics of distorting and perverting testimony. A just administration of law must rest upon the truth of testimony. If truth in testimony is to be sought, the rule in *Cooper* v. *Bakewell* requires a rescission. Its corrupting influences will prove unendurable. In this case, however, we rely upon grounds not in conflict with that part of that decision, which excludes parol evidence to control or explain the magistrate's certificate in the caption.

We offered *documentary* evidence, the original citation to defendant, and the officer's return upon it, showing of themselves that due notice had not been given.

The statute allows the party a given time, in which to go from his place to the place of caption. In this case not one moment was allowed us. The time of serving the notice and the time for taking the depositions were one and the same.

Besides, this flood of seven depositions, obtained in denial of our right to cross-examine, were taken on the day previous

to the sitting of the Court. This appears from their respective captions. We submit that, at so late a period in the vacation, we were not bound to attend.

The verdict was written, signed and sealed up on Sunday, and was therefore a nullity. The R. S., c. 160, § 26, prohibits any work, labor or business on that day, works of necessity and charity alone excepted.

Besides the statutory provision, that day, *by common law rules*, is *dies non juridicus*. The jury constitute a part of the Court; and they, as a jury, could do no lawful act on any part of that day. Nor is it sufficient, as a reply, to say that the verdict, though agreed upon on Sunday, was not delivered or affirmed on that day. *Clough* v. *Adams*, 9 N. H. 500, where it is held that a note, written on Sunday and handed to an agent to be delivered on Monday, is void. *Story* v. *Elliott*, 8 Cowen, 27; *Shaw* v. *McCoombs*, 2 Bay. 232.

It was our right to have permission given to the jury to retire again for consideration of their verdict. The proof was, that one of their number applied in the forenoon of Monday for such a permission; stating as a reason that the close of their action was hurried; that it was at about one o'clock on Sunday morning; that their room was cold; that they had been some thirteen hours confined without any refreshment; that they all were tired and some of them sick; and that several of them wished opportunity to consult further. On that request, the permission to the jury should have been granted, even without motion by the counsel, but especially was it the right of the party, on motion, to have that reasonable request granted.

The second count was bad on demurrer, for the cause specially assigned.

The mode of declaring generally, that the defendant imputed to the plaintiff the crime of adultery, is at variance from the ordinary course of pleadings, and can be sustained only on the most stringent authority, or extraordinary reasons.

In a criminal prosecution, such a mode of charging the of-

fence would be clearly insufficient. Yet the rules in this respect are the same as in civil suits.

The principle upon which this second count is framed, so says WESTON, C. J., in *Brown* v. *Brown*, 14 Maine, 318, "has not been adopted by any judicial decision in this State." And I trust the Court will be slow to adopt it, with the light which experience and judicial discussion has thrown upon the subject elsewhere.

The *words* or the substance of the *words*, not the substance of the *charge*, should be alleged; that the Court may see whether they impute the crime charged; 1 Saund. 242, n. (a); 3 M. & S. 110; 6 Taunt. 169; and also that the defendant may know with certainty what he has to meet, both in his pleadings and proofs.

The *words* should be alleged, for the further reason, that the suit may be pleaded in bar to a second suit for the same cause.

The case of *Nye* v. *Otis*, 8 Mass. 122, rests on one authority only, and that a mere *dictum* of a single Judge, and that Judge only sanctioned the setting out of the substance of the *words* spoken, not the substance of the *charge* made.

And that authority, Lord ELLENBOROUGH, 78 years afterwards, characterises as "an opinion hastily thrown out at *Nisi Prius;* an *obiter dictum;* and evidently founded on a mistake in regard to the precedent in Rastell."

The case of *Whiting* v. *Smith*, 13 Pick. 364, on which the plaintiff may attempt to rely, is founded mostly on the enfeebled decision of *Nye* v. *Otis*. The reasonings from convenience, which the Judge so laboriously arrays, are in conflict with experience and good sense; and, it is believed, do not give satisfaction to any legal mind. They make but a specious argument to maintain a questionable decision.

Greenleaf, in his forms for declaring in libel and slander, omits the general form, used in the second count of the declaration in this suit, thus evidently manifesting his disapproval of it.

The mode of declaring generally in slander has been ex-

pressly repudiated in several of the States. 2 Johns. 10; 12 S. & R. 427. These cases, conflicting with the decisions in Massachusetts, are overbalancing. So that, to say the least, there is no constraining weight of authority, to impel the Courts of Maine to encourage a course of pleading so much at variance from the ancient paths of the law, as is attempted in the count now under consideration.

The depositions of Samuel Whielden and Peter Whielden were wrongfully admitted. They stated words used by the defendant, but did not fix the time. The words may have been used, *after* the bringing of this suit, and, if so, being in themselves actionable, they may be the foundation of another suit, thus sustaining both this suit and a subsequent suit for the same cause. 7 C. & P. 112; 3 B. & C. 125. After suit brought for defamatory words, actionable in themselves, it is not competent, even with a view of showing malice, to prove that they were afterwards repeated. *Wilson* v. *Apple*, 3 Ham. 270; *Stuart* v. *Lovell*, 2 Stark. N. P. 93; *Root* v. *Lowndes*, 6 Hill, 519; *Kenholts* v. *Beeher*, 3 Denio, 348; *Watson* v. *Moore*, 2 Cush. 137.

The counsel then examined and commented elaborately upon the views of the Judge, as offered to the jury, in relation to damages; and especially objected that, in the charge to the jury, the Judge presented them no rule or principle by which to guide them in the assessment of damage.

A. W. Paine, for the plaintiffs.

Appleton, J. — The numerous questions arising in this cause have been argued with great elaborateness and ability, and it will become necessary to examine them with care, as well on account of their intrinsic importance, as on that of the interests involved in their determination.

The depositions of Timothy Fuller and others were taken at 8 o'clock, on the Monday preceding the session of the Court to which they were returnable. The defendant offered to prove, that the notice to take them, was served on him at half past seven of the same morning, and that, when they

were to be taken according to the notice given, he was engaged in attending to the taking of another deposition, which had been commenced on the Saturday previous, but had not been finished. It was held in *Cooper* v. *Bakeman*, 33 Maine, 377, that the magistrate's certificate as to the notice, manner and cause of taking a deposition is conculsive proof of the facts certified and that parol evidence, to show that the time between the notice and the caption was less than that allowed by the statute, was inadmissible.

In *Wyman* v. *Wood*, 25 Maine, 436, the Court decided, that a deposition taken on the day preceding that on which the Court at which it was to be used was to commence its session, should not for that cause be excluded. If there was an impossibility to attend, or if there was any surprise in the testimony offered, it might, in certain cases, furnish a ground for a continuance. No request for delay or for a continuance seems to have been made, and according to the authorities cited, the depositions were properly received.

The cause was committed to the jury on Saturday, and they were permitted to seal up their verdict and separate after they had agreed. The evidence tends to show, that they were engaged in the consideration of the cause, and that they had not agreed upon their verdict, till after twelve o'clock at night. The verdict was rendered and affirmed on Monday. The counsel for the defendant move, that for this cause it should be set aside, and rely on *Shaw* v. *McCoombs*, 2 Bay. 232. This case, which is directly in point, was briefly argued by counsel, and the opinion of the Court was given without any examination of authorities or discussion of principles. It has been subsequently examined and may be considered as overruled. In *Harrington* v. *Osborn*, 15 Johns. 115, the Court say: — "It was proper to receive the verdict on Sunday, presuming the jury were impanneled before Sunday commenced, but it was illegal to render the judgment on Sunday." In *Hurdekoper* v. *Collin*, 3 Watts, 56, it was held not to be void that a verdict in a civil cause was rendered on Sunday, the cause having been commenced on the previous

day. In *Baxter* v. *The People*, 3 Gil. 368, which was an indictment for murder, the jury did not agree, and the verdict was not rendered until Sunday morning, and upon full consideration the Court recognized the distinction, that a verdict may be received that day, but that no judgment could be entered or sentence pronounced. "We think," says CATON, J., "the authorities clearly establish, that when a cause is submitted to the jury before twelve o'clock on Saturday night, the verdict of the jury may be received on Sunday; but that it is not a judicial day for the purpose of rendering any judgment, and if it attempt to render a judgment, still in law it would be no judgment, but absolutely void, and will be so declared, and may be reversed by the Court."

On Monday afternoon, when the jury were directed to bring in their verdict, upon the inquiry being addressed by the clerk to the jury, whether they had agreed, and before their answer, the counsel for the defendant requested the Judge to say to the jury, that if any of them wished to retire again to consider the case further, that it was their right to do so, but this the Judge declined to do. The counsel for defendant then requested the Court to ask, or let them ask the jury, if any of them wished again to retire to consider the case, and these requests were renewed again after reading the verdict by the clerk and before the same was recorded, and in both instances they were refused by the Court, and, as we think, properly refused. The answer to the inquiry of the Court, and the verdict, as affirmed and recorded, was under oath. Any juryman might have dissented, had he deemed such to be his duty, before the affirmance of the verdict. *Ropps* v. *Barker & al.* 4 Pick. 242. After the jury had sealed up their verdict and had separated, the Court could not have sent them back to reconsider the verdict, without the assent of both parties, and had they so done, without such assent, it would have been good cause for setting it aside.

The second count contains a general allegation that the defendant had accused the plaintiff's wife of adultery. To this there was a demurrer and joinder in demurrer. An issue

of law was thus raised, and if the demurrer was sustained, the plaintiffs could not recover on the count to which it related. If the count was adjudged good, all that would remain to be done, would be the assessment of damages. The demurrer admitted all facts well pleaded, and if they constituted a ground of action the plaintiffs' right to recover was conceded. The Court adjudged the declaration good, which left only the damages to be assessed. Instead, however, of relying on the question of law thus raised, and presenting it before the full Court for their decision, the defendant pleaded the general issue to the count demurred to, and the action proceeded to trial as if no demurrer had been filed. As this was done by mutual consent, and as the defendant has had the benefit of an issue of law, and subsequently of an issue of fact, he cannot be allowed to take advantage of this irregularity.

But as the propriety of this mode of declaring may frequently arise, and as it has been fully argued, it may be advisable to examine and determine now the question thus raised. This general mode of declaring in slander by setting forth the substance of the words spoken, though opposed to the decisions in England and in many of the States, is in conformity with the usual course of practice in Massachusetts as well as in this State. Before the separation, in *Nye* v. *Otis*, 8 Mass. 122, it was held that a general count in an action for defamation was good. In *Whiting* v. *Smith*, 13 Pick. 364, this mode of declaring received the consideration of the Court, and the previous decision of the Court, in *Nye* v. *Otis*, was reäffirmed. In *Allen* v. *Perkins*, 17 Pick. 369, the Court held that a general count setting forth that the defendant had charged the plaintiff with a crime, was good. In *Clark* v. *Munsell*, 6 Met. 373, it was decided that the Court might, at the instance of the defendant, require a specification of the plaintiff, of the words upon which he intended to rely to support his action. The judicious exercise of this power would seem to remove all fears of any difficulty, which might be anticipated as likely to arise from this general mode

of declaring. The defendant might have required the filing by the plaintiff of the particular words by him spoken which imported the charge of adultery, and unless they had been furnished, the defendant would not have been compelled to proceed to trial.

In an action for damages for words not actionable in themselves, the plaintiff, besides proof of the words, must show the special injury resulting therefrom. When the words are actionable, the law infers malice and that some damages have ensued.

The words in the first and third counts in this case being actionable and the law implying malice, the counsel for the defendant object to the proof of other and different words, spoken by the defendant, for the purpose of showing malice.

It seems to be well settled that the intention, the *quo animo*, with which the words complained of were uttered, is an element most material in relation to the question of damages. To mitigate damages, the defendant may show that the words spoken and for which a suit is brought, were uttered in a passion, or in sport; in a state of intoxication, or under such circumstances as would tend most essentially to diminish their injurious effect, or to rebut the malice inferrable from their utterance. Sedgwick on Damages, 540.

The depositions of Samuel Whielden and Peter Whielden, to the admission of which the counsel for the defendant objected, contain actionable words of the same character, and asserting the same charge as those in the first and third counts, and were received for the purpose of proving express malice. The admission of evidence of this description, for this purpose, has been the subject of much discussion. In England, after much mutation of opinion, and after different rulings of eminent Judges, it was finally determined that it might be received to show malice on the part of the defendant, but not to obtain damages for the subsequent injury. "This appears to us to be the correct rule," says TINDAL, C. J., in *Pearson* v. *Lemaittre*, 5 Man. & Gran. 719, "that either party may, with a view to the damages, give evidence to

prove or disprove the existence of a malicious motive in the mind of the publisher of the defamatory matter; but that, if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And if such evidence be offered merely for the purpose of obtaining damages for such subsequent injury, it should be rejected." In *Bodwell* v. *Swan*, 3 Pick. 376, evidence of words spoken by the defendant after the commencement of the suit, of a similar import with those charged in the declaration, was held admissible for the purpose of proving malice.

In *Watson* v. *Moore*, 2 Cush. 134, the Court recognize with approbation the law as settled in *Bodwell* v. *Swan*, 3 Pick. 385, but limit its application to the repetition of the same slanders, or to those of a similar import. The same rule was adopted in this State, in *Smith* v. *Wyman*, 16 Maine, 13.

It has been decided, in *Campbell* v. *Brett*, 3 Coms. 173, that it was no defence to an action of slander, that the words sued for had been used in a former suit to prove malice. Hence, the importance of the qualification to the jury, that they should not increase the damages on account of words received merely to prove malice. For as damages are increased by proof of express malice, and as the tendency of a repetition of the same slander on the minds of a jury would be to show the intensity of the defendant's malice, and consequently to aggravate the damages, the jury should be forewarned against giving any such effect to this kind of evidence. This reason, among others, may have led the Court of New York to adopt the course of excluding all evidence of slanderous words other than those declared on, even for the purpose of proving malice. *Randall* v. *Buller*, 7 Barb. 260.

The objection, that it does not appear that the words in these depositions were uttered before the commencement of the plaintiffs' suit, cannot avail. They were not offered to sustain the declaration, but to show malice, and if to be ad-

mitted for that purpose, it would seem to be immaterial when they were spoken.

The words charged in the first count are, that "she," meaning the female plaintiff, "is a damned whore," and in the third count, that "she was a whore." The Court instructed the jury, that if they believed the testimony of Richard Libbey and Jonas C. Spooner, it was sufficient to maintain these counts. This instruction the counsel for the defendant claims to be erroneous.

The testimony of Libbey was, that the defendant said "Mrs. True was a bad woman, decidedly bad," that witness told him he thought B. had more regard to his own family than to take a bad woman there," to which defendant replied, "she is a damned whore or she would never ride with J. B." These words, it is insisted, do not prove the first count. We think otherwise. The charge thus made, may, in the mind of the defendant, have been a just inference from the facts stated, but whether the inference is one, which any other person would have made or not, whether it be just or not, it equally exists. The assertion is none the less made, though the inference may have been entirely without foundation. How far these words, "she is a damned whore," may be considered as modified in their meaning by the subsequent words, was for the jury to consider. *Whiting* v. *Smith*, 13 Pick. 372.

The evidence of Spooner was, that "defendant expressed himself strongly that she was a bad woman, that she had dealings with other men besides her husband, and was not very particular who." In slander the words must be proved as alleged. It is not enough to prove equivalent words, nor are words to the same effect the same words. *Fox* v. *Vanderbeck*, 5 Cow. 515. The testimony of Spooner does not sustain either of the counts. The habit of prostitution for the sake of gain, the utter debasement implied in the words charged, is not proved to have been asserted of the female plaintiff by the speaking of these words. "Unless," says Lord Ellenborough, in *Cook* v. *Cox*, 3 M. & S. 116, "the very words are set out, by which the charge is conveyed, it is al-

most, if not entirely impossible to plead a recovery in one action in bar of a subsequent action for the same cause." According to the recognized rules of law, the testimony of Spooner would not sustain either the first or third count. The words being proved and malice being an inference of law, the question occurs, by what rules shall the jury be governed in assessing damages.

The Court instructed the jury that if the plaintiff did commit adultery, they would consider it as evidence, though not conclusive, and if adultery is proved it will go in mitigation of damages in the first and third counts, and the plaintiff cannot recover in the second count. Of the correctness of this instruction there can be no question. If the defendant had established incontrovertibly the fact of adultery, still it might have been only in a single instance. But proof of one offence would not sustain the charge of that long continuance in vice which is asserted by the words in the first and third counts. The solitary instance does not prove the general habit. If one lapse from virtue was proved, it would be a defence to the second count and would properly reduce damages on the others, and so the Court instructed the jury.

The Court further instructed the jury as to damages, in these words; "As to damages you will consider the pain and anguish occasioned by defendant's slander, the cost and trouble, the suffering occasioned by that slander, her prospects in life as affected thereby, the wealth and position of the defendant, and his power therefrom to injure, and give such damages as she is entitled to."

Different rules for determining the measure of damages to which a plaintiff may be entitled in actions of tort, have been laid down for the guidance of a jury, by different Judges, and advocated by different juridical writers. Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less; and this, whether it be to his person or his estate." 2 Greenl. on Ev. § 253. "The damages,"

says METCALF, J., in *Halson* v. *Moore*, 2 Cush. 140, "in an action of slander, are to be measured by the injury caused by the words spoken and not by the moral culpability of the speaker." In this class of cases the law "permits the jury to give what it terms punitory, vindictive or exemplary damages; in other words, it blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." Sedgwick on Damages, 38. "In cases of personal injury," says GIBSON, J., in *Pastenus* v. *Fisher*, 1 Rawle, 27, "damages are given not to compensate, but to punish." "The jury may not only give," says WALWORTH, Ch., in *King* v. *Root*, 4 Wend. 113, "such damages as they think necessary to compensate the plaintiff for his actual injury, but they may also give damages by way of punishment to the defendants." The difference between the different rules above referred to is obvious. The jury should have been governed by that alone which is right. Whatever rule may be the true one, the plaintiffs are entitled to such damages as upon the evidence can be awarded in conformity therewith, and not to damages assessed upon other erroneous principles. Now no rule was given to the jury. Are they then to be a law unto themselves and freed from all legal restraints to assess damages at their own will and pleasure? The jury were directed to give the plaintiffs the damages to which they were entitled. To what are the plaintiffs entitled? The question unanswered recurs. To damages which are simply compensatory and to the full extent of any injury sustained? to those which would by way of example be sufficient to deter others? or to such as beside compensating, and deterring by example may impose a punishment on the defendant as for a crime? thus infusing into the civil proceedings the effect of a criminal procedure and erecting the jury into a tribunal which shall in each case impose the penalty. Either of these principles might have been adopted by the jury. Which in fact they did adopt, we know not and cannot know. As was remarked by ROGERS, J., in *Rose* v. *Story*, 1 Bacon, 190,

where somewhat similar instructions were given, "this is giving them discretionary powers without stint or limit, highly dangerous to the rights of the defendant. It is leaving them without any rule whatever."

Most of the various matters referred to in this instruction might be regarded as elements proper for the consideration of the jury, but still some rule should have been given to the jury, unless the law is that they are to determine the damages without any restraints, and in each case, according to their arbitrary discretion.

In actions brought to recover damages for an injury to the person or to the reputation, the injuries which may have arisen, as well as those likely to occur, must receive a compensation in one and the same suit if at all. The jury may regard the probable future as well as the actual past. In no other way can compensation be obtained. In *Gregory* v. *Williams*, 1 Car. & Ker. 568, the instructions given were, that in estimating damages, the jury might consider the prospective damages which might accrue from the defendant's act. "It is said," remarked BOSANQUET, J., in *Ingrane* v. *Lawson*, 8 Scott, 471, "that the damages sustained at the time of commencing the action, is all that the plaintiff could recover, and that the jury were erroneously directed that they might take into account the prospective injury. But it appears to me, that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might affect him at a subsequent period."

The counsel for the defendant requested the Court to instruct the jury that if they believed the defendant, in any thing he said, had no malice or intention to injure the plaintiffs, their verdict would be for the defendant. The Court declined to give this, but said to the jury it was not necessary defendant should have *any* malice against the plaintiffs, or intention to injure them, to maintain the suit; that, if defendant's malice was entirely towards another person, in slandering whom he uttered the slanderous words against the plaintiffs, the action was maintainable and the *damages would be*

just as great as if the malice of the defendant had been towards the plaintiffs. As if A threw a stone with malice, intending to kill B and killed C, against whom he had no malice, his guilt would be the same as if he had killed B.

Were this an indictment for murder, the instructions would have been less liable to exception. Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse. *Commonwealth* v. *York*, 9 Met. 115. Doing a wrongful act, knowing it to be such, constitutes malice. So far as regards the maintenance of the suit, it is equally maintainable whether there be malice in fact or not. But in a civil cause, where the jury are to assess damages, nothing is more clearly established by an entire uniformity of decisions, than that damages in slander may be increased upon proof of malice in fact. The instruction of the Court amounts to this, that the same damages are to be given when malice in fact exists, as when it is only a legal inference from the speaking of the words. Now, such we do not consider to be the law. "Upon principle," says TINDAL, C. J., in *Pearson* v. *Lemaittre*, already cited, "we think that the *spirit and intention* of the party publishing a libel, are fit to be considered by a jury, in estimating the damages done to the plaintiff." In *King* v. *Root*, 4 Wend. 139, WALWORTH, C. J., says, "that the plaintiff is at liberty to give evidence of actual malice and vindictive motives on the part of the defendant to increase the damages." Hence, for the purpose of showing the intention with which the words constituting the cause of action were spoken, and increasing damages, the repetition of the same slanders is received. The intention being of importance in fixing damages, as they may be greater or less accordingly or not, as malice in fact concurs with malice in law. It is manifest that the damages must be less when this special ground of enhancing them does not exist than when it was the moving and inducing motive of action. "The malice," says BUCHANAN, C. J., "which the law implies, is of itself sufficient to support the action, but the damages to be commensurate with the offence, should be regulated by the *quo animo* with which the

words were spoken, for which the suit is brought." *Rigden* v. *Wolcott*, 6 Gill & Johnson, 418; *Wagner* v. *Holbunner*, 7 Gill, 300. If damages were made to depend merely upon the malice which the law implies, then one, who with honest intentions and with reasonable grounds of suspicion, should impeach the integrity of another, and one who should with malignant purpose utter slanders intentionally false, might be both properly mulcted in the same sum. The instruction that they should be *just as great* in one case as in the other, we cannot but deem erroneous, and we think that the presiding Judge in the pressure of a *nisi prius* trial did not sufficiently regard the distinction between malice in law and malice in fact, as affecting the damages to which the party injured would be entitled. A new trial must therefore be granted.

Verdict set aside, and new trial granted.

SHEPLEY, C. J., and TENNEY, J., concurred. RICE, J., concurred in the result.

(*) ROLLINS *versus* RICHARDS.

An execution-debtor's relief bond obliges him, within six months, to deliver himself to the keeper of the jail, unless he have disclosed his property affairs or paid the amount due on the execution.

After the giving of such a bond upon the execution, no action upon the judgment can be maintained, if commenced before the expiration of the six months.

ON FACTS AGREED.

DEBT on a poor debtor's relief bond.

The plaintiff recovered a judgment against the principal defendant. Upon the execution issued on that judgment, the defendant was arrested, and gave the poor debtor's relief bond. One of its alternative conditions being, that within six months, he would deliver himself into the custody of the keeper of the jail, &c.

This is an action of debt upon the judgment, brought after the giving of the bond and within six months.

G. W. Crosby, for the plaintiff.

Rowe & Bartlett, for the defendants.

HATHAWAY, J. — This action was commenced after the debtor's release from arrest on execution, by giving bond; his body, or the bond in place of it, was holden for satisfaction of the judgment. No suit, then, on that judgment, could be maintained without some statute provision authorizing it. The facts agreed, do not maintain the plaintiff's action under R. S., c. 119, § 56.

By c. 148, § § 42 and 59, the debtor's person may be discharged, without discharging the judgment or his property, the body only is to be forever exempt. By § 60, the fact of discharge may be indorsed on the execution, which, if it has not expired, may be enforced, and when the return day be passed may be renewed. By § 61, whether such indorsement be made on the execution or not, an action of debt on the judgment may be maintained, — *That is*, it may be maintained *after* an actual discharge of the debtor's person, (although the indorsement thereof be not made on the execution,) but not *before*, and while he is liable to be surrendered and go into prison on the first judgment.

The second action pursues the *property* of the debtor, and can be maintained *only*, when his person has been discharged from liability to imprisonment in execution of the first judgment. *Plaintiff nonsuit.*

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

(*) MAHONEY, *Complainant, versus* CROWLEY.

A bastardy process pertains to the civil and not to the criminal department of the law.

Of such a process, the Court, at a term held for the transaction of *criminal business*, has no jurisdiction, and its proceedings thereon are merely void.

On Exceptions from *Nisi Prius*, Appleton, J.

Bastardy Process.

The respondent was examined before the Police Court of Bangor, and was ordered by that Court to give bond for his appearance at this Court at its term to be held Nov. 1852, "for the transaction of *criminal* business."

The complaint was entered at that term. The respondent moved that it be dismissed for want of jurisdiction, alleging that it pertained, not to the criminal, but to the civil department of the law. The motion was overruled, and the respondent excepted, the verdict being against him.

Peters, for the respondent.

Wakefield, for the complainant.

Shepley, C. J. — The Act of April 9, 1852, provides, that terms of Court shall be holden in this and certain other counties "for the transaction only of the civil business of said Court," and that certain other terms shall be holden "for the transaction of all the criminal business thereof." The question presented is, whether the Court, at a term holden for the transaction of criminal business, had jurisdiction of a prosecution for the maintenance of bastard children.

The question has been fully considered and decided by the Courts in New Hampshire, Massachusetts and Connecticut, upon statutes containing provisions much like our own. The reasons for those decisions have been so fully and ably stated, that no one can be expected to add much to them. Those that have been and may be assigned for the conclusion, that such a prosecution is comprehended in the terms, "all crimes and offences," or in the terms, "every other matter or thing of a criminal nature," are in substance, that the statute of Massachusetts authorizing it was entitled, "an Act for the punishment of fornication and for the maintenance of bastard children;" that cognizance of the subject had in that State been vested in a Court of criminal jurisdiction for nearly two centuries; that the prosecution originates in a transaction by law deemed to be criminal; that it is commenced by com-

plaint, upon which a warrant is issued for the apprehension of the person who is arrested and forthwith carried before a magistrate for examination; that the officer who arrests cannot take bail; that the accused may be committed to prison, if he does not give bond for his appearance at Court to answer to the charge; that when found to be guilty, the judgment is not simply for the payment of money, but that he is the putative father of the child; that it is not enforced by a writ of execution; that upon failure to comply with the order of the Court he is immediately committed.

The reasons for a different conclusion are in substance, that in this and the other States the Acts contain no provision for the punishment of any offence or of either party; that the process is not commenced by or in the name of the State; that it cannot be commenced or controlled by the State or by any of its officers; that the female cannot be compelled to commence it or to testify respecting it; that when the case is presented in Court it cannot proceed upon the complaint alone, but she must file a declaration, as in a civil suit, which may be amended as in civil suits; that when she has a husband he must be joined in the process; that she may discontinue the proceedings unless prevented by statute provisions; and may discharge the judgment; that the accused is not arraigned as a criminal or treated as such; that he may appear and plead by attorney; that juries for the trial of such issues are not impanneled as in criminal cases; that the judgment is not a sentence upon conviction for a crime, but only is an award to pay a sum of money to the other party, and to save the town harmless from expense for support of the child; that depositions, have always been used, on such trials, as in civil cases, without any special provisions of statute; that costs are awarded to the prevailing party as in a civil suit; that the bond to be given is not to the State, but to the female; that the purpose and end of the prosecution is not punishment for an offence, but only to compel the father to contribute to the support of his child; that a pardon by the executive could have no effect upon the

proceedings; that, when a party for his own purposes is authorized by law to use a process assimilated in form to criminal process, it does not thereby become a criminal matter or criminal business.

It is admitted, in the decided cases, that such a prosecution partakes partly of a criminal and partly of a civil character. Whenever the Legislature of a particular State has recognized it as pertaining to its civil or criminal business, the Courts of that State may properly so regard it.

By the Courts of Connecticut and New Hampshire, it has been decided to be of a civil, and not of a criminal nature. *Hinman* v. *Taylor*, 2 Conn. 357; *Marston* v. *Jenness*, 11 N. H., 156. In the Court of Massachusetts, the decision has been different. *Hill* v. *Wells*, 6 Pick. 104; *Cummings* v. *Hodgdon*, 13 Met. 246; *Smith* v. *Hayden*, 6 Cush. 111.

In this State, it will be difficult to come to a conclusion, that such a prosecution is a part of the criminal business of the State, without overruling former decisions of this Court.

It was said in the case of *Mariner* v. *Dyer*, 2 Greenl. 165, "this process is regarded as a civil remedy, and for that reason, depositions which can be used only in civil causes, are received in prosecutions of this sort."

In the case of *Low* v. *Mitchell*, 18 Maine, 372, the Court held, that it was not designed to punish the accused for a crime, but to make him, if found to be guilty, contribute to the support of the child; and that the general character of the accused was not admissible in evidence, it being regarded as a civil suit.

In the case of *Robinson* v. *Swett*, 26 Maine, 378, it became necessary to decide, whether the complainant and accused were parties interested in cases, of which the Municipal Court of Portland had jurisdiction. The opinion declares "a bastardy prosecution is a case, and it is not a criminal proceeding."

In the case of *Eaton* v. *Elliot*, 28 Maine, 436, the question presented was, whether the District Court had power to set aside a verdict rendered in such a prosecution. It appeared,

that this Court was authorized by statute, c. 123, § 1, to grant reviews "in all civil actions, including petitions for partition," and "including also prosecutions for the maintenance of bastard children." The second section of the same statute authorized a Justice of the District Court to "grant reviews of actions of the kinds, and under the circumstances in the preceding section." The Court considered, that the Legislature designed to include such prosecutions in the actions designated. The opinion states, "the process is criminal in form, but it is well settled, that in substance it is a civil remedy, having all the incidents of civil process."

The Court was assisted to come to such a conclusion by remarks made by the Court of Massachusetts in decided cases.

The opinion in the case of *Wilbur* v. *Crane*, 13 Pick. 284, had stated, "the process is in some respects in the form of a criminal prosecution. But we consider the form of process immaterial; the suit is in substance and effect a civil suit; as much so as it would have been, if the remedy provided were a special action on the case."

The opinion in the case of *Williams* v. *Campbell*, 3 Met. 209, states, "we are however of opinion, that this process is essentially of the nature of a civil action, although in the forms of proceeding it more resembles a criminal prosecution." It was considered to be comprehended in the statute provision, that "all transitory actions" might be brought in the county where one of the parties lived.

If the Court, in this State, for the transaction of criminal business, should be considered to have jurisdiction of such a prosecution, it would seem to follow, that the forms of trial in criminal cases must be applicable, and this would be at variance with established and uniform practice in such cases. As by our Legislature as well as by our Courts, the prosecution appears to have been regarded as a civil suit and included in civil actions, before the passage of the Act of 1852, it must be considered as included in the civil business of the Court.

If such should be the conclusion, the counsel for the complainant desires, that the case may be transferred to the docket

for the civil business, that judgment may be entered upon the verdict there. This the Court cannot do. The whole proceedings in the Court for the transaction of criminal business, must be considered as unauthorized by law and therefore void. The accused has not been required to appear or answer in the Court for the transaction of civil business.

Exceptions sustained, verdict set aside, and the proceedings dismissed.

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

(*) BUCK *versus* BABCOCK.

A deed of land, though unrecorded, conveys title as against the grantor and his heirs.

Prior to the Revised Statutes, a disseizee of land could make no valid conveyance.

To a deed made prior to the Revised Statutes by a disseizee, these statutes imparted no new efficiency.

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

WRIT OF ENTRY.

Jacob G. Remick formerly owned the land. On Feb'y 11, 1836, he conveyed it to the demandant by a deed, which, though not acknowledged, was spread upon the record Feb'y 13, 1836.

Proof of the deed was made before this Court at Nov. term, 1852, in Cumberland, by one of the subscribing witnesses, in manner provided in c. 91, § 18, and following sections of the Revised Statutes, Remick not being an inhabitant or resident in this State. A certificate of that proof was indorsed by the clerk of the Court, under the seal of the Court, upon the deed, and the deed and certificate were then recorded, Jan'y 6, 1853.

On April 30, 1836, Remick, by deed, dated and acknowledged and recorded on that day, conveyed to Luce. Under this deed to Luce, the tenant, through mesne conveyances, derived

title by deed dated and recorded in 1841. To the admission of these deeds, the demandant objected, especially the one to the tenant's immediate grantor, which was dated in 1853, since the commencement of this suit.

Remick left the State in 1838, and has not returned. The demandant introduced Nathan Emerson, who testified, that about the middle of Feb'y, 1836, while he, the witness, was living on the land, the demandant went to the land, and informed the witness that he had purchased it; and examined the boundaries; and also, that it was agreed that the witness should remain on the land, till notified to remove, and should protect it from plunderers and pay the taxes, taking wood for fires but for nothing else; and that, in accordance with that agreement, he had ever since remained on the land, claiming no title to it.

He further testified, that the tenant, in 1841, went into possession and cut off timber and wood, the witness forbidding him to do so; and that the tenant has since cut and carried away large quantities of the growth.

The tenant also relied upon a tax title.

The case was withdrawn from the jury and submitted to the Court.

A. W. Paine, for the demandant.

J. Godfrey, for the tenant.

The demandant is to recover upon the strength of his own title, if at all. The deed he claims under was not acknowledged. Its registry was therefore wrongful and inoperative.

The 18th § of R. S., c. 91, relied on by the demandant's counsel, gives him no relief. For Remick did not leave the State till two years after giving the demandant's deed; and before his conveyance to Luce, the forty days monition had expired. *Pidge* v. *Tyler*, 4 Mass. 541; *DeWitt* v. *Moulton*, 17 Maine, 418; *Sigourney* v. *Larned*, 10 Pick. 72; *Blood* v. *Blood*, 23 Pick. 80; *Roberts* v. *Bourne*, 23 Maine, 165; *Veazie* v. *Parker*, 23 Maine, 170.

The counsel seems to rely upon a constructive notice to the tenant of a prior sale, resulting from the supposed arrangement

between the demandant and Emerson. Emerson, however, held no possession; he was employed merely to pay the taxes.

But implied or constructive notice of a prior deed is insufficient. R. S., c. 91, § 26, requires *actual* notice. *Spofford* v. *Weston*, 29 Maine, 140; *Butler* v. *Stevens*, 26 Maine, 484.

HATHAWAY, J. — Jacob G. Remick was the owner of the land in controversy, and both parties claim title under him; the demandant, by Remick's deed to him, February 11, 1836, not acknowledged, the execution of which was not proved, nor the deed recorded, till January 6, 1853.

The demandant took immediate possession under his deed, and retained it by his tenant, Nathan Emerson.

The tenant claims title by deed from Remick to George W. Luce, dated April 30, 1836, and sundry mesne conveyances to David Messman, who was the tenant's immediate grantor. Remick's deed to the demandant, though not acknowledged or recorded, was valid against the grantor and his heirs. *Lawry* v. *Williams*, 13 Maine, 281.

The case finds that, at the date of Remick's deed to Luce, the demandant, by his tenant, was in the exclusive possession of the demanded premises, claiming title. Remick was therefore disseized when he made the deed to Luce, and as the law then was, nothing passed by it, and all the subsequent deeds, under which the tenant claims title, resting upon that deed as their foundation, were inoperative.

The defendant was a mere trespasser, and his deed cannot avail him. *Hathorne* v. *Haines*, 1 Greenl. 238.

The tenant also relies upon a tax title derived from Nahum Emery, August 31, 1844, but the case does not present such evidence as the law requires to establish the validity of a tax title. 27 Maine, 289; 30 Maine, 319; *Matthews* v. *Light*, 32 Maine, 305.

Tenant defaulted, judgment for demandant for possession, and his damages to be assessed as agreed.

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

(*) Baldwin *versus* Doe *& al.*

If a poor debtor, when disclosing his property affairs upon a relief bond, shows that he has money on hand, or debts due to him, and does not cause the same to be appraised and set off for the creditor, the bond is forfeited.

Thus, if he have paid in advance to the examining justices for their fees, a greater sum than they were allowed by law to receive, the bond is forfeited, unless he causes his claim against them for reimbursement to be appraised.

To the creditor's claim for a forfeiture, in such a case, it is no answer, that he might have recovered in a suit against the justices as trustees of the debtor.

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

Debt on a poor debtor's relief bond.

Defence, that he had performed the condition by disclosing his property affairs and taking the oath, as therein provided for, before two justices of the quorum.

The justices, in their certificate of discharge, incorporated the debtor's disclosure, from which it appears, that when making it, he laid upon the table and left three dollars for the justices' fees.

The Judge instructed the jury, that it might perhaps be presumed the justices took the three dollars, but that their legal fees were only fifty cents each, and, that therefore, there were two dollars of the debtor's money, which should have been turned out by him to the creditor, and if the same had not been appraised or turned out and accepted, and if the plaintiff had not waived an appraisal, then the plaintiff would be entitled to their verdict for two dollars at least. To this instruction the defendants excepted.

The defendants requested the Judge to instruct the jury, that if the legal fees of the justices were only fifty cents each, and they had received the three dollars, which the debtor laid on the table as their fees, still that sum was liable to the process of foreign attachment in their hands, and therefore did not come within the provisions of § 29, of c. 148, of the R. S., and the bond would not be forfeited by the debtor's neglecting to have it appraised.

This request was refused, and the defendants excepted.

The verdict was for the plaintiff, assessing the damage at six dollars.

The answer by the jury to certain questions propounded to them, is given in the opinion of the Court.

A. Sanborn, for the defendants.

I. The instruction was erroneous. —

1st. Justices are by statute allowed for travel, besides the fifty cents for attendance. And the distance of travel does not appear in the case.

2d. The law requires nothing useless. An appraisement of the value of two dollars could but be an idle form. What would appraisers say two dollars were worth?

II. The instruction requested should have been given.

If the justices took the sum of three dollars as their fees, then it was no longer in the possession or control of the debtor. It was in the possession of the justices, claiming it as their property. It is manifest, therefore, that it does not come within the meaning of § 29, of c. 148, of R. S. The surplus, if any, above their fees, might have been reached by process of foreign attachment in their hands. But it would be wrong, not only against the principal debtor, but especially against his sureties, that the bond should be forfeited, because he did not turn out the money when it was not practicable for him to do so.

Simpson, for the plaintiff.

Appleton, J. — The jury have found, in answer to certain questions proposed at the instance of the counsel for the defendants, that the debtor, at the time of the disclosure, possessed, or had under his control, bank notes, bills, accounts, bonds or other property, not exempt from attachment, and which could not be come at to be attached, and that upon such property being so disclosed by the debtor, the creditor and such debtor did not agree to apply the same in part or in full discharge of the debt, and that the creditor did not waive an appraisal of such property.

The instructions given, and those refused, relate entirely to

three dollars, which the debtor says he left on the table, but whether the same was taken by the justices or not, does not distinctly appear. If this sum was paid to the magistrates after having been disclosed by the debtor, then this case is brought clearly within the authority of *Butman* v. *Holbrook*, 27 Maine, 424, where it was decided that the lien given by R. S., c. 148, § 34, attached to the money disclosed in favor of the creditor, and that it could not be disposed of within thirty days next after the disclosure, without working a forfeiture of all benefit from the certificate. If, therefore, the money was paid to the justices, then, in the language of WHITMAN, C. J., in the case before referred to, "this brings the case within the literal import of the statute to work a forfeiture."

If the money was not paid to the justices, but remained the property of the debtor, then, as by the facts found by the jury there was a forfeiture of the bond, the money should be included in the sum found by the jury, as damages. The law is well settled that, to prevent a forfeiture, the property disclosed, so far as it is embraced by R. S., c. 148, § 29, should have been appraised. *Harding* v. *Buller*, 21 Maine, 191; *Fessenden* v. *Chesley*, 29 Maine, 368.

In either event, therefore, the plaintiff is entitled to judgment. *Exceptions overruled. Judgment on the verdict.*

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

(*) WILSON *versus* WADLEIGH *& al.*

An attorney, in virtue of his general employment to prosecute a suit, has no authority to *discharge* the judgment or execution which he may recover, unless upon the payment of the amount due.

Neither has he authority to *assign* the judgment or the execution. An assignment made by him could confer no rights upon the assignee.

A discharge of the execution by such an assignee can therefore impair none of the rights of the plaintiff in whose behalf the judgment was recovered.

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

DEBT on judgment, recovered in 1847, against J. Wad-

leigh, I. Wadleigh and James Purington, jr., for $541,77. Jewett & Crosby were the plaintiff's attorneys of record in obtaining the judgment. The death of Purington having been suggested, the writ was amended by striking out his name.

The defendants put into the case, the execution issued upon that judgment. Upon the back of it was the following indorsement: —

"In consideration of four hundred dollars, we hereby assign and transfer the within execution to E. D. Hoskins, with all the rights and powers belonging to the same.

"*Jewett* and *Crosby*, Att'ys for Wilson.

"December 8, 1847."

The defendant also introduced a discharge of the execution by Hoskins, dated April 1, 1850.

The defendants also put in the writ in the case, *Jewett & al.* v. *Wadleigh & al.*, reported, 32 Maine, 110. By agreement, all the papers referred to in that case are to be considered as in this case.

The defendants called a Mr. Crosby as witness, who testified that after Ira Wadleigh had paid to Jewett, one of the plaintiff's attorneys, the $400, Jewett and Wadleigh had a conversation about Purington's liability to pay a portion of the demand, and the assignment was made for the purpose of enabling Wadleigh to collect of Purington. Wadleigh preferred that mode in preference to having it discharged, and Jewett wrote something on the execution.

The case was submitted to the Court for a decision as the legal rights of the parties may require.

Rowe & Bartlett, for the plaintiff.

The assignment of the execution is void, Jewett & Crosby, the attorneys, having no power to make it.

Parol evidence is not admissible to show, that this assignment was intended to operate as a discharge, and not as an assignment. 7 Maine, 435; 14 Maine, 335; *Osgood* v. *Davis*, 18 Maine, 146; *Jewett* v. *Wadleigh*, 32 Maine, 112.

The memorandum given by the defendants to Jewett & Crosby, shows that the execution was not discharged; nor in-

tended to be, except on the performance of certain conditions on the part of the defendants, which have not been performed. *Jewett* v. *Wadleigh*, cited above.

Cutting, for the defendants.

On Dec. 8, 1847, in consideration of $400, paid and secured by defendants, the judgment was either discharged or assigned to E. D. Hoskins.

If discharged, then the plaintiff has no cause of action. —

For by statute c. 213, (Approved June 3, 1851,) § 1, it is enacted, that "no action shall be maintained in any Court of this State, on any demand or claim, which has been settled, canceled or discharged by the receipt of any sum of money less than the legal amount due thereon, or for any good or valuable consideration, however small, by the owner thereof, or by his agent or attorney to whom the same has been entrusted for collection or settlement, whether such agent or attorney be generally or specially authorized."

The present action was commenced Sept. 1, 1851, after the passage of the Act.

Mr. Crosby's testimony shows, that the assignment was made to enable Wadleigh to collect of Purington, and that Wadleigh preferred that mode, rather than a discharge, and that thereupon Jewett wrote something on the execution.

That something, turns out to have been an assignment to E. D. Hoskins, but solely for the benefit of Wadleigh.

Thus, from the testimony of Crosby and the act of Jewett, the conclusion cannot be otherwise, than a design to exempt Wadleigh from the payment of the execution, which in the language of the statute, so far as it regards him, was settled, canceled or discharged.

In the case, *Jewett & al.* v. *Wadleigh & al.*, 32 Maine, 110, the decision is based principally on the consideration that, *as the law then was*, an attorney was not authorized to receive a less, in payment of, a larger sum.

It would seem that the agreement to Jewett & Crosby, under the circumstances, was made in order to uphold the execution for Wadleigh's benefit; for all the parties then must

have contemplated that the cash and notes secured by E. D. Hoskins was to be in full, which notes were paid though not promptly. All the damages recoverable was the interest on the notes after they became payable, which the plaintiff has received.

That agreement says that the execution was "settled." "Whereas, we have *settled* an execution," is the language.

Crosby swears to the same effect, that at Wadleigh's request, there was a transfer instead of a discharge.

Rowe, in reply.

The testimony of Crosby was inadmissible. The matter was not for the jury. It is merely a report to be decided on the parties' legal rights. Inadmissible testimony, then, is not to have influence.

Our objection is, that it was introduced for an unallowable purpose.

The statute cited by the counsel can have no effect here. It is not to operate retrospectively.

APPLETON, J. — It appears in evidence that Messrs. Jewett & Crosby, the attorneys to the plaintiff, upon receiving notes for an amount less than the sum due, assumed to assign the judgment, on which this suit is founded, to one Hoskins, by whom the same was subsequently discharged. The defence, therefore, mainly rests on the right of an attorney, without special authority, to assign a demand left with him for collection.

An attorney cannot, by virtue of his general character as such, discharge a defendant from custody on execution, without satisfaction. *Kellog* v. *Gilbert*, 10 Johns, 229. He cannot commute a debt, or materially change the security which his client may have, without his assent. *Smoch* v. *Dade*, 4 Rand, 639. Nor can he, by virtue of his retainer to prosecute or defend a suit, release a claim of his client on a third person, for the purpose of making such person a witness for him. *Shores* v. *Caswell*, 13 Met. 413. So, too, he cannot, in virtue of his general employment, discharge an execution in favor of his client, unless upon payment of the

amount due. *Jewett* v. *Wadleigh*, 32 Maine, 110. He is necessarily vested with great discretion in the management of a cause during its progress to final judgment, but he is not authorized to assign or transfer that judgment when obtained. Such authority is not necessary for the discharge of his duty, and would leave the interests of his client to his mercy. In *Penniman* v. *Patchin*, 5 Ver. 352, PHELPS, J., says, "he cannot compromise a demand without special authority for that purpose, nor discharge it without satisfaction. Much less can he assign it for his own benefit; such an act being not only foreign to the purpose of his employment, but inconsistent with it. A power so liable to abuse, (which indeed could hardly be exercised without abuse,) can with no propriety be admitted." The assignment to Hoskins gave him no title to control the execution, and the rights of the plaintiff remain unaffected by his acts as assignee.

The counsel for the defendant rest their defence on statute c. 213, approved, June 3, 1851, which enacts that "no action shall be maintained in any Court of this State on any demand which has been settled, canceled or discharged by the receipt of any sum of money less than the legal amount due thereon, or for any good or valuable consideration, however small by the owner thereof or by his agent or attorney to whom the same has been entrusted for collection, or settlement whether such agent or attorney be generally or specially authorized." But the case, as now presented, is not embraced, by the provisions of this statute. The execution was not in fact, nor was it intended to be discharged by Messrs. Jewett & Crosby. It appears from the testimony of Mr. Crosby, that the assignment was made to Hoskins, who was surety on the notes given at the time of the transfer, to enable him to collect the execution of Purington, one of the original defendants. The assignment to Hoskins, as has been seen, was utterly void. As he was neither the owner, nor agent or attorney, as he was neither generally nor specially authorized to act in the matter, his alleged discharge can be no bar to the further prosecution of this suit.

Nor is the defendant in a condition to invoke the aid of the contract of Dec. 8, 1847, which was before the Court in *Jewett* v. *Wadleigh*. 32 Maine, 110.

If that were to be considered as a settlement and not an assignment, still it was upon conditions with which the defendant has never complied. He cannot claim the benefit of its provisions and repudiate the terms upon which it was made. By that settlement, if such it were to be deemed, the notes then given were to have been paid at maturity, and if not so paid, the balance was to have been paid to the attorneys of the plaintiff. To entitle the defendant to the deduction then made, the amount agreed upon was to have been punctually paid. As the defendant has successfully defended against that contract, on the ground of want of authority in those with whom it was made, he is not now in the most favorable position to assert its existence.

The plaintiff is entitled to judgment for what may be due after deducting such payments as may have been made.

Defendant defaulted.

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

(*) HUNTINGDON *versus* HALL.

The sale of personal property, in the possession of the vendor, at a fair price, raises a warranty of title.

But, if the property be not in possession of the vendor, and if there be no assertion of ownership in him, no implied warranty of title arises.

In such a sale, the maxim, *caveat emptor*, applies.

Where a note is given for personal property to which the vendor had no title, assumpsit to recover back the agreed price is not maintainable in the absence of proof, either that the note was negotiable, or that it had been paid.

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

ASSUMPSIT. The declaration contained two counts.

A small dwellinghouse stood upon the land of a third person. It was occupied by one Parody. The defendant sold

it to the plaintiff, at the price of $50, and gave a bill of sale, describing it as "the house now occupied by Parody, and acknowledging to have received pay by two notes, one of $20, and one of $30.

The plaintiff now alleges, that the defendant had no ownership of the house, and the first count in this action is upon an implied warranty of title.

The second count claims to recover back the $50, as having been paid upon a consideration which has failed.

The case was submitted to the Court.

J. T. Hilliard, for the plaintiff.

Upon the question whether the sale of personal property, not in possession of the vendor, imports a warranty of title, there is a conflict of authorities. Story, in his work on contracts, § 535, lays down the principle, that "a warranty of title will be presumed, whether the goods sold be, at the time of the sale, in the possession of the vendor or of a third person, unless the contrary be then expressed."

It was upon this authority, that this suit was instituted, and it is relied upon to support the action.

On the second count the defendant is also entitled to recover.

The defendant received the consideration, $50. But he had no title. He received the consideration without an equivalent, and this is the appropriate form of action to recover it back.

The defendant acknowledged he received his pay in notes.

A negotiable note is payment. An unnegotiable note is merely collateral, and is not payment. Hence the notes must have been negotiable. Whether paid or not, they were equal to cash to the defendant, and he may have negotiated them in the market, so that this plaintiff must pay them at all events. If in the hands of a third person, the failure of consideration would afford no defence in a suit against the maker.

Rowe & Bartlett, for the defendant.

Appleton, J. — The plaintiff having purchased a house of the defendant on the land and in the occupation of a third

person, claims to recover back the consideration paid, upon the ground of an implied warranty of title by the vendor in the sale of personal chattels. The contract between the parties shows that the one bought and the other sold the house as personal property, and it must be so considered in determining their rights.

There was no fraud, no express warranty, no delivery of the thing sold, and no *assertion of title* on the part of the vendor before or at the time of sale. The bill of sale discloses that it was not in the possession of the vendor, and the evidence shows that it was on the land of a third person. In such case, no warranty of title will be implied. The implied warranty arises when the vendor is in possession of the chattel himself or by his servant at the time of the sale. "In every sale of a chattel, *if the possession be at the time in another*, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own and not as the agent of another, and for a fair price, he is understood to warrant the title." 2 Kent's Com. 478. This question was elaborately discussed in *Morley* v. *Attenborough*, 3 Wils. Hurls & Gordon, 512, and after a careful review of the English authorities, PARKE, B., in delivering the opinion of the Court, thus declares the law; "It would seem that there is no implied warranty of title in the sale of goods, and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty or an equivalent to it by declarations or conduct, and the question in each case, where there is no warranty in express terms, is whether there are such circumstances as to be equivalent to such warranty." In *McCoy* v. *Artcher*, 3 Barb. 323, after a careful examination of the decisions in relation to this subject, the Court came to the conclusion, that if the property sold was at the time of the sale in the possession of a third person, and there was no affirmation or assertion of ownership, no warranty of title would be implied, but if there was an af-

firmation of title, in such case the vendor would be subjected to the same liability as if he had possession.

In *Russell* v. *Richards*, 1 Fairf. 433, the doctrine of implied warranty would seem to be limited to the case where the vendor has possession. "A sale of a chattel, "says MELLEN, C. J.," *in the possession of the vendor*, amounts to a warranty of title; not so in the case of real estate." The law is laid down in accordance with these views in the various text books, with the exception of Story on Sales, 535, cited by the counsel for the plaintiff in his argument. Ross on Vendors & Purchasers, 335; Long on Sales, Rand's Ed., 201; 1 Parsons on Con. 458. The cases where it is asserted in general terms, that in the sales of personal chattels, the law will imply a warranty, will be found to be those in which the vendor was in possession, and where the distinction here considered did not arise, and was not necessarily involved in their determination.

There is no evidence that the plaintiff has paid the notes given for his purchase. It is not necessary to determine whether the money can be recovered back as on a failure of consideration. *Plaintiff nonsuit.*

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

(*) CRAIG *versus* WEBBER.

The remedy given by R. S., c. 148, § 49, against one who aids in a fraudulent transfer or concealment of a debtor's property, is allowed to *creditors* only.

During the pendency of an action of tort, sounding in damages, the plaintiff's right to recover does not constitute him a creditor.

For aids given to the defendant in a fraudulent transfer or concealment of his property, pending an action of tort, sounding in damages, the statute gives to the plaintiff no right of action.

The plaintiff, however, in such a suit, becomes a creditor, upon the rendition of a judgment in his favor for damages.

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

CASE.

The plaintiff, in 1846, commenced an action of trespass *quare clausum fregit*, against one Willa, and, in June, 1851, recovered judgment therein, damage $1, cost $37,26.

In 1847, while that suit was pending, Willa fraudulently and without consideration transferred his property to the defendant for the avowed purpose of keeping it from seizure on the execution which the plaintiff might in that action recover.

This suit was brought on Dec. 22, 1851, and was founded on R. S., c. 148, § 49, for aiding Willa in the fraudulent transfer or concealment of the property.

The case was withdrawn from the jury and submitted to the Court.

C. P. Brown, for the plaintiff.

This statute provides "that any person who shall knowingly aid or assist any debtor or prisoner in any fraudulent concealment or transfer of his property, to secure the same from creditors, and to prevent the seizure of the same by attachment, or levy on execution, shall be answerable to any creditor, who may sue for the same, in double the amount of the property, so fraudulently concealed or transferred; not, however, exceeding double the amount of such creditor's just debt or demand."

The facts present the exact case, which the statute was designed to meet, unless it be that the plaintiff was not a creditor of Willa. We contend he was such a creditor within the intendment of the statute.

Webster defines the term creditor to be "a person to whom a sum of money or other thing is due, by obligation, promise, or in law." "Correlative to debtor."

Willa had invaded the plaintiff's rights, and done him an injury. A demand thence arose, which he was morally and legally bound to satisfy. Was not here, then, "money or other thing due," both by "obligation" and "in law?" Could not the plaintiff have obtained that money, if the defendant had not wrongfully interfered to take the defendant's pro-

perty? and the taking was precisely in the language of the statute, "to prevent the seizure by attachment or levy."

The reason of the statute extends as fully to persons injured by a trespass as to one holding a promissory note.

Upon recovering his judgment, the plaintiff instantly became a creditor, if he was not so before. *Meserve* v. *Dyer*, 4 Maine, 52. But though the defendant took the property before the judgment was recovered, he has continued to retain it till this time, and that retaining is to be treated as a renewal of the taking every day. Hence he took it and held it when the plaintiff was undeniably a creditor.

But it may be said that, at the time of the defendant's fraudulent taking, the plaintiff's damage was unliquidated. But the legal maxim is, that "that is certain, which is capable of being made certain," and the damage was reduced to a certainty before this suit was brought.

Knowles, for the defendant.

APPLETON, J.—This is a special action on the case, in which the plaintiff, under the provisions of R. S., c. 184, § 49, claims to recover of the defendant for aiding in the fraudulent transfer or concealment of the property of one Henry S. Willa, whose creditor he alleges himself to be.

It appears in evidence that the plaintiff having commenced an action of trespass against Willa, he, during the pendency of the suit, fraudulently transferred his property to the defendant without consideration, and for the avowed purpose of preventing its seizure, on such execution as might eventually be recovered. Some time after this transfer, judgment was obtained, which remains unsatisfied. From the evidence reported, the defendant is within the section on which this suit is founded, and would, under its provisions, undoubtedly be liable to any of the creditors of Willa. The question here presented, is whether, having at the time of the transfer an unliquidated claim for damages, the plaintiff is to be deemed a creditor within a just construction of the Act.

The R. S., c. 148, § 49, give the right of action against

persons aiding in the fraudulent concealment or transfer of property "*to any creditor*" who shall sue, and he is entitled to recover "double the amount of property so fraudulently concealed or transferred, not however exceeding double the amount of *such creditor's just debt or demand.*" Debtor and creditor are correlative terms implying correlative relations, simultaneous in their origin and inseparable in their existence. No debt exists without a corresponding credit. The distinction between contracts and torts is recognized in all codes. Contracts are entered into; they are the results of mutual assent between the parties to them. Torts are committed without and against consent. An unliquidated claim for damages, as for words spoken, or for a trespass to person or property, would not, in the ordinary use of language, imply the relation of debtor and creditor between the slanderer and the person slandered, or between the trespasser and the person upon whose rights a trespass had been committed. Nor have the words any such technical signification, so that such should be considered their meaning when used in legislative enactments. "In general, whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other, (as in the case of a bond for the payment of money or an implied promise to pay for goods supplied, so much as they shall be reasonably worth,) a debt is said to exist between the parties, while on the other hand, if the demand be of uncertain amount, as when an action is brought against a bailee, for injury done through his negligence to an article committed to his care, it is described not as a *debt*, but as a claim for *damages.*" 2 Steph. Com. 187. In the construction of the statute of foreign attachments, no claim for a tort is deemed to be embraced within the word "credits." "A man may be liable to another to an action for slander, assault and battery or any other *tort*," says MELLEN, C. J., in *Rundlett* v. *Jordan*, 3 Greenl. 47, "in which heavy damages would be given, but such a *liability* would not render him a trustee." When the remedy of the defendant lies in *tort* merely against another, such person cannot be sum-

moned as trustee. *Paul* v. *Paul*, 10 N. H., 117. The language of the English Bankrupt Law is more general than that of the statute under consideration, yet, by the uniform course of the authorities, a claim for damages arising from a tort is not barred by a discharge. *Parker* v. *Norton*, 6 T. R., 695. The same construction has been given to the recent Bankrupt Act of the United States. *Hughes* v. *Oliver*, 8 Barr, 429. When a demand founded on tort passes into a judgment, it becomes a debt and is discharged. But to produce this result, judgment must be entered up before the bankruptcy. The mere assessment of damages by a jury or the award of referees, will not be sufficient. *Bress* v. *Gilbert*, 2 M. & S., 70; *Crouch* v. *Gridley*, 6 Hill, 250. In case of intestacy, if the next of kin refuse to administer upon the estate, the Judge of Probate may by statute commit administration to one of the principal *creditors*, but it would be a novel construction, which should declare the plaintiff in slander or in trespass a creditor and entitled to administer upon the estate of the defendant whom he had been pursuing.

The English statute against fraudulent conveyances, of which this is a fitting complement, has been construed to embrace creditors and those against whom a tort had been committed. But the language of that Act is most general, making all feoffments, gifts, grants, &c., contrived to delay, hinder or defraud creditors, or *others*, of their just and lawful actions, suits, debts, accounts, *damages*, &c., utterly void. So that though the plaintiff might have brought himself within that statute, and have been permitted to contest the conveyance to the defendant as fraudulent, it would by no means follow that he would be entitled to maintain the present suit.

The *just debts* or *demands* referred to in § 49, are such debts or demands as a creditor has, and such alone. The word demand, though a word of large signification, must be construed in connection with the rest of the sentence, and cannot be considered as enlarging the meaning of the words *just debt*, so that they should embrace torts, or creditor, so that it should mean any person having any claim whatsoever.

In *Fox* v. *Hills*, 1 Conn. 295, the statute of Connecticut against fraudulent conveyances, which provides that all fraudulent conveyances, &c., made to "*avoid any debt or duty* of others," as against the party whose debt or duty is endeavored to be avoided, should be utterly void, received a judicial construction. It was there held that duty was commensurate with debt, and that a tort would not be embraced within the statute.

We can only judge of the intention of the Legislature by the language in which it is expressed. Words are to receive their ordinary and accustomed signification. An unwonted and unusual meaning is not to be attached to them, unless required by the most unmistakable indications that such was the Legislative purpose. If the Legislature had intended to confer a right of action upon one situated like the plaintiff, a few words only were necessary to render such intention most evident. It can hardly be conceived that they would have been thus sparing in their use of language. We think the plaintiff cannot, without a manifest and palpable disregard of the usages of speech, be considered as having been a creditor of Willa at the time of his fraudulent transfer of his property to the defendant. Not having been a creditor *then*, he cannot maintain this action. *Thatcher* v. *Jones*, 31 Maine, 528.

It may be expedient to extend the remedial benefits of this statute so as to embrace all causes of action. That, however, is a question for the Legislature, and can afford no aid in its construction. *Plaintiff nonsuit.*

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

(*) DWINEL, *in Equity, versus* VEAZIE.

A trustee of real estate, when required by a court of equity to convey to the *cestui que trust*, is bound to insert in the conveyance a covenant of warranty against persons claiming under himself.

By a conveyance of land to one, upon a valuable consideration paid by another, an equitable trust is created.

In order to the creation of such a trust, it is immaterial at what time or in what mode the consideration was paid to the grantor.

Dwinel *v.* Veazie.

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

Bill in Equity. The hearing was upon bill, answer and proof.

It appeared that Dwinel, being indebted to the Commercial Bank, conveyed to them, in 1839, several parcels of land, and took back a bond for a re-conveyance on payment of the debt.

The bank having received payment conveyed the land, in Sept. 1843, at Dwinel's request, to Veazie, who gave his bond to reconvey on performance of certain conditions. In December, 1843, Veazie, at Dwinel's request, conveyed several pieces of the land to M. P. Sawyer, an acknowledgment of which was indorsed on Veazie's bond.

In 1845, Dwinel had performed all the conditions and requirements of that bond, to the satisfaction and acceptance of Veazie, and in 1846, Veazie conveyed by deed to Dwinel all the residue of the lands, except two stores on Main Street in Bangor, and Dwinel, supposing the deed conveyed all the lands which Veazie was bound to convey, gave up the bond to be canceled. Afterwards, on discovering the omission, he demanded of Veazie a conveyance of the two stores, which Veazie refused to give.

The bill prays that Veazie may be compelled to make such a conveyance.

In Veazie's answer, he denied his obligation to convey, but afterwards, upon inspection of the proofs, he filed a supplemental answer, in which he admitted Dwinel's right to a conveyance of the stores, and filed with the clerk a release of them, though without any covenants against persons claiming under him.

The above mentioned conveyance to Sawyer was made to secure to him a debt due from Dwinel; and Sawyer gave a bond, that when his debt should be paid, he would reconvey, and that bond is lost. Whether the bond was to Veazie or Dwinel, none of the parties can remember. Dwinel paid the debt to Sawyer, who thereupon reconveyed the land to Veazie, of whom Dwinel demanded a conveyance to himself, which was refused.

The bill prays that Veazie may be compelled to make such a conveyance.

Veazie, in his answer, denies his legal obligation to convey these lots, because the obligation of the bond, so far as these lots were involved, was discharged by the deed to Sawyer, and no new obligation had been assumed.

He yet admits his moral obligation to make such conveyance, and expresses his willingness to do so, whenever the plaintiff shall perform a like moral obligation or trust toward him, which he alleges has grown out of another transaction, and of which he has no legal proof to enable him to enforce his claim at law. This claim he alleges to be $1500, and says that Dwinel denies the claim, and refuses to pay any thing on that account. The particular grounds of this claim are set forth in the answer, but no proof was offered of the truth of the statements there made. The statements of the answer, upon this point, are not responsive to any allegations made in the bill.

Rowe & Bartlett, for the plaintiff.

A. W. Paine, for the defendant.

Shepley, C. J. — The defendant, at the time of trial, presented a supplementary answer admitting, that the plaintiff would be entitled to a conveyance of the stores and lots, if he were not morally authorized to retain them to induce the plaintiff to do him justice in a matter in which he has no legal means to compel him to do it.

This matter in defence wholly fails, there being no proof to sustain it.

By the written acknowledgment of the plaintiff, indorsed upon the back of the bond made by defendant to him, it appears, that the defendant conveyed the lots to M. P. Sawyer by the request of the plaintiff. The obligation of the bond having been thereby performed it was extinguished, and could not be revived by a subsequent conveyance from Sawyer to the defendant.

The report of the case states, that the debt due to Sawyer,

for the security of which he held the lots, was fully paid by the plaintiff; and that Sawyer conveyed them to the defendant to perform his obligation to convey to the plaintiff or to him.

The defendant appears to hold the estates by a conveyance from Sawyer, for which he has paid nothing, and for which the plaintiff has fully paid. The law regards the defendant as holding them in trust for the plaintiff.

It is objected, that a resulting trust arises only from payment of the purchase money, and that the plaintiff only paid an old debt due from him to Sawyer.

The principle, upon which one person is regarded as holding estates for another by a resulting trust is, that the other has paid for the estate so conveyed. It is not material in what manner payment was made to the grantor. It is sufficient, that it was made in such manner as to induce him to convey.

An objection is made by the counsel for the plaintiff, that the conveyance offered by the defendant, did not contain any covenant against titles or rights acquired under him. It should contain the usual covenant against any such right or title.

The plaintiff is entitled to a decree for a conveyance of the stores by such a deed, and also for a like conveyance of the lots, and for costs.

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

(*) WEBBER *versus* WILLIAMS *& al.*

By the statute of 1846, § § 11, 12, if a person had received payment for liquor sold by him in violation of law, the amount might be recovered of him in a suit at law by one to whom the purchaser was indebted.

In such a suit, brought against a co-partnership, there is a failure of proof, that the sale was in violation of law, if *one* of the co-partners had license to make such sales, unless it be shown, that the sale was made by the *other*.

In such a case, the presumption of law is, that the sale was made by the co-partner who had a right to make it.

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

ASSUMPSIT for money had and received.

The statute of 1846, c. 205, prohibited the sale of intoxicating liquors, except for medicinal or mechanical purposes by persons licensed therefor by the city or town authorities.

The same Act, § 11, provided, that if any person had paid for such liquors, sold in violation of the law, it should be considered a payment made without consideration, and his creditor should be allowed to recover the amount so paid, in an action for money had and received, brought in his own name, directly against the seller.

The defendants reside in Portland, and are co-partners in business. One of them, Williams, was licensed to sell liquors for medicinal and mechanical purposes, in quantities not less than twenty-eight gallons. They sold liquors to William G. Webber at different times, at each time in quantities exceeding twenty-eight gallons. The amount of sales was something over six hundred dollars, and they received payment for the same from the purchaser.

William G. Webber was indebted to this plaintiff, and this suit is brought, under the statute, to recover from the defendants the amount which they had so received of William G. Webber.

The Court are authorized by agreement of parties to draw inferences of fact, and to render judgment on nonsuit or default as the case may require.

J. E. Godfrey, for the plaintiff.

The license to Williams was for selling liquors for medicinal and mechanical purposes and no other. But the defendants do not undertake to show, nor does it appear, that the sales to William G. Webber were for those purposes only. The burden of excusing proof is upon the defendants. For what purposes the liquors were sold, was peculiarly within their knowledge. *State* v. *Crowell*, 25 Maine, 171; *State* v. *Whittier*, 21 Maine, 34; *Little* v. *Thompson*, 2 Greenl. 228.

The license to Williams was given to him as an individual. It was not given to the co-partners. An unlicensed member

of the company can by no means excuse himself, through a license, a mere personal trust, confided to his partner.

A co-partnership is distinct from an individual member of it. It is a different "person" in contemplation of law. Its interests are distinct. Its transactions do not issue to the advantage or detriment of one member only, but to all.

Partners are liable for a tort committed by one of them, and may be sued in trover, although there was no joint conversion in fact. One is innocent, but both are liable. *Nichol* v. *Glennie*, 1 M. & S., 588.

The case at bar is analogous to that of *Edmondson* v. *Davis*, 4 Esp. 14. In that case, debt *qui tam* was brought to recover penalties against the defendant for practicing as an attorney, without having entered a certificate. It appeared that he was a partner to one Plaisted, who did the business and had all the profits of it. But the Court held the action maintainable, as the business was done in the partnership name, and "it was the business of the office, and both would have been accountable for negligence.

The principle on which we rely was settled in *Willitt* v. *Chambly*, Cowper, 814, cited 1 Metc. 563; 1 Dane's Abr. 625, § 2.

In the case at bar, both defendants participated jointly, not separately, in the illegal sale. Both derived the benefit. The violation of law was by both.

We respectfully refer the Court to Watson on Part. 159 and 160; *Briggs* v. *Lawrence*, 1 Term. R. 454.

Cutting, for the defendants.

Shepley, C. J.—By the eleventh section of the Act approved on August 7, 1846, a creditor of one, who has paid for spirituous liquors, "sold in violation of law," may recover the amount received therefor, by the seller, in an action for money had and received. The plaintiff, as such a creditor, has commenced this suit to recover from the defendants the amount of money received by them for liquors sold to William G. Webber, in violation of law.

The testimony proves, that the defendants, when the sales were made, were partners in business, as distillers and venders of spirituous liquors, in Portland; and that one of them, Williams, had been duly licensed in that city, to sell such liquors "at his distillery by wholesale, or in quantities not less than twenty-eight gallons, and that delivered and carried away all at one time," — "to be used for medicinal and mechanical purposes." There is no proof that the liquors were not sold to be used for such purposes. They appear to have been sold at different times during the existence of the license, at the distillery, and at each time in quantities exceeding twenty-eight gallons, delivered and carried away at one time. It does not appear, that the sales were not all made in conformity to the license; and if they were made by Williams, there would be no proof of a violation of law. The sales were made as of property of the firm. The charges were made by the firm of liquors sold to the purchaser, and payments were made to the firm. It does not appear by which member of the firm the sales were made. Each might make them, one of them might lawfully do it, the other could not. If the one, who might lawfully do it, did in fact personally make the sales, he might be wholly unable to prove it. A personal confidence was by the license reposed in Williams only, which could not be transferred by him to another, and yet he might employ a clerk, an agent, or his partner, to make such sales for him. Nor was it necessary, that he should be the sole owner of the liquors sold by him, or even that he should own any part of them. He might lawfully sell such liquors, acting as a merchandise broker for others, who might in their own names recover for their value. The facts, therefore, that the liquors were sold as the property of both defendants, and that payments were made on account thereof to them, have no tendency to prove, that the sales were not lawfully made by Williams personally, or by a clerk, agent, or partner, under his direction.

The burden of proof rests upon the plaintiff, upon the whole testimony introduced, to show that the liquors were sold in violation of law. Without it he does not exhibit a case with-

in the provisions of the statute. While this is left in uncertainty, the plaintiff's case is not made out. The most favorable aspect for the plaintiff, presented by the testimony, is, that it is as probable that they were sold by one without license as by the other under license. In the absence of all proof, the just and legal inference is, that the sales were made by the one who might rightfully and legally make them, or by his direction, and not by one who must violate the law without any occasion for it. *Plaintiff nonsuit.*

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

RICE and HATHAWAY, J. J. dissented.

(*) HANSON *versus* INHABITANTS OF DEXTER.

To bind a town by the doings of one of its committees, a majority of the committee must concur.

If, within the scope of a committee's appointment, a minority undertake to make a contract, it is competent for the majority to ratify it.

When ratified, the contract has the same force against the town, as if a majority had originally concurred in making it.

Labor performed under such a ratified contract, though it was performed prior to the ratification, and though it was of no value to the town, is a sufficient consideration on which to maintain suit against the town upon the contract.

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

ASSUMPSIT.

The defendants had occasion to make a new road.

They voted money for the purpose, and appointed a committee of six men to let out the job on contract, and to superintend the work and to adjudicate upon its fulfillment.

The committee staked out and marked the lines for the road, and contracted with the plaintiff to make it upon that route for $195, which sum he received. When the plaintiff began to do the work, one or two of the committee authorized him to deviate a few feet from the route designated, and he did so. The majority of the committee objected to the alteration and required the plaintiff to make the road exactly

between the lines marked out, and he did so, thus getting no benefit from the work which he had done outside of those lines.

This suit is brought to recover for that work.

At the trial, the plaintiff produced evidence tending to prove that the committee, when objecting to the deviation, promised verbally to pay him or see him paid what was right for his loss, in consequence of the alteration, if he would abandon the deviation, and make the road on the stipulated route.

In reply to an interrogatory propounded by the Judge, the jury replied, that the committee did so promise.

The Judge instructed the jury, that, if they found such a promise was made, the verdict should be for the plaintiff. To this instruction the defendants excepted.

J. Crosby, for the defendants.

1. The promise, if made, was without consideration.

2. If there was any consideration it was a past consideration, for labor previously performed, not at the request or for the benefit of the defendants. *Loomis* v. *Newhall*, 15 Pick. 159; *Wells* v. *Wyman*, 3 Pick. 209; *Balcom* v. *Craggin*, 5 Pick. 295; *Jewett* v. *Somerset*, 1 Greenl. 128.

3. The promise, if any, was made by the committee in their individual capacity and it is against them, that the right of the plaintiff, whatever it may be, exists, and not against the town. The committee had no authority to bind the town for such a claim. *Thayer* v. *Boston*, 19 Pick. 511.

Knowles, for the plaintiff.

Rice, J. — This is assumpsit for work done on a road, and for extra labor on the same. There was proof that the principal part of the labor performed by the plaintiff was under a contract, which the jury found had not been waived nor abandoned. The amount of compensation, stipulated in the contract, seems to have been paid. That part of the work which was thus performed is not now matter of controversy and therefore not a subject for consideration.

The only questions now open, have reference to labor per-

formed off of the location of the road as staked out by the committee, under the direction of one or two of its members. The committee consisted of six members. The concurrence of a majority was necessary to give validity to its acts. When the committee was informed of the deviation of the plaintiff from the location which they had staked out as the line of the road, five of its members, the other not dissenting, directed him to return to the original location, promising verbally, to pay him what was right for his loss, in consequence of the alteration.

For that promise the defendants contend there was no legal consideration, and that it is consequently void. Though the plaintiff, under the direction of one or two of the members of the committee, had deviated from the line staked out by the whole committee, it does not appear that he had departed beyond the exterior lines within which the committee was authorized to cause the road to be constructed. The deviation when made was unauthorized, but it was competent for the full committee to ratify the acts of the plaintiff, done under the direction of a minority of its members. The agreement to pay what was right for the work thus performed, if he would return to the line originally staked out, was within the scope of their authority, and must be deemed a ratification of the acts of the minority, as far as proceedings had then been had. The labor performed under directions thus ratified was a sufficient consideration for the promise. By that promise the defendants are bound.

The exceptions are therefore overruled.

SHEPLEY, C. J., and TENNEY and HATHAWAY, J. J., concurred.

(*) BALDWIN, *in Equity*, *versus* CITY OF BANGOR.

The proper width of a street must depend upon the amount of travel passing over it, upon the business transacted in it, and upon the comfort of those residing or doing business upon it.

With a view to such uses, the authorities may rightfully locate streets in different parts of the city, varying much in their widths and consequent accommodations.

The Act of 1845, c. 256, relating to the city of Bangor, referring to the legal voters the necessity or expediency of erecting public buildings or making public improvements, which should require an expenditure exceeding three thousand dollars, does not apply to the establishment of public streets.

To obtain a decision whether the proceedings in establishing streets have been legal, the process is by *certiorari*.

Upon a *bill in equity* brought for such purpose and praying injunction, the proceeding will not be examined.

BILL IN EQUITY, heard on bill, answer and proof.

The bill alleged *that* the city council voted to widen Wall, Water and Fore streets in said city, in such manner as to embrace all the land between Mercantile Block and Wall street north of Water street, and also certain other described premises south of Water street; *that*, by a vote of the city council, the streets thus widened were located and established under the designation of "public streets, to be known as Wall street place"; *that* the plaintiff is the owner of certain lots (described) embraced within the limits of said "Wall street place" of the value of $5000, and has a dwellinghouse built on said estate; *that* the streets are not in the line of any public travel, passing to or from the settled parts of the city, or between parts of it where much business is transacted, and, before the widening, were all of sufficient width to accommodate all the travel which was desired, or had occasion to pass over the same, and for all other legal purposes of streets; and *that*, therefore, the public convenience and necessity did not require the enlargment or widening; *that* the whole proceedings of the city council in the premises were undertaken and perfected for a purpose, not warranted by law, and altogether different from that set forth therein, in utter disregard and violation of law and of the rights of the plaintiff; viz., for the purpose of taking land of the plaintiff and others for a public common or promenade, for which the council had no right to take land of any citizen, as they have here undertaken to do; *that* said council and its members, well knowing this, have, in derogation of the plaintiff's right

and in fraud thereof, assumed to take the land under the pretence of widening said streets which happen to lie contiguous to the land desired to be taken; and in furtherance of such illegal design have actually passed the vote aforesaid; *that* all said proceedings were instituted and carried out for a fraudulent purpose; *that* the fraudulent design is attempted to be covered under the appearance of legal proceedings had as aforesaid; *that* an Act, passed March, 22, 1845, provided that it shall be voted upon by the legal voters of the city whether it is necessary or expedient to erect a public building or buildings, or to make such public improvements in said city as towns and cities may lawfully make, when requiring an expenditure exceeding three thousand dollars; *that* the public promenade or common, created by the doings of the counsel, was a "public improvement" within the meaning of said Act, and the expenses thereof were at least twelve thousand dollars, and no vote of the citizens was taken in favor of it, and the proceedings of the council being in violation of that Act, are void; *that* the city council, by vote passed September 1, 1851, directed the city clerk to give notice to owners of buildings on said premises to remove the same before June 1, 1852, it being for purpose of making same into a public promenade or common, as before alleged; and *that* the city officers are about to appropriate to the city's use the land taken as aforesaid, and deprive the plaintiff of the same, which doings will be waste and an unlawful interference, &c.

Wherefore the bill prays for injunction and perpetual stay of proceedings on the part of the city in the premises, and for further relief.

The answer filed and signed by the city solicitor, not under oath, *admits* that the city council did vote as alleged, to widen the streets described in plaintiff's bill, and that the streets so widened were established as widened, and called "Wall street place"; *admits* the plaintiff's right of property in land taken as alleged, but, if material, refers to plaintiff's deed for title; *admits* that the city intends to remove the dwellinghouse

beyond the limits of the streets as widened; *asserts* that the streets are in settled and business parts of the city, where common convenience and necessity need and require other and greater facilities and wider streets than for mere passing and repassing, and that had each of said streets been wider, there would have been much more travel over them, and that some of the streets in the vicinity of, and leading to, said streets are inconveniently crowded with travel and business, and that the widening of said streets is designed in part to relieve, and will relieve in part, the crowded state of the other streets, and that each of said streets as widened is no wider than common convenience and necessity require, and that the travel and business on said streets will be greatly increased by said widening; *denies* that said streets were sufficiently wide for all purposes for which streets can be legally used, and that they are not in the line of travel passing from the settled parts of the city and different portions thereof; *denies* that the said proceedings were for any other and different purposes than those apparent on their face, &c., and that these proceedings are against law and not warranted by law; *denies* that said proceedings were instituted and perfected for the purpose of making a common or promenade, and that the members of the council acted fraudulently, and that they have assumed to take land illegally of plaintiff, or any other citizen; *asserts* that land in the vicinity and contiguous to said streets will be greatly increased in value, and that generally the owners are in favor of the widening and approve of the same, and that the plaintiff, in early steps of the proceedings, was in favor of the same, and urged members to vote in their favor; *admits* the passage of the Act of March 22, 1845; *admits* that the widening will cost more than $3000, and that no vote of the inhabitants was taken; *denies* that this Act was intended to embrace the laying out or widening of streets or such improvements as this, and submits the question to the Court; *asserts* that, by the 6th section of city charter, the city council has power to lay out streets, widen and alter the same, estimate the damages therefor, and that

any person aggrieved may appeal; that the council here allowed damages to plaintiff for his land, the sum of $1541, and the plaintiff appealed, and his appeal is still pending in this Court where he has a plain and adequate remedy for his damages.

The substance of the proof will sufficiently appear in the opinion given by the Court.

Cutting and *A. W. Paine*, for plaintiff, contended; —

1. That the city council, in laying out and establishing Wall street place, exceeded their authority, and pointed out what they alleged to be fatal omissions and defects in the proceedings.

2. That the decision of the question as to the legality and effect of those proceedings, could rightfully be had upon a bill in equity, praying for an injunction to stay the action of the city in opening said "Wall street place."

3. That as the amount assessed against the city for the land-damage exceeded three thousand dollars, the location was in violation of the Act of 1845, and was therefore in itself void, and does not require a *certiorari*.

4. That the fraud of the city council, in establishing a public common, under the pretence of merely widening the streets for travel, vacated the whole transaction, and that therefore an injunction ought to be awarded, to stay all further proceedings.

Wakefield, City Solicitor, for the defendants.

Shepley, C. J. — The city council have by the city charter exclusive power "to lay out and establish any new street or public way, or to widen or otherwise alter any street or public way in said city." In all other respects the city council are to be subject to the same rules and restrictions as are provided by law regulating the laying out of streets and public highways,

The proper width of a street in a city or town must depend upon the travel passing upon it, the business transacted in it, and the comfort of those residing or doing business upon it.

These may require one street to be of much greater width than another, and the same street to be of much greater width in one place than in another. It cannot be admitted, that the only legitimate purpose of a street is the accommodation of the travel passing and repassing upon it. The great purpose for making streets and ways safe and convenient for travelers, is to enable them to transact their business with more convenience and safety and to enjoy the comforts of social life. The greatest benefit to be derived from a street in a city may be its adaptation for the transaction of business. To overlook in the construction of streets the great purposes to be accomplished thereby, would be neither wise nor in accordance with the design of the laws requiring them to be made. The space required for these purposes may be much greater, where several streets or ways terminate or cross each other. That may be the place, where teams, carts, trucks, drays and other vehicles, are concentrated for the sale and purchase of goods, and for their removal and for standing, while they are being loaded and unloaded. The width of streets and the space required for these purposes can be satisfactorily determined only by those familiar with the travel and business there exhibited, its past history, and its future prospects. A space, which to the eye of a stranger might appear to have been appropriated for a square, or common, or promenade, designed for the preservation of health or the enjoyment of life, might be known to the city council to be necessary for the accommodation of travel and for purposes, for which a greater portion of the travel takes place.

There is, therefore, nothing in the extent of the space made by the combined width of the streets, which would authorize the Court to determine, that the proceedings were commenced and perfected for a disguised and fraudulent purpose. The testimony introduced proves, that certain citizens differed from the city council in opinion respecting the necessity for making those streets so much wider. This is no more than may be anticipated respecting almost every act of the constituted authorities respecting ways, streets and public improvements.

The city council were responsible for their acts, to their constituents, who would not be likely to be unmindful of them, when a charge of fraudulent conduct had been preferred against them. Sufficient time has elapsed to enable them to exert their power to displace them and to enable others to arrest or vacate any proceedings conceived and carried out for deceptive and fraudulent purposes. There is no indication, that their constituents have regarded them as liable justly to such a charge. Under these circumstances, and in the absence of any clear proof of it, the Court cannot be expected to come to such a conclusion.

It is alleged, that the proceedings of the city council were forbidden by the provisions of the Act approved on March 22, 1845. By that Act the Mayor and Aldermen of the city are required to call a meeting of the legal voters and submit to them, whether "it is necessary or expedient to erect a public building or buildings, or to make public improvements in said city, which towns and cities may lawfully erect and make, and which shall require an expenditure exceeding three thousand dollars." The public improvements referred to in that Act, were those of a like character with the erection of public buildings. Such improvements as a city or town may be authorized to make for the transaction of its own business, the support of its schools and its poor, or the safety of its citizens and their property. It cannot be considered as prohibiting the city council from the exercise of a power respecting streets and ways, specially delegated to them, and over which the city can have no direct control; its exercise being, not for the benefit of the city only, but for the public benefit.

The charge of waste made in the bill is not sustained. That cannot be waste which is authorized by law.

A bill in equity is not the proper process to bring the proceedings of selectmen of towns, city councils or county commissioners, in laying out ways and streets, before this Court to obtain a decision, whether they have been in all respects correct, formal, and in conformity to law. To entertain a bill for such a purpose would make a precedent for the transfer

from this Court, acting as a court of common law, of the purposes entrusted to it as the superintendent of all inferior tribunals, to be exercised by writs of error, certiorari or mandamus, or other proper process, to the equity side of the Court, to be exercised through the channel of a bill in equity.

It is not therefore proper to enter upon such an inquiry in this case. *Bill dismissed with costs for defendants.*

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

(*) Taylor *versus* Godfrey *& al.*

Whether there was probable cause for a criminal prosecution, is a question of law upon the facts; if, as to the facts, there be no disagreement in the testimony, the question is one of law only.

In an action for a malicious prosecution, if there be no testimony that the accused committed the crime, or that the prosecutor had been informed or knew of any fact inducing a belief that he had, the law itself pronounces that there was no probable cause, and leaves nothing to be submitted to the jury.

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

Case for malicious prosecution.

For several years the steamer Boston carried goods on freight between Boston and Bangor. Its owners had provided a storehouse at the wharf in Bangor for storing such goods as were to be sent and such as were brought by the boat.

They had, for about two years, employed the plaintiff to take charge of the store and goods, and he was sometimes called the "agent of the boat." Among the articles in the storehouse, on storage, were sometimes seen barrels, supposed to contain spirituous liquors. It was proved, however, that the plaintiff was never engaged in selling liquors.

The defendants made a complaint on oath before the Police Court, charging, that the plaintiff kept intoxicating liquors with intent to sell, in violation of the Act of 1851, for the suppression of drinking houses and tippling shops. Upon that complaint a warrant was issued, upon which the officer seized nine barrels of liquor in the storehouse, and summoned

the accused, this plaintiff, to appear before the Police Court to answer, &c.

No witnesses appeared before the Police Judge in support of the complaint, and the accused, this plaintiff, was discharged, but the liquors were detained for further advisement by the Judge.

This is an action against those complainants, charging that their proceeding against plaintiff was a malicious prosecution.

At the trial, the defendants introduced a witness who testified, *that* he had seen liquor in the storehouse; *that* he was present when the complaint and warrant were made; *that* before the complaint was made, he had represented to Judge Pratt, of the Police Court, that there was liquor in that storehouse; *that*, at the time the defendants were there to get the warrant, the Judge said that the warrant must be made against some one, that it was necessary to have some name, and requested the witness to go out and get the name of the agent of the boat; *that* the witness went into the street and ascertained that the plaintiff was the agent, and returned with the information; *that* the Judge wrote out the complaint, but it was not fully completed before the witness returned with the agent's name, until which time, the name had not been inserted in the complaint; *that* on that occasion, in the Court-room, the defendants inquired of him, and he told them there was liquor in the storehouse. He further testified that the agent of the boat had the custody and control of the liquors in the storehouse, but that he never supposed the plaintiff sold liquors.

He further stated, (under objection by plaintiff,) that he had seen at the storehouse a barrel which he afterwards saw on Exchange street at the store of two Irishmen, who had been convicted for an unlawful sale of liquors. Whether it was before or after the making of the complaint against this plaintiff, that the barrel was seen at the Irishmens' store, the witness could not remember.

The Police Judge was then introduced as a witness for the defendants. From his testimony the following facts appear-

ed. The defendant Low, first spoke to him about the liquor, one or two days before the complaint was made, neither of the others being present. Low then urged the necessity of a warrant to search the storehouse for liquors, and stated that he was satisfied the Irish got their supplies of liquor from the boat and storehouse. Witness suggested to Low some difficulties, regarding the description of the place to be searched, and wanted the owners' names. At the subsequent interview, (at which time the complaint and warrant were made,) all the defendants being present, and Low not having been able to procure the owners' names, witness suggested that, if the keeper's name could be obtained, that would be sufficient, and suggested to get the name of the agent of the boat, and a messenger went out and returned with the name of the plaintiff.

On cross-examination, he testified that he could not say that Low, in the conversation before referred to, named any person who, as he supposed, got liquor there. The most that he said was about mere rumors. The witness could not remember any fact that Low stated. On being recalled by plaintiff, after leaving the stand, and being asked whether he understood Low to state that he understood the Irish bought their liquors at the storehouse, or only that the steamer brought liquors for them on freight; he replied that nothing was said about any liquors being bought or sold there, the idea was only that the steamer brought liquors on freight; and here the witness was interrupted by the remark of the presiding Judge, that he understood that to be the purport of his testimony in chief, and the defendants' cousel then stated, that they so understood it, and did not contend there was any pretence that liquors were sold there.

The presiding Judge instructed the jury, among other things, *that*, to make out a case, the plaintiff must prove both want of probable cause and malice; *that* probable cause was the existence of such a state of facts, as would warrant a reasonable man to believe the accused to be guilty of the offence charged; *that* the question of probable cause was one

of law and fact, the facts when there was any dispute, to be settled by the jury, and the law by the Court; *that* although in this case there was no conflict of evidence, still it would be necessary for them to settle some questions of fact, on which the question of law depended; *that* they would inquire whether the plaintiff kept the liquors for sale himself, intending to sell in violation of the statute, or as bailee or depositary; *that* if he kept them simply as bailee, not selling or intending to sell, and the defendants so understood it, there was no probable cause; *that* if they found the plaintiff kept the liquors for sale himself, intending to sell in violation of the statute, there was probable cause, and if they found probable cause, they should return a verdict for defendants; *that* if they found a want of probable cause, then they would inquire whether there was malice; *that* malice was of two kinds, malice in fact, and malice in law; *that* malice in fact was ill-will or a grudge against the party; *that* malice in law, was any wrongful act done knowingly and intentionally to the injury of plaintiff, without just cause or excuse; *that* if a prosecutor took the advice of counsel, laid all the facts frankly before him, and prosecuted in accordance with that advice in good faith, that would be proof of probable cause; *that* a question arose here for the jury to settle; whether the complainants sought and obtained the advice of Mr. Pratt as counsel, or in his capacity as magistrate; *that* if they should find the former, and acted upon his advice, in good faith, that would be evidence, and very strong evidence, to prove probable cause and disprove malice; but if his advice was simply that of a magistrate, it could be used only to negative malice; *that* if the jury believed that defendants supposed the offence was committed, and committed by the plaintiff, and that they acted under the advice of counsel, after disclosing all the facts, in good faith, the jury must render a verdict for the defendants, even though the prosecution originated in the error of the defendants, or of the magistrate.

The jury returned a verdict for defendants, and to the rulings and instructions of the Judge, the plaintiff excepted.

Rowe & Bartlett, for the plaintiff.

Plaintiff made out a *prima facie* case. He showed a want of probable cause, from which the jury might infer malice.

The facts show that defendants knew there was no probable cause when they made the charge; that it was a mere *ruse* to effect another object, which they had in view, the seizure of liquors; that defendants had no expectation or design of procuring the conviction of plaintiff; that they knew no facts, had received no information on which to found a belief of his guilt; and in reality entertained no belief that he was guilty; but that they swore falsely, knowingly and designedly, for no other reason than because they could not get a warrant without so doing.

The only fact in the case, which they relied upon at all as justification, was that the magistrate refused the warrant, unless some one was charged, and suggested to them to charge the plaintiff.

Upon such a state of facts, there can be no pretence of the existence of probable cause. 2 Greenl. Ev. § 455; *James* v. *Phelps*, 11 Ad. & E. 489; *Delagal* v. *Highley*, 3 Bing. N. C. 950; *Stone* v. *Stevens*, 12 Conn. 230; *Merriam* v. *Mitchell*, 1 Shepl. 439; *Brooks* v. *Warwick*, 2 Stark. 389; *Wills* v. *Noyes*, 12 Pick. 327.

Upon such facts the law implies malice. The act of the defendants was clearly unlawful; at least, perjury was so considered before the passage of the "Maine Law."

In a legal sense, "any act done wilfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." "It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill-will towards the individual, or that he entertain and pursue a general bad purpose and design. On the contrary he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he wilfully inflicts a wrong on others, which is not warranted by law, such act

is malicious." SHAW, C. J., in *Commonwealth* v. *Snelling*, 15 Pick. 337, 340; *Wills* v. *Noyes*, 12 Pick. 324, 328.

In actions for malicious prosecution, malice is presumed in the absence of proof of probable cause. Per MELLEN, C. J., *Chesley* v. *Brown*, 11 Maine, 146.

Every false charge for a crime is a libel. The making such charge or complaint, is a publication. An action for malicious prosecution, founded on such charge, is in fact an action for libel, in part. The common form of declaration contains averments of injury to reputation. *Rex* v. *Woodfall*, 5 Bur. 2667. Such is the declaration in this case. "It is not the danger of plaintiff, but the scandal, vexation and expense, upon which this action is founded." 1 Bl. Com. 127.

Every criminal prosecution, instituted for any other purpose than the ostensible and avowed purpose of procuring the conviction and punishment of the accused, is malicious.

The commencing of such a prosecution, on a charge which the prosecutor knows to be false, must be done for some sinister purpose, and is a fraud upon the law, and deeply malicious towards the individual accused.

"No evidence of malice can be more cogent than the proof that defendant *knew* that plaintiff was innocent." 2 Stark. Ev. 913. To the same point is *Ives* v. *Bartholomew*, 9 Conn. 313.

The facts proved by the defendants themselves, are sufficient to sustain an indictment against each of them for perjury. Those facts show that they swore falsely, knowingly, and therefore wilfully and corruptly; that they did this with a full knowledge that their oaths would work wrong and injury to plaintiff; that they took these oaths with the design to do such wrong and injury.

The presiding judge erred in submitting the question of probable cause to the jury.

The question of probable cause is to be settled by the Court, unless there be a conflict of evidence. *Stone* v. *Crocker*, 24 Pick. 81.

Here the facts were undisputed; and the presiding Judge

should have instructed the jury that there was no probable cause.

He erred further in raising a question of fact, which was not raised by the evidence; that is, whether plaintiff kept liquor for sale himself, or as bailee; and in making the decision of probable cause depend upon the finding of the jury on that fact.

There was not only no proof, but not even a pretence, that plaintiff kept the liquors with intent to sell. The entire proof of both parties on this point was, that he kept them simply as bailee.

The presiding Judge erred in instructing the jury, that if the jury believed defendants *supposed* the offence was committed, and by plaintiff, and that they acted under the advice of counsel, after disclosing all the facts in good faith, the jury must render a verdict for defendants, even though the prosecution originated in the error of the defendants, or of the magistrate.

Supposition is less than belief. *Belief* is not enough in a case like this. Defendants must, in addition, have *reason to believe.*

But if right in the law, the Judge erred in instructing the jury, that a question arose in this case, as to whether the complainants sought and obtained the advice of Mr. Pratt, as counsel or as magistrate, and that their verdict should be influenced by their finding on that question.

The evidence raises no such question — shows no ground for a pretence that Pratt acted as counsel.

The whole proof is, that they applied to him only as a magistrate; and that he acted only as a magistrate.

They did not seek the advice of Mr. Pratt, as to whether the facts disclosed were sufficient to warrant a charge against Taylor; for they had no facts to disclose; and when they went to him they had no charge against Taylor to make; and there was no question at all made as to the sufficiency or insufficiency of the facts; but they inserted Taylor's name in the complaint, not because Pratt advised them there was

probable cause to charge, or suspect him, but because Pratt told them he would not receive a complaint unless it charged somebody. See *Merriam* v. *Mitchell*, 1 Shep. 439; *Brooks* v. *Warwick*, 2 Stark. 389; *Wills* v. *Noyes*, 12 Pick. 327.

Cutting, for the defendants.

The defendants went to the only and proper tribunal to complain against the liquor in the storehouse, and not against any individual.

But the Police Judge informed them, "that the warrant must be made against some one, that it was necessary to have some name, and requested some one to get the name of the agent."

The plaintiff's name was consequently inserted in the complaint, as purely a matter of form, under a mistaken idea of the Police Judge that some name was necessary.

The defendants' object was to put the liquor on trial, and not the agent; they never appeared on trial against him or procured any one to appear.

Now, under these circumstances, I contend, these defendants were justified; the name was procured and inserted, if not by Pratt himself, it was at his suggestion; that proceeding was advised by him and by him officially sanctioned.

It also discloses the fact, that these defendants could not have been actuated by any malicious or improper motives towards this plaintiff, but is conclusive evidence to the contrary.

"The plaintiff is bound to prove, *that the prosecution was at the instigation of the defendants*, was without probable cause and malicious." *Wells* v. *Parsons*, 3 Harring. 505; *Hardin* v. *Bordas*, 1 Iredell, 143; *Feazle* v. *Simpson*, 1 Scam. 30.

Now this prosecution was not at the instigation of defendants, but at the instigation of Judge Pratt.

And after all, it is immaterial so far as it regards this plaintiff, whether his name was inserted in the warrant or not, because, by the 11th § of c. 211, it was the duty of the officer "to summon the owner or keeper of said liquors, seized as aforesaid, if he shall be known to the officer seizing the same,

before the Justice or Judge by whose warrant the liquors were seized, &c."

Now, it was known to the officer, that the plaintiff was the keeper of the liquors, and it was his duty to have summoned him, whether his name was inserted in the complaint and warrant or not, so, that in either event he would have had the same duties to perform and the same responsibilities to assume.

The Judge's charge to the jury was strictly conformable to law. *Stone* v. *Swift*, 4 Pick. 389; *Stone* v. *Crocker*, 24 Pick. 81.

J. E. Godfrey, on same side.

The facts proved are such as to warrant a reasonable man to believe the plaintiff guilty, which is probable cause. *Stone* v. *Crocker*, 24 Pick. 86; *Hall* v. *Hawkins*, 5 Humphrey (Tenn.) 357; *Farris* v. *Starkie*, 3 B. Munroe, (Ken.) 4; *Stone* v. *Stevens*, 12 Conn. 219.

The representation to defendants by a third person of such facts, was sufficient to authorize defendants to make the complaint. *French* v. *Smith*, 4 Verm. 363.

The *onus probandi* is on the plaintiff to show affirmatively want of probable cause. *Stone* v. *Crocker*, 24 Pick. 84; *Gorten* v. *DeAngelis*, 14 Wend. 192.

And the plaintiff cannot require defendant to prove probable cause until the plaintiff prove express malice. *Frowman* v. *Smith*, 6 Littell, (Ken.) 7.

The complainants, (defendants,) acted by advice of counsel, which is evidence of probable cause and disproves malice. *Stone* v. *Swift*, 4 Pick. 389; *Wills* v. *Noyes & al.* 12 Pick. 327.

A counsellor may act as a magistrate, although he has previously given an opinion upon the question. *Wilson* v. *Hinkley*, (Kirby,) Conn., 199.

Presumption of malice may be rebutted by showing, that the prosecution was instituted and carried on without malice and for justifiable ends. *Stone* v. *Stevens*, 12 Conn. 229–30; *Wills* v. *Noyes & al.* 12 Pick. 327.

SHEPLEY, C. J. — The action is case for a malicious prosecution, charging the plaintiff with keeping spirituous and intoxicating liquors for sale in the storehouse of the steamer Boston, in the city of Bangor, in violation of the provisions of the Act approved on June 2, 1851, c. 211, § 11. Those provisions required, that the complainants should state on oath, "that they have good reason to believe and do believe, that spirituous and intoxicating liquors are kept or deposited and intended for sale by any person not authorized to sell the same in said city or town, under the provisions of this Act." The defendants appear to have made a positive charge upon oath, that the plaintiff kept such liquors intended for sale. Before making such an absolute charge, they should at least have been careful to ascertain, that there was reason to believe it to be true.

By the record of the Police Court it appeared, that the prosecution, so far as it respected the plaintiff, had been finally determined by an acquittal. From the bill of exceptions it appears, that there was an entire absence of testimony to prove that he had ever kept such liquors intended for sale, or that the complainants had been informed, that he had, or that they had been informed or had knowledge of any fact inducing the belief, that he had. Upon such testimony it became the duty of the Court to instruct the jury, that there was not probable cause for the prosecution. It could only be inferred from testimony proving that they sought for and acted under the advice of counsel. And whether they did in that respect, as well as in others, so conduct as to exhibit probable cause, was a question of law to be decided by the Court when there was no contradictory testimony, and no dispute about the facts presented by the testimony. There does not appear to have been any in this case respecting what occurred between the complainants and the Judge of the Police Court, who was the only counsel consulted.

Forbearing to make any comments upon the propriety or right of a magistrate, upon being first consulted, to express an opinion as counsel upon the effect of statements, which

if proved, might constitute a part or the whole of the testimony, on which he might very soon be required to decide upon the guilt or innocence of a person accused of crime, it will be necessary only to ascertain whether there was any testimony in the case, which authorized the Court to submit it to the jury, that probable cause might be inferred from it on account of legal advice sought and given.

The officer states in substance, that he informed the complainants, that there was such liquor in the storehouse. He does not state, that he informed them, that those liquors were intended for sale or that liquor had been sold there, or that he informed them of any facts inducing them to believe it. On the contrary he testified, that he never supposed that the plaintiff sold or intended to sell liquors, thus showing that the complainants could not have received any information from him authorizing the complaint.

The police magistrate testified in substance, that one of the complainants, a day or two before the warrant was issued, urged the necessity of one to search the storehouse for liquors, stating, that he was satisfied that the Irish got their supplies of liquors from the boat or storehouse; that he suggested some difficulties, and stated that he wanted the names of the owners; that nothing was said about any liquors being bought or sold at the storehouse; the idea was only, that the steamer brought liquors on freight. When the complainants were all present, on the day when it was made, he testified, that he suggested, that if the keeper's name could be obtained, that would be sufficient, and suggested to them to get the name of the agent of the boat. It is not perceived, that there was any other testimony that could tend to prove, that the defendants consulted counsel and acted upon his advice. No person appears to have asked for, or to have expressed any opinion, whether their information, if it could be proved to be correct, would authorize them to make the complaint.

In the case of *Stevens* v. *Fossett*, 27 Maine, 266, this Court expressed the opinion, "that if a person with an honest wish to ascertain, whether certain facts will authorize a suit on

a criminal prosecution, lays all such facts before one learned in the law, and solicits his deliberate opinion thereon, and the advice is favorable to the prosecution, which is thereupon commenced, it will certainly go far, in the absence of other facts, to show probable cause and to negative malice."

It would have been entirely correct to consider all the testimony introduced in defence as true, for there was no contradictory testimony or other cause to occasion doubt.

Whether it proved probable cause, according to the rule stated above, was a question of law to be determined by the Court. It was submitted to the jury, thereby affording them an opportunity to find, that there was probable cause from a state of undisputed facts, which the law pronounces to be insufficient to prove it. *Exceptions sustained, verdict set aside and new trial granted.*

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

(*) HAMILTON *versus* BUCK.

Where several owners of logs separately employ the same drivers, or where they separately contract for the driving with a person, who employs the same drivers, and, in the drive, all the logs get intermixed, their respective liens are not collectively upon the whole mass of logs, but are distributed upon the logs of each ownership, according to the amount of labor bestowed thereon.

ON FACTS AGREED.

CASE against a deputy sheriff for neglect to keep, to be sold on execution, a quantity of mill-logs which he had attached on the writ.

The Messrs. Hodgkins owned a small quantity of logs, 71 thousand feet, of a distinct mark, and employed John Pomroy to drive them down the river at seventeen cents per thousand, that being a fair price. Pomroy also contracted with other owners to drive their logs, making in his drive six millions of feet; the logs of each owner being marked with distinctive marks, and for that purpose Pomroy employed from

thirty to fifty men, and among others, this plaintiff, who labored upon the whole drive, the logs of all the owners having become intermixed.

For that labor, the plaintiff sued Pomroy and attached all of Hodgkins' logs, in season to secure any lien which he could have thereon. The defendant was the officer, who made the attachment, and into his hands the plaintiff, (after having recovered judgment against Pomroy,) seasonably placed his execution, with directions to seize and sell the logs of Hodgkins, which had been so attached.

But the officer did not so sell the logs, having previously surrendered them to Hodgkins, who gave him an indemnifying bond.

It is for that surrender and that neglect to sell, that this suit is brought.

C. S. Crosby, for the plaintiff.

The only question designed to be submitted to the Court is, whether a laborer, working on a large drive of logs, consisting of various marks, and belonging to different owners, and who has a lien for his personal services thereon, can enforce that lien in whole upon one particular mark of logs belonging to one only of the persons interested in the whole drive, or whether he must enforce his lien *pro rata* upon the several lots or parcels.

The case of *Spofford* v. *True*, 33 Maine, 283, does not exactly meet this case, but the reasoning of the Court in that case is strongly for the plaintiff in this.

To hold that the laborers, under the circumstances of this case, must resort to all the different lots of logs embraced in a drive, and enforce their liens *pro rata* upon such parcels, would be too onerous upon the laborers to render their lien of any value. How can they learn the exact quantity or number of logs embraced in each mark, or even in the whole drive? Very frequently a large part of a drive is left behind, "hung up" for want of water, and the balance only of the drive comes to the boom, and the contractor for the whole drive, (in this case it was Pomroy,) will be paid only for what he

gets in according to his contract. In such a case how is the lien to be enforced *pro rata?* All the logs of one mark may be left behind and must the laborer wait until another year before he can get his pay by enforcing his lien upon the lot left behind?

It is no hardship upon the several owners to hold that the lien of the laborer extends to all and to each parcel of the logs for his whole services. Each owner knows, and can prove, the exact quantity of his logs; and each pays the contractor *pro rata*, and if any one man's logs are seized by laborers having a lien thereon, and that man is compelled to pay more than his proportion of the whole bill, he may compel the other owners to contribute.

To compel the laborers to enforce their lien upon each mark of logs would hold out an inducement to log owners to make their driving contracts with worthless and insolvent men at a low price, so that the contractor might easily defraud the laborer of his pay, for there would need to be so great a degree of accuracy in enforcing the lien upon the several parcels of logs, that no man would hazard the experiment.

A. W. Paine, for the defendant.

APPLETON, J. — The case presented for consideration is not without its embarrassments, arising from the conflicting rights and interests of the laborer and the owner of the lumber upon which his labor has been performed. The object of the Legislature, as is abundantly indicated in the title of the Act under which the plaintiff claims, stat. 1848, c. 72, was to give to "laborers on lumber a lien thereon." The Act, in its terms, gives this lien on "all logs and lumber," and provides that any person having such lien "may secure the same by attachment."

Hodgkins, the defendant in interest, owning about seventy-one thousand feet of lumber, employed one Pomroy to drive them to market, at a stipulated price per thousand. Pomroy having contracted with others to drive their logs, to the amount

of six million feet, mingled the logs of Hodgkins therewith and employed the plaintiff and others to drive the whole quantity thus contracted to be driven. The labor of the plaintiff was on the whole mass and but a trifling fraction upon the property of Hodgkins.

While it is desirable that the laborer should receive all due protection, it must not be forgotten that others have rights, which the same law should protect. The statute gives a lien on "all logs and lumber." Hodgkins had nothing to do with the six millions driven by Pomroy, was no party to, nor conusant of, any contract by which they were to be driven, and the question is, whether others, by contracting with the same individual, can impose on his logs a lien for driving their own, with which he had no connexion, in which he had no interest, and of which he had no knowledge. If his logs are to be burthened with any other lien than that arising from the work and labor done thereon, then the burthen thus imposed, may be indefinite in extent.

A lien is a qualified ownership, enforced by detention of the property till the claim resting upon it shall be paid and satisfied. It usually arises from the act of the owner. In the present case it is matter of statutory enactment, and the only question is, what construction shall be given to that enactment. All the logs and lumber driven are subject to a lien. But if the owners of different quantities severally contract with sufficient laborers to drive their own logs, the lien of such laborers is solely upon the logs they were employed to drive, notwithstanding the logs of all the several owners were intermixed in driving, and were driven collectively by all the laborers employed by all the owners. *Doe* v. *Munson*, 33 Maine, 430. If the different owners, by different contracts, employ the same person to drive their logs, is each lot jointly and severally liable for its own expenses, as well as for those of other lots driven at the same time? If each lot is so liable, then a lien on the logs of A may be enforced against those of B, and the property of one man be taken to pay the debts of another, between whom there is no privity of estate or of

contract. A similar question arose under R. S., c. 67, in reference to which Mr. Justice SHEPLEY, in *Marsh* v. *Flint*, 27 Maine, 478, remarks as follows: — "The question therefore arises, whether logs owned by one person may be seized, libelled and sold to pay, not only the expense incurred in driving them, but also the expenses incurred in driving the logs owned by another person. A construction of the statute that would premit this, must rest upon the conclusion that the Legislature intended to allow the property of one person to be taken to pay the debt of another. If this were the design, it would exhibit an attempt to violate private rights not permitted by the constitution." If the lien is on the portion of each owner, jointly and in severalty, then there is no mode by which the owner may relieve his own property, except by discharging all the liens resting upon whatever logs may have happened to have been driven at the same time.

In *Spofford* v. *True*, 33 Maine, 283, logs cut under different contracts, with and for the same person, were by consent or permission mingled together, and it was held that this should not affect the rights of the laborers so as to deprive them of their lien, but that it attached to all the logs thus mingled together. But nothing in this case shows that Hodgkins knew of, or consented, that his logs were to be run with those of others; still less, that he was so associated in interest with others, that they were or should be held as security for the logs of other owners which might be driven with them.

The statute is in most general terms, and seems to make no provisions for the various contingencies which may arise under its provisions. As the debt is that of Pomroy alone, and the lien is on all the logs driven, the liability of the officer must be only for the lien which the plaintiff has on the logs attached. Any other result would impose on the defendant in interest the obligation of paying the whole expenses, however large, of driving any lot of logs, hower great, with which his own may have been commingled without his knowledge or consent.

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

(*) GILMAN *versus* SCHWARTZ.

An unsealed agreement to convey land to the plaintiff at a specified day, and reciting that it was in consideration of a sum paid by the plaintiff and of another sum *to be* paid by a third person, (who in fact had never agreed to pay it,) is upon a condition that the latter sum be paid before the making of the conveyance.

ON FACTS AGREED.

The defendant received a conveyance of land from one Freeman Nye, and two days afterwards gave an obligation to reconvey, if within eighteen months Nye should pay seventy-five dollars and interest and taxes.

A few days before the end of the eighteen months, the defendant gave to the plaintiff an agreement without seal, that he would convey the land to him, as soon as the bond should expire which was given to Nye, if Nye should not choose to redeem it. This agreement purported to be "in consideration of seventy-five dollars paid to me by Charles F. Gilman, [the plaintiff,] and fifteen dollars to be paid by Elisha Nye." At the time of signing the agreement, the plaintiff paid seventy-five dollars to the defendant. There was no agreement by Elisha Nye, or by the plaintiff, to pay the fifteen dollars, and it has never been paid.

After the end of the eighteen months, Freeman Nye not having redeemed the land, the plaintiff demanded a deed of it, which the defendant refused to give, alleging as a reason, that the fifteen dollars had not been paid. Whereupon this action was brought upon said unsealed contract.

A. Sanborn, for plaintiff.

A. W. Paine, for defendant.

RICE, J. — The only matter submitted for the consideration of the Court is, whether the payment of the fifteen dollars, being part of the consideration, and which was to be paid by Elisha Nye, was a condition precedent to be performed before the defendant should be required to convey; or whether the payment of this sum is to be viewed as an independent transaction, upon the performance of which the obligation of the defendant to convey in no wise depended.

In the construction of contracts Courts will always give effect to the intention of the parties, when their intention can be discovered, and no rule of law is thereby violated. For this purpose the intention of the parties to the contract, as presented by the case, may be taken into consideration.

In the case at bar the whole consideration for which the defendant had obligated himself to convey, was ninety dollars. Of this sum seventy-five dollars was paid in cash by the plaintiff, and fifteen dollars were to be paid by Elisha Nye. No agreement, however, was made by the plaintiff or Elisha Nye to pay that sum. The only security which the defendant had for the payment of the fifteen dollars, was the land then in his possession. If a demand had been made for a deed under the bond to Freeman Nye, the defendant would have been required to convey only on the payment of seventy-five dollars with interest from Oct. 31, 1849, and all taxes which said Schwartz might have paid on the premises.

There is nothing in the case, or in the intention of the parties, that would seem to indicate, that the defendant was to be required to give a deed under the contract with the plaintiff, on terms less favorable to himself, than those stipulated in his bond to Freeman Nye.

In view of these considerations, we are of opinion, that it was not the intention or expectation of the parties, that a deed should be required from the defendant until the fifteen dollars, which make a part of the consideration, should be paid. This has not been done. According to the agreement a nonsuit is to be entered.

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

(*) DOYLE *versus* TRUE.

When logs of different owners have been intermixed in the drive, the lien of the drivers extends to the logs of each owner, not however to an amount beyond his proportion of all the drivers' services.

Doyle *v.* True.

Where a laborer, having a lien for assisting to drive intermingled logs of different ownerships, has, in order to enforce his lien, rightfully and seasonably attached a part of the logs; if the officer, seasonably having the execution, refuse to sell the logs thereon, he will be liable for such refusal, unless he make it to appear that such sale would take more in value of the logs of some one of the owners than to the amount of his indebtedness under the lien.

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

Case, against the sheriff for the default of his deputy.

Three or four owners of logs of six different marks, to the value of $5000, contracted with one Stinson to drive them. Stinson employed the plaintiff with others to do the work. In the course of the drive, all the logs became intermingled. Certain proofs offered in defence are noticed in the opinion of the Court.

The plaintiff brought an action against Stinson and, in order to secure his lien, seasonably caused the logs of certain of those marks to be attached. The defendant's deputy made the attachment, having been indemnified for so doing. The plaintiff, having obtained judgment in that suit, (debt $84,40, cost $22,92,) seasonably placed the execution in the hands of the deputy, with directions to levy it upon the logs attached. This the deputy neglected to do, and the execution has never been returned.

It is for this neglect, that the present action is brought.

The parties agree that the Court may draw inferences of fact, and order a nonsuit or default, as the law shall require.

Wakefield, for the plaintiff.

J. H. Hilliard, for the defendant.

Shepley, C. J. — It is admitted, that the deputy of the defendant returned an attachment of logs of certain marks named, of sufficient value to pay the debt and costs, on a writ in favor of the plaintiff against Thomas Stinson. That he was indemnified for so doing; that an execution issued on a judgment recovered in that suit was in possession of that deputy within thirty days after judgment, with orders to levy on the property attached; and that he neglected to do it;

that the labor, for which that judgment was obtained, was performed by the plaintiff by "driving logs, masts and spars of six several marks alleged in said writ; and that said Stinson had contracted to drive said lumber, with the owners thereof."

The plaintiff acquired a lien upon those logs, for payment of his labor upon them, by the provisions of the Act approved on August 10, 1848, c. 72.

Proof was offered in defence, that those logs were "owned by three or four individuals in different proportions, some owning one mark and some another of the six marks, and that they were all mingled in one drive and run together; and that the value of all the logs was at least $5000."

It does not appear, that they were not so "mingled in one drive" by the consent of the owners. Or that more of the property of any one owner, would necessarily have been sold, than would pay the amount for driving his own logs.

There is nothing in the facts admitted, or proposed to be proved to show, that the deputy would have been required to take the property of one person to pay the debt of another, when such person had done nothing to subject it to such liability; or that he would have been required to do any unlawful act, by making sale of the property attached. The defence entirely fails. *Defendant defaulted.*

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

(*) J. C. GILMORE *versus* PATTERSON *& al.*

In a Bill in Equity, the adjudication of the Judge at the *Nisi Prius* hearing as to the facts of the case, is conclusive.

So far as a defendant's answer is responsive to the bill, or explanatory of the responsive matter in the bill, it is evidence. But when a new and independent fact, not called for by the bill, is set up, it must be established by proof.

It is a general rule that the answer of one defendant is not evidence for his co-defendant.

It is a general rule of evidence that the admissions of one co-partner, with reference to the legitimate business of the co-partnership, are deemed to be the admissions of each and all of its members.

Such admissions are not the less evidence, because found in an answer to the bill under consideration of the Court.

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

In Equity.

The case was heard on bill, answer and proof.

The Judge's report of the case is substantially as follows: —

The bill was instituted by John C. Gilmore against Martin Gilmore, Robert Patterson and Phineas Pendleton, jr. The several defendants have duly filed their answers. Since filing his answer, and since the taking of the proof, Martin Gilmore has deceased, dying at sea, insolvent, (leaving no estate,) and no administrator has been appointed upon his estate, and he is not represented in the cause. Phineas Pendleton, jr. in no way contests the plaintiff's claim, but submits himself to the order of the Court. The controversey, therefore, is entirely between John C. Gilmore and Robert Patterson.

In January, 1846, John C. Gilmore and Martin Gilmore entered into partnership at Point Pleasant, in Virginia, to carry on mercantile and shipbuilding business. The business was continued till Dec. 1, 1848, when the plaintiff sold out his interest in the goods in their store to Martin Gilmore, but the partnership was continued by agreement, for the purpose of disposing of the partnership property then on hand, and paying the debts and settling the affairs of the firm.

On April 1, 1848, the co-partnership owned a brig of the value of $8000, or thereabouts; they then agreed that Martin Gilmore should take the brig to Boston to be sold for the benefit of the firm, which he did, and there sold her to the defendant Pendleton, for $8250, taking his notes running to said Martin, instead of the firm to whom the brig belonged. These notes, or a portion of them, remained in the hands and under the control of Martin till Oct. 1849, when he became embarrassed, his property was attached, and he was arrested at Point Pleasant, at the suits of creditors of the firm resident there.

The firm was then, and before, insolvent, and still owes large amounts, and the notes given for the brig are needed for

the payment of the just debts of the firm, and this bill is brought by the plaintiff to obtain them for that purpose.

On the 15th of Oct. 1849, without the knowledge or consent of the plaintiff, Martin Gilmore inclosed two of the notes, each to the amount of $2666, payable in two and three years, in a letter, and sent them to the defendant Patterson, at Belfast, in this State. The letter, inclosing the notes, is called for in the bill, and the answer alleges it to be of the following tenor.

"Dear Sir:—Inclosed you will find two notes against Phineas Pendleton, jr., which I assign to you and some other creditors in your parts, as surety for what I owe you; but I do not want you to take any steps to collect them till I see you. If it is so that you can come and see me, I shall like to have you, as I am in jail and cannot go to see you.

"Yours, &c., Martin Gilmore."

Shortly after the receipt of that letter, Patterson proceeded to Point Pleasant, where he arrived on Nov. 5, 1849; and he states in his answer *that*, on his arrival, and on the same day, in the afternoon or evening, he saw Martin in jail, relating to his claims against the firm; *that* they computed the interest, and found the whole amount, principal and interest, due him from the firm to be $3900; *that*, by agreement with Martin, he gave up all claims against the firm and discharged them, and surrendered up their notes, the dates and amount of which are specifically set forth in the answer; and *that*, in consideration therefor, Martin transferred said two notes to Patterson, under an arrangement specified in an instrument in the hand writing of Patterson, but signed by Martin, as follows:—

"Point Pleasant, Nov. 5, 1849. Received of Martin Gilmore two notes, by letter dated October 15, 1849, against R. Pendleton for $2666,00. Said notes dated Boston, June 17, 1848, and I have this day given up to said Gilmore, M. & J. C. Gilmore's notes and interest on said notes to the amount of three thousand, nine hundred dollars.

"Now it is agreed by said Gilmore that said Patterson may get said notes cashed at the best rates he can, and apply the

funds to the payment of the notes given up and interest since, and a reasonable pay for all his travel and expense in the same. And the assignment as security on said notes is void, and his blank indorsement on said note is to be good against him, waiving demand and notice in any way, and if said notes shall overpay the notes given up, said Patterson is to pay the balance to some one of M. & J. C. Gilmore's creditors, as Gilmore shall direct. The two notes against Pendleton are payable in two and three years with interest from date. "Martin Gilmore."

The notes were produced by Patterson at the hearing, and had the indorsement of Martin Gilmore thereon.

Though Patterson remained some days at Point Pleasant, it does not appear that he had any interview with the plaintiff there.

No further proof was offered of the time when the indorsements on the notes were made, unless the answers be such proof.

No evidence was introduced of the claims of Patterson against the firm of J. C. & M. Gilmore, or of the transmission of the notes, or of the settlement made in jail, except his answer and the answer of Martin Gilmore, which Patterson claims to use as evidence in his favor.

The bill charges that Martin delivered said notes to Patterson with the fraudulent design of secreting them from plaintiff and from the creditors of the firm, and of fraudulently appropriating them to his own use; and that Patterson knew of such design and received them in aid of its execution, all which is denied by the answers both of Patterson and Martin, which concur in every material particular. Plaintiff introduced much evidence of a circumstantial nature to show the fraud on the part of Martin, and notice to and coöperation on the part of Patterson, but on carefully considering the evidence, I do not find sufficient evidence of fraud and collusion on the part of Patterson to overcome his answer.

The Judge appointed a receiver, to whom the notes against Patterson should be delivered.

Upon the foregoing report, the Court is to render such decree as the rights of the parties may require.

Rowe & Bartlett, for the plaintiff.

J. S. Abbott, for the defendants.

RICE, J. — This case comes before us on report of the Judge, who heard the parties in Penobscot county. The gravamen in the plaintiff's bill, is, that Martin Gilmore, who is one of the defendants, and a co-partner with the plaintiff, having possession of the notes against Pendleton, described in the bill, which notes were the property of the firm of M. & J. C. Gilmore, transferred and delivered them to Patterson, for the purpose of deriving benefit therefrom, personally, and with the further purpose and design of defrauding the plaintiff and the creditors of the firm; and that Patterson had knowledge of these facts, and of the fraudulent designs of Martin, before he obtained possession of the notes, and thereby became a participator in the alleged fraud.

The defendant Pendleton admits in his answer, that he gave the notes described in the bill, and affirms that he has at all times been, and now is ready and willing to pay the same according to their tenor, to any party entitled to receive payment therefor, and prays the direction of the Court. He is without fault.

Martin Gilmore has deceased, insolvent, since his answer was filed, and the plaintiff desires no further proceedings against him or his representatives.

Patterson and Martin Gilmore in their several answers, do not deny, but admit the existence of the co-partnership between plaintiff and Martin, as set forth in the bill; and Martin admits that the notes were the property of the firm, which fact is not contested by Patterson. But both these defendants expressly deny all fraud in the transfer of the notes, or that they were transferred or delivered to Patterson for the private benefit of Martin.

At the hearing, this plaintiff introduced much circumstantial evidence to show fraud on the part of Martin, and notice

and coöperation on the part of Patterson. But the Judge did not find sufficient evidence of fraud and collusion on the part of Patterson to overcome his answer. This being a question of fact, the finding of the Judge is conclusive and the allegation of fraud therefore repelled.

From the answer of Patterson it satisfactorily appears, that from the time the notes came into his hands in the letter dated Oct. 15, 1849, until Nov. 5th, following, they were held as collateral security for the benefit of himself and certain other creditors of M. & J. C. Gilmore, though a literal construction of the language of the letter inclosing the notes would seem to restrict their application to indebtedness from Martin alone. This however is not material, because Patterson admits that that arrangement, whatever it may have been, was rescinded and a new arrangement made on the 5th of November, 1849. On that day Patterson states that he saw Martin Gilmore, who was then incarcerated in prison in Virginia, relative to his claim against the firm; that they computed the interest and found the whole amount of principal and interest then due him from the firm, to be $3900, and that by agreement he gave up to Martin all of said claims against the firm, and fully discharged the same. In consideration of which, Martin, in behalf of the firm, transferred and delivered to him said two notes, and as part of the same transaction agreed that he might, if he saw fit, get them cashed, and deduct from the proceeds said $3900, and a reasonable sum as compensation for his trouble and expenses, Patterson at the same time agreeing to pay over the surplus, if any, to the creditors of the firm, as Martin might direct. This contract was not in writing, but at that time Martin gave Patterson the memorandum in writing, recited in his answer.

It is now contended by the defendant Patterson, that his answer should be received as evidence, not only of the manner in which the notes came into his hands, but also as to the amount of the indebtedness of the firm to him.

So far as the defendant's answer is responsive to the bill, or necessarily connected with, or explanatory of the responsive

matter in the bill, it is evidence. But when a new and independent fact, not called for by the bill, is set up, such fact must be established by proof. The extent of the indebtedness of the firm to Patterson is of this character and must therefore be proved.

As evidence upon this point, Patterson offers the answer of his co-defendant Martin Gilmore. It is a general rule, that the answer of one defendant is not evidence for his co-defendant.

But it is also a general rule of evidence that the admissions of one co-partner, with reference to the legitimate business of the partnership, are deemed to be the admission of each and all its members. The existence of the co-partnership between Martin Gilmore and the plaintiff having been alleged in the bill, and admitted in the answers of the defendants, and the charge of fraud having been successfully repelled, the admissions of Martin, touching the indebtedness of the firm to Patterson, are admitted as evidence for Patterson, and may be used by him in establishing his claim against the firm, whether those admissions are found in the answer of Martin or in any other paper signed by him. They are admitted, however, as the admissions of a co-partner, not as the answer of a co-defendant, and as such must receive the consideration to which they are justly entitled under the circumstances under which they were made.

The rights of the parties stand thus; — Patterson has an interest in the notes, or the proceeds thereof, to the extent of his just claims against the firm, which were surrendered by him to Martin, and also for such reasonable expenses as have been incurred under the agreement made with Martin at the time he surrendered his claims, and the surplus must be paid over to the plaintiff.

To determine the amount of Patterson's interest in the notes or their proceeds, a master must be appointed, who is authorized to hear testimony and report the amount which is justly due to Patterson from the firm of M. & J. C. Gil-

more, and for this purpose the master is also authorized to examine the parties upon oath.

The decree of the Court below, appointing a receiver, is affirmed, and said receiver is authorized to collect the notes and hold the proceeds to be disposed of, according to the principles above stated, under the order of Court, after the coming in of the master's report.

The defendant Pendleton, not appearing to have resisted any of the just demands of the plaintiff, is entitled to his costs.

SHEPLEY, C. J., and TENNEY and HATHAWAY, J. J., concurred.

WIGHT *versus* PHILLIPS.

The contractors with a town to make and open a county road, which is obligatory upon the town to build, are not restricted in reference to suitable means in which to effect their object, provided opportunity is given to the owner of land over which it passes to take from the land such things as he has a legal right to do.

And one invited by such contractors to pass over the road while in process of construction, to test its sufficiency, is not liable to an action of trespass by the owner of the soil.

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

TRESPASS *quare clausum.*

The County Commissioners had laid out a road across the plaintiff's field, and the town of Brewer, where he dwelt, were obliged to open the same. The plaintiff's damages were allowed and paid. All the proceedings were in accordance with the statute provisions.

The town of Brewer authorized their road commissioners to contract with some persons to build the road, and they made such a contract with Barker and others to complete it on or before Sept. 1, 1851.

The contractors, on Aug. 12, 1851, invited the defendant to pass over the road to try it, and in passing over it, he re-

moved a fence, in order to go by, which the plaintiff had erected across it. For that removal, the plaintiff brings this action of trespass.

Upon these facts, it was stipulated, that the Court should enter judgment by nonsuit or default as the law requires.

A. Sanborn, for plaintiff.

The question in this case, is, was the place of the alleged trespass, a legal highway made and opened for public travel?

The mere act of the Commissioners in locating a highway does not transform the land laid out *for* a highway, *into* a highway. It only imposes upon the town through which it passes the obligation, clothing it with the right to make and open it. *Loker* v. *Damon*, 17 Pick. 287.

It cannot become a public highway until made and opened for public travel. Until that is done, the public right to use it as a way of travel does not exist.

Before the road was thus made, the defendant went over it and tore down the plaintiff's fence, and was guilty of a trespass.

The invitation to defendant, by the contractors to build the road, to ride over and try it, cannot change the rights of the parties. They had no power to open the road for public travel. They were authorized simply to go on to the premises appropriated for the highway, and make it.

Peters, for defendant.

The road builders were rightfully there, and they desired the defendant to pass over the road, to have his opinion whether it was suitably made. If the contractors had a right to go over the road, they had a right to carry others over.

The case cited by plaintiff's counsel from 17 Pick., when examined, will be found to support the defence.

TENNEY, J. — The inhabitants of the town of Brewer were bound to construct the road for travel, in one year from the session of the Court of County Commissioners, which commenced on the first Tuesday of August, A. D. 1850. They were not restricted in reference to suitable means, in

which to effect their object, provided full opportunity was given to the plaintiff to take from the land such things as he was legally entitled to do, within the same time. R. S., c. 25, § 20. The persons, who contracted to build the road, had the same rights, enjoyed by the town, and were subjected to similar duties, so far as they were interested in the work to be done. They were entitled to every reasonable opportunity to perform their work, till they had entirely completed it, by themselves, or those whom they chose to employ for that purpose. They could rightfully go over the road with such teams and carriages, with appropriate loads, as usually pass upon public roads, in order to test its sufficiency; and consequently could invite others to do the same, without causing any liability to the latter.

The defendant passed over the road by authority of the contractors. *Plaintiff nonsuit.*

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

STATE OF MAINE *versus* TIBBETTS.

So much of § 17, of c. 36, R. S., as prohibits any person from being a *common victualler*, without a license, is not affected by statutes of 1846, c. 205, and of 1851, c. 211, and remains unrepealed.

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

INDICTMENT, against the respondent, for being a common victualler without license.

The defendant objected to the indictment, that the statute on which it was brought had been repealed or become invalid by force of certain subsequent statutes. But the Court ruled otherwise, and the defendant was convicted.

Peters, for the respondent.

The section of the statute upon which this indictment is based has been repealed by the liquor laws of 1846 and 1851.

It is unnecessary always to *expressly* repeal a statute that it may no longer be binding. *Towle* v. *Marrett*, 3 Maine, 22.

To ascertain the meaning of a law, the Court may look to the object in view, the remedy intended and the mischief to be remedied. *Winslow* v. *Kimball*, 25 Maine, 493.

The object of a license and restraint upon a victualler, was to regulate in them the sale of intoxicating drinks. That was a part of the business and definition of "common victualling," the furnishing of liquors. *State* v. *Burr*, 10 Maine, 438.

When the law of 1846 was passed, which prohibited sales of liquor altogether, and provided new modes and remedies, there was left no such offence as that of common victualling; there was left no object for the law, no mischief to be remedied. The entire prohibition of sales, made in the Act of 1851, has repealed all those statutes founded merely on a purpose of restraining or regulating that business to which selling was an incident.

Under the Revised Statutes, there was a board of license, consisting of *aldermen, treasurer and clerk*, and a victualler must obtain a license of that board. But now there is no such board. By § 2, c. 211, of Laws of 1851, the only board of license are the aldermen, or in towns, the selectmen. It cannot be that there are two boards of license; to wit, one board consisting of aldermen alone, and one of aldermen, with clerk and treasurer added. Still there is no provision for a victualler to have a license from the board of 1851, and if this indictment is well founded, there can be in the whole State no such thing as licensed common inn-holding or victualling. The reasonable construction of the statute would be, that there is now no requirement for a license; and common victualling, without the sale of intoxicating drinks, is no offence. That is, that inn-holders and victuallers are now punishable at common law, for all nuisances, and at *statute only, as sellers.* They are as much reached as before, only in a different mode, and under another appellation.

Evans, Att'y Gen., for the State.

TENNEY, J. — This is an indictment against the defendant for being a common victualler, and is founded upon R. S., c.

36, § 17. It is contended that this section has been wholly repealed by statutes of 1846, c. 205, and of 1851, c. 211.

The statute of 1846 repeals so much of § 17, c. 36, R. S., as affixes a penalty for being a common seller of liquors by retail; and that of 1851 repeals the Act of 1846, excepting the thirteen sections from ten to twenty-two inclusive. It is very manifest that the Legislature of 1846 and 1851 intended to leave unaffected the provision in the Revised Statutes, which had relation to common victuallers. There is a provision in both of these statutes, however, repealing all Acts inconsistent with them. These statutes are entirely silent upon the subject of common victuallers, and consequently are not inconsistent with the statute, by authority of which this indictment was found. *Exceptions overruled.*

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

BATCHELDER *versus* MCKENNEY.

Compensation for services performed on the credit of defendant, may be recovered of him though rendered to another.

But where the plaintiff performed services for a neighbor at the request of defendant, and it was known to the plaintiff that he only acted as the friend and agent of his neighbor, he can maintain no action against the defendant for compensation.

And the fact, that defendant was a partner with him, for whom the labor was performed, will not render him liable.

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

ASSUMPSIT on account for services rendered.

The facts found upon the evidence reported, appear in the opinion of the Court.

Waterhouse, for the plaintiff.

Blake, for the defendant.

SHEPLEY, C. J. — The plaintiff was employed to take care of C. B. Robbins, while his mind was disordered. By the request of a neighbor, the defendant first requested his attend-

ance. He appears to have remained one or two days, and to have been discharged by the wife of Robbins, who soon after requested the defendant to get some person to take care of her husband. The defendant sent the plaintiff again and he remained five or six weeks.

Robbins became so far restored as to be able for a short time to attend to business, and he paid the plaintiff fifteen dollars in part for his services. The plaintiff knew, that the defendant requested him to perform services beneficial to another and not to himself.

There was, therefore, much reason to conclude, that the defendant was acting as the friend and agent of the person for whom the service was to be performed, unless he desired that they should be performed upon his own credit. There is no reason to doubt, that the plaintiff could have recovered a judgment against Robbins for any balance due to him. There is no testimony tending to prove, that defendant specially engaged to pay for services, rendered for the benefit of another. The rights of the parties cannot be varied by the fact, that Robbins was then a partner of the defendant, who cannot be holden to pay the debt of another by a verbal request, that services should be performed for him. If there had been testimony to prove, that the defendant requested the plaintiff to perform services for him by attending upon Robbins, the rights of the parties would have been different. *Plaintiff nonsuit.*

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

HAYNES *versus* YOUNG.

A public road is an easement, the existence of which over a part of a lot of land conveyed by deed, with covenants of warranty, is a breach of those covenants.

In the construction of deeds, *monuments* control courses and distances.

And when a *line* is described as a monument, the course and distance given, must yield to the line.

A *definite* boundary by monuments, courses and distances will limit the *generality* of a term previously used in the deed.

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

COVENANT BROKEN.

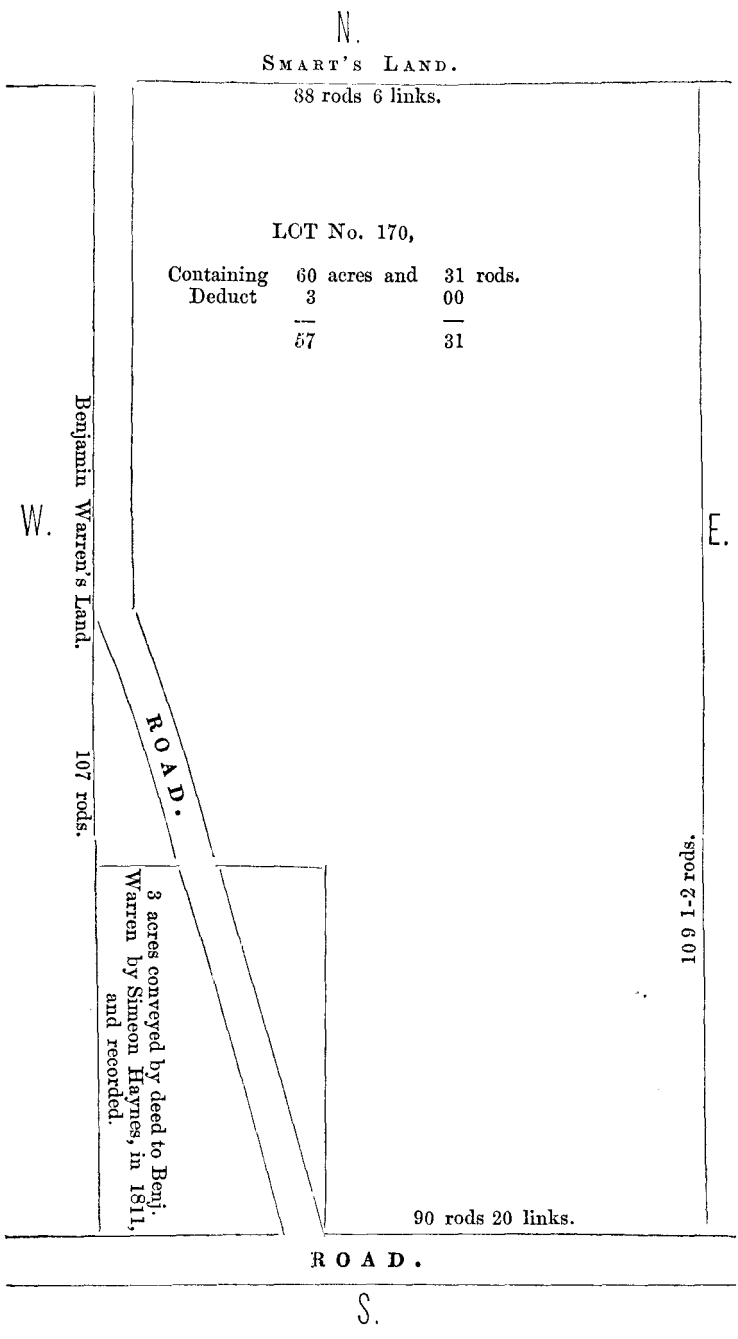
The deed of defendant was dated November 16, 1840, containing the usual covenants of warranty. The description was "being lot in fifteen hundred acre tract (so called) No. 170, according to the survey and plan of Andrew Strong and Robert Houston, containing fifty-six acres and 135 rods, and being bounded and described as follows; viz., beginning at a stake and stones at the south-east angle of Benjamin Warren's land; thence north by said Warren's land 107 rods to a stake and stones; thence east by Richard Smart's land, 85 rods to a stake and stones; thence south by Benjamin Tripp's land, 107 rods to a stake and stones; thence westerly to the highway 85 rods, to the place begun at."

An office copy of a deed of warranty was also put into the case by plaintiff, from Simeon Haynes to Benjamin Warren, dated and recorded in 1811, of three acres out of the south-west corner of lot 170.

The plaintiff also introduced evidence of a public road over a portion of lot 170, for more than 30 years, and of the damages, both as to the road and the value of the three acres formerly sold to Warren, and that the plaintiff never lived in the vicinity of the land.

The sketch attached will show more distinctly, the nature of the plaintiff's complaints, by the road across lot 170, and the three acres sold to Benjamin Warren.

Haynes *v.* Young.



Before Warren bought the three acres, he owned the land adjoining lot 170 on the west.

It was stipulated that the Court might draw such inferences of fact as a jury and should enter judgment by nonsuit or default, according to the legal rights of the parties, and if a default should be ordered, the damages should be assessed by the Judge who presided at the trial.

C. P. Brown, for plaintiff.

The description in the deed to plaintiff, by comparing it with the plan, appears to cover the whole of lot 170, without any reservation or exception whatever. As to any effect upon the general words by a more restrictive description, I cite *Keith* v. *Reynolds*, 3 Maine, 393; *Ball* v. *Barnum*, 11 Mass. 163; *Coller* v. *Tufts*, 3 Pick. 272.

It may be said, that "the south-east corner of Benjamin Warren's land" may be regarded as at the S. E. angle of the three acre lot, and that the deed from defendant to plaintiff does not embrace the three acre lot, &c.

This cannot be so, the plan negatives any such construction, and the defendant's deed will not admit of any such construction. It conveys the entire lot, No. 170. The first bound is fixed at "the south-east angle of Benjamin Warren's land." "*Thence north by said Warren's land*, 107 *rods*," to Richard Smart's land, &c. Suppose the point of beginning is regarded the south-east corner of the three acre lot, thence north, "by said Warren's land, 107 rods," &c., he cannot go north or northerly on this line, "by said Warren's land, but 22 rods," and this line would then, in order to reach the north end of the lot, run through the centre of the 170 acre lot. This construction cannot prevail. Again, suppose we take the south line of the lot No. 170, on the highway. The distance of this lot, fixed by the original plan and survey is precisely the same, as across the rear of the lot, to wit, 85 rods. By adopting the construction, that the three acre lot is not included in the defendant's deed, would leave the line on the highway less than 70 rods.

This cannot be adopted, and even upon this construction

the highway, including near an acre, would be included in the deed, and not reserved or excepted therefrom.

A. Sanborn, for the defendant.

By the first portion of the description alone, in plaintiff's deed, the whole lot would undoubtedly pass. But this is modified and controlled by the definite boundaries specified in the second portion. It is a well established rule of law, that definite boundaries in a deed limit and control general terms previously used. *Thorndike* v. *Richards,* 13 Maine, 430; *Allen* v. *Allen,* 14 Maine, 387.

In the construction of this description, the manifest intention of the parties to the deed is to govern. This may be reached by the boundary being made upon Warren's land, evidently meaning not to convey any which he owned. And again, the Court may gather the intention from the price received for the land which defendant says was sold, and the value of the three acres, which the plaintiff is now endeavoring to make him pay for. Instead of the consideration paid, the plaintiff should have paid four times the sum he did. *Jameson* v. *Palmer,* 20 Maine, 425; *Deering* v. *Long Wharf,* 25 Maine, 51.

The location of the highway over a small parcel of the land conveyed, did not create a breach of the covenants of seizin. It gave the public a right to use the land over which it was established, a mere easement in the soil. The fee and title in and to the soil, subject to the easement, was in defendant. He was therefore legally seized of the land covered by the road, and had good right to sell and convey it.

But was the covenant of defendant in the deed against incumbrances broken? I am constrained to admit, that under the decisions of this Court, the highway was an incumbrance, and that the action may be maintained on this covenant against defendant. On this ground alone, a default must be entered.

Tenney, J. — It is not denied, that the existence of a public road over a part of the land described in the deed from

the defendant to the plaintiff, dated November 21, 1840, constitutes an incumbrance, for which the former is liable. Such a road is an easement, and amounts to a breach of the general covenants of warranty, like those contained in this deed. *Harlow* v. *Thomas*, 16 Pick. 66.

But the principal question involved in the case is, whether the description of the land in the deed containing the covenants alleged to have been broken, embraces the parcel conveyed to Benjamin Warren, by deed of Simeon Haynes, on February 28, 1811. This deed, it is admitted, was recorded at its date. Prior thereto, Simeon Haynes was the owner of lot No. 170, according to the plan. This lot was then bounded on the west the whole distance by the land, then and now owned by said Warren. By that deed Warren took a rectangular piece of land and part of lot No. 170, from the south-west corner thereof, containing three acres, and bounded on the west by the east line of land, which was previously owned by him, for the distance of 22 rods and 21½ links. If, by a legal construction of the deed from the defendant to the plaintiff, this parcel of three acres is included, that portion having been previously conveyed, did not pass by the deed, and there is a breach of the covenant; if, on the other hand, it is not embraced in the description, no breach of the covenant has taken place on that account.

The first clause in the description is lot No. 170, according to the survey and plan of Andrew Strong and Robert Houston. If this were the only description, the whole of lot No. 170, would fall within it. But the land is afterwards more specifically described by monuments, courses and distances. When this is done, the definite boundaries may limit the generality of a term previously used. *Allen* v. *Littlefield*, 7 Greenl. 220; *Allen* v. *Allen*, 14 Maine, 387. According to this rule, if the particular boundaries restrict the premises to a quantity less than the entire lot, and do not include the parcel described in the deed from Simeon Haynes to Warren, this ground of action fails.

The north-west, north-east and south-east corners of the

land described in the deed to the plaintiff, together with the north and east lines thereof, are in every respect free from controversy.

It is a rule well settled, that monuments will control courses and distances. By the application of this rule, the result is very clear. The south-west corner of the premises is the south-east angle of Benjamin Warren's land. This angle of Warren's land must be determined by the facts existing at the time the deed was given, and not by those, which had long before passed away; and it is only at the south-east corner of the land conveyed by Simeon Haynes to Warren, that this call in the deed can be answered. The course from this monument is represented to be "north," though upon the defendant's construction a part of the line will be west. But this line is described in such a manner, that it is to be regarded as a monument. There is no dispute as to the location of the eastern boundary of Warren's land, as it was at the date of the deed to the plaintiff. The western boundary of the land described in this deed, is north, "by Warren's land." The course represented as "north" must yield to the line, well defined, as a monument.

According to the agreement of the parties, a default is to be entered, and damages to be assessed by the Judge who presided at the trial, for the injury for a breach of the covenant on account of the road only.

Shepley, C. J., and Rice, Appleton and Hathaway, J. J., concurred.

(*) Bryant *versus* Crosby, *Executor.*

A contract signed by a party upon receiving the possession of personal property, and containing his promise to pay for the same, and also an agreement that the property shall remain the property of the other party till the payment should be made, is not a *bailment* but a *conditional sale.*

If such a contract, though not signed by the vendor, describe the property as "in good order and condition," such description is equivalent to a representation, and, if he knew it to be untrue, will vacate the contract.

But, though untrue, it will not have that effect, unless, at the time of making it, it was known to be untrue.

A surety cannot be discharged on the ground of fraudulent representations made to his principal, except when that principal would be.

That concealment by a vendor in the sale of goods, which would entirely discharge the surety of the vendee, is a concealment of facts, known to the vendor and not known to the vendee or his surety, being facts of a character to increase materially the risk beyond that assumed in the usual course of business of that kind, the vendor having a suitable opportunity to make them known.

After chattels have been delivered by the principal in part payment of his note, it is competent for him to adjust their value with the payee, and his written admission upon the contract of the amount remaining due, will be binding upon his surety, unless there be proof of error or fraud in making it.

Parol testimony cannot be received to give the effect of a mortgage to a bill of sale, absolute in its form, though not under seal.

Though a bill of sale may purport to be for a cash consideration already paid, it is competent to prove by parol that the payment was not made in cash, and also to show in what mode it was made.

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

Assumpsit, on a contract signed by Oliver Crosby, the defendant's testator, as surety; viz.: —

"Received of Nathaniel Bryant four hundred and seventy-five sheep and twenty-five rams, now in good order and condition, for which we jointly and severally promise to deliver to him at E. T. Morrill's house, in Atkinson, thirty-five hundred pounds of wool, one half of it to be delivered in June, 1848, and the other half in June, 1849. The wool to be equal in quality to that grown on said sheep, and well washed on the sheep, and done up in good order and condition; and the said stock and the wool sheared from them, and all increase shall be and remain at all times the property of said Bryant until the payments are made as above, and the same shall be well kept at our risk, and on failure to make any payment as aforesaid, or if they pass out of our hands, said Bryant may take them at any time and we will pay all expense and damage. "E. T. Morrill, *Principal.*

"Oliver Crosby, *Surety.*

"Atkinson, Nov. 30, 1847."

On the back of the contract were the following indorsements: —

"1186¼. — December 29, 1848. Received eleven hundred and eighty-six and one-quarter pounds of wool in part on the within.

"October, 1849. Received three hundred and twenty-one pounds of wool on the within in part.

"July 16, 1850. Received one hundred and seventy-two and a half pounds.

"August 26, 1850. The amount due on this obligation this day is six hundred and sixty-three dollars and twenty cents.

"$663,20. "E. T. Morrill."

The plaintiff read the contract and there stopped.

Upon notice to produce, the defendant introduced a bill of sale made by Morrill, as follows: —

"Aug. 26th, 1850.

"In consideration of six hundred and sixty-three dollars, and twenty one-hundredths, paid by Nathaniel Bryant of Dexter, I this day sold, transferred and delivered to said Bryant the following personal property on my farm in Atkinson, viz.:

20 tons hay, the same in my barn,	$100 00
1 stud horse,	100 00
600 bushels of oats, being all standing and growing on said farm as estimated, and those already harvested, and I am to harvest those not harvested and put the same into the granary in my barn in good condition, to be at said Bryant's disposal at any time he calls for the same, at 25 cents per bushel,	150 00
2 oxen, about ten years old, of light red color, at	40 00
2 cows, one nine and the other twelve years old, both red, at	25 00
1 bull, 3 years old, at	20 00
11 rams, marked with red paint,	13 20
1 gray mare, 3 years old, and one racking colt,	85 00
50 bushels wheat, as estimated, which I am to harvest and deliver when called for in good condition,	50 00

1 old mare, dark red color, 20 years old, at	25 00
1 yearling colt, red color,	25 00
50 bushels corn, which I agree to harvest in good condition and deliver the same as soon as the same can be threshed out, in merchantable order,	30 00
	$663 20

"Said property all having been left in my charge, I hereby agree to keep the same safely in good condition, all at my risk, and in case of loss or any deficiency in the oats, or wheat, or corn, or loss in any shape, I agree to pay the same to said Bryant, he having the right to take any part or the whole of the same any time he may wish so to do.

"E. T. Morrill."

On the back of this paper were the following indorsements:

"Sept. 27, 1850. Received on the within one stud horse, valued at	$100 00
1 old mare, twenty years old, valued at	25 00
11 rams,	13 75
Also, one gray mare, three years old, and colt by her side,	85 00
1 one year old colt,	25 00
	$248 75
October 4, 1850. Received one pair of oxen ten years old,	40 00
2 cows,	25 00
1 bull,	20 00
	$85 00
Dec. 21, 1850. Received on the within 50 bushels corn,	30 00
23½ bushels wheat and rye,	25 50
1 pair of oxen, yoke and chain,	70 00
1 wagon,	55 00
1 cow,	15 00
36 bushels corn, at 75 cents,	27 00
For keeping oxen and men,	6 50
	$227 00
	$554 25"

The plaintiff thereupon introduced Jethro Goodwin and the said E. T. Morrill, who both testified, against the defendant's objection, that said paper was taken as collateral security, and not as an absolute sale. It was not recorded by the town clerk of Atkinson or any where.

Morrill further testified, that the first conversation he had about the trade for the sheep, was in October, 1850, at Bryant's house in Dexter, and again a few days afterwards at the same place, where he agreed upon the trade. That afterwards Bryant came to his, (Morrill's) house in Atkinson, a few days before the date of the contract in suit; that Bryant brought the contract ready prepared for signature, except as to date; that he (Morrill) wrote the date; that he did not know that Bryant and Oliver Crosby had any conversation about it; that after Bryant went away, he (Morrill) presented the contract to said Oliver Crosby and requested him to sign it; that said Oliver did sign it. Morrill wrote the date and one other word in the contrat, viz.: the word "our." That the contract being signed he took it and went with it to Dexter about the 6th of December, 1847, to get the sheep; that he selected 400 sheep from one flock, and examined them; that then he, with Bryant, went one or two miles to another place, where was another flock of three or four hundred; that a large number were in a barn; that they were driven from the barn out of the door and counted as they went out; that he did not see much difference in them; thinks he did not take them all as they came out; thinks he rejected some; got as good as he could get; that he delivered to Bryant the contract in suit at the same time; that the sheep were driven to his place in Atkinson in two days, 18 miles; part of the time it was rainy and snow fell. Got them home and they were mingled with the flock of sheep which he had previously drove, consisting of about 40 sheep; thinks none died within three weeks; then many of them showed signs of disease; were relaxed; thought they had the rot; thinks he did not lose more than 25 till after the 1st of February; that during that winter from 250 to 300 of them died of this disease; the next winter about 150

sheep more died; that some of those previously owned by him died in the same manner.

Ebenezer Brown, called by plaintiff, testified that he was present at the time of the selection of all the sheep by Morrill; that the last 100 were selected from a flock of 350; the sheep were put into a barn, and turned out at the door as they run till 100 were counted; Morrill said he was in a hurry, and he would take them in that way; that he was satisfied with the sheep.

There was other testimony tending to show that a large number of the sheep at the time they were driven to Atkinson were old, poor and diseased; and there was evidence tending to show that they were well kept, and the contrary; that the sheep began to die the next day after they were driven to Morrill's farm, and so from day to day afterwards.

There was evidence tending to show, from other witnesses, that they bought sheep of Bryant from the same flock from which Bryant got his sheep the same fall; that many of them proved to be diseased, and about half of them died the ensuing winter, and that other sheep which were mingled with the sheep which they bought of Bryant became infected and died.

There was no evidence that Oliver Crosby ever saw the sheep till they were driven to Morrill's farm in Atkinson. There was evidence tending to show that the market price of wool, such as specified in the wool contract, was low during the months of June, 1848 and 1849; that the market price was higher on the 29th of December, 1848 and in October, 1849, and July 16th, 1850; that it was worth more at those times than during June, 1848, and June, 1849, and so of wool generally.

There was evidence tending to show, that in relation to the oats and hay mentioned in the paper of the 26th of Aug., 1850, there was a deficiency, the amounts therein specified not having been raised by Morrill on the place that year and he not having the same.

The defendant contended on the question of fraud, to the

jury, that if Bryant prepared and delivered the contract in the manner testified by Morrill, and if Oliver Crosby so signed it, and did not see the sheep himself, and if Morrill took it and got the sheep, and delivered the contract to Bryant in the manner testified by Morrill, and if the sheep were in fact different from those described in the contract, or if they were not in good order and condition, the surety was discharged. The Court instructed the jury, that if Bryant made any representations to Morrill that were untrue, although Morrill saw the sheep and selected them, it would discharge the surety.

The defendant contended, that if Bryant delivered sheep to Morrill, under the circumstances testified to by Morrill, which were not in good order and condition, the defendant would be discharged. The Court instructed the jury, that if Bryant delivered sheep to Morrill, knowing they were diseased, and concealed the fact from Morrill, Oliver Crosby would be discharged.

The defendant requested the Court to instruct the jury, that the preparation of the contract by Bryant, and the obtaining the signature of the surety under the circumstances, testified to by Morrill, and the delivery of the sheep implied a warranty to the surety that the sheep were in good order and condition, and that if they were in fact not in good order and condition, the defendant should have the benefit of it on the question of damages. The Court declined to give the instruction, but did instruct the jury that if there was a warranty, they might consider what damages he, Morrill, has sustained by any breach of such warranty, and make a deduction correspondent thereto.

The Court instructed the jury to inquire whether on all the evidence the paper of August 26th, 1850, was an absolute sale, or whether it was taken as collateral security; that if it was taken as collateral security, and if Morrill had liberty from Bryant to sell any of the property; and did so sell, whether the proceeds were paid to Bryant or not, the loss was on Bryant, and the surety was discharged to that extent; but that if Morrill sold any of the property without consent or

authority of Bryant, then Bryant would not be responsible for such sale.

The Court also instructed the jury that, in relation to the computation of the amount due on the contract sued, they should consider the fair price of such wool as described in the contract in June, 1848, and consider the indorsement of December 29th, 1848, as a payment made in June, 1848, without regard to the difference in value from June to December 29th, and add interest to the balance. That in relation to the second installment they should consider the fair price of the wool in June, 1849, and consider the indorsement of October, 1849, as made in June, 1849; and also the indorsement of July 16, 1850, as made in June, 1849, and add interest to the balance, without regard to the difference in the value of such wool from June, 1849, to the several indorsements.

The Court also instructed the jury that if the paper of Aug. 26th was taken as collateral security, they should inquire how much, upon the principles stated, the plaintiff had received on the contract sued and on the paper of 26th August, (casting interest to the several times of payment as indorsed on said paper of 26th August, deducting the indorsements and casting interest on the balance to the next indorsement, and so to the time of the rendition of their verdict,) and render a verdict for the balance, if any; and further, that if the paper of 26th August, was found to be an absolute sale, they should inquire whether there was in fact any deficiency in the hay and oats, and other property, and if they did so find, they should render a verdict for the amount of such deficiency with interest. Further, that though they should find the paper of 26th August to have been taken as collateral security, yet that they might answer how much that deficiency amounted to, and the interest on the same, on the supposition that it was an absolute sale.

The jury, after being out some time, returned into Court and asked the Court to instruct them whether, if they found that there was a deficiency, and that other property was indorsed on the paper of August 26th, not originally included in it they had a right to substitute that property for the deficiency

The Court instructed the jury that, on the hypothesis that the bill of sale was absolute then the plaintiff would be chargeable for so much as was in existence, and was by the bill of sale conveyed to the plaintiff, and that if one article of property was substituted for another it was a matter between plaintiff and Morrill, unless on the whole the plaintiff had been paid; that they would see how much there was conveyed in and by the bill, and if all the property, to the amount therein specified, passed to him, then the debt was paid; if there was a deficiency they would see how much in fact passed, either in the original bill of sale or by substitution, for articles therein, which, with any other payments, should be allowed the defendant, and they would see what, if any, balance, was due.

The jury returned to their room and rendered a general verdict for the plaintiff for the sum of $108,81, and also, —

"The jury decide that if the memorandum, dated August 26, 1850, is a bill of sale, that the actual property falls short of the amount specified in the bill fifty-five dollars, and that the interest on the same amounts to eight dollars and seventy-four cents, making a difference of sixty-three dollars and seventy-four cents."

To the above rulings and instructions the defendant's counsel excepted.

J. Crosby, for the defendant.

S. H. Blake, for the plaintiff.

SHEPLEY, C. J. — It is insisted in defence, that the contract made on Nov. 30, 1847, constituted a bailment and not a sale of the property.

No option was given to Morrill upon any contingency to return it; and none to the plaintiff to reclaim it, except upon the failure of Morrill to make the payment or to retain possession. The contract therefore provided not for a bailment but for a conditional sale.

It is also insisted, that it contained a warranty by the plain-

tiff, that the sheep were at the time of sale "in good order and condition."

It was not signed by the plaintiff. The engagements were not made by him, but to him. He entered into no warranty. The idea is presented by those words to both parties, that the sheep were in that condition; and that is equivalent to a representation, that they were. It being regarded as a representation made by him, the plaintiff would be guilty of fraud, if he then knew that they were not in that condition.

The jury were instructed, "that they would look at all the evidence and see if Bryant made any representations to Morrill, that were untrue, and if he did, although Morrill saw the sheep and selected them, it would discharge the surety."

A surety cannot be discharged on the ground of fraudulent representations made to his principal, except when that principal would be. The plaintiff could not in law be considered as conducting fraudulently, unless he knew that the representations were false. To make him lose his security, because his representations were untrue, when he did not know them to be so, is to impose upon him the risk of a warrantor.

A fraudulent concealment of facts from his principal, would not necessarily have the effect to discharge the surety; while he would be relieved so far as his principal would be.

A concealment, which entirely discharges a surety, is one of facts known to the other party and not known to him, and known to be of a character to materially increase the risk beyond that assumed in the usual course of business of that kind, having a suitable opportunity to make them known to the surety.

Respecting these matters the instructions were too favorable to the defendant.

Three indorsements had been made upon the contract, of wool received in part payment after the time, when the payments should have been made. The price of wool might have been quite different at the times when it was delivered, and when it was by the contract to be delivered. After the

actual delivery and indorsement of it the principal parties agreed upon the amount remaining due upon the contract, and that was indorsed upon the back of it and subscribed by Morrill. They had a right to adjust the matter respecting the price to be allowed for the wool, according to their own pleasure, although the effect of those indorsements might be different from what they would otherwise have been. When they had thus made an adjustment, neither party could be relieved from it without proof of some error, mistake or fraud in making it. There being no such proof, the jury were instructed to find what would be due on the contract, according to a mode of reckoning stated, without regard to that settlement made by the parties. The mode prescribed was less favorable to the defendant than the adjustment. In this there was error, and for this cause a new trial must be granted.

As the same questions may be again presented, arising out of the sale of property from Morrill to the plaintiff on August 26, 1850, and the indorsements upon that contract, a new trial may be prevented or facilitated by an opinion upon its effect.

It is in form an absolute sale of the property described. Parol testimony cannot be received to vary it and give to it the effect of a mortgage. There is nothing found in it stating or indicating, that the property or the price of it was received in part payment of the contract made on November 30, 1847. It states, that the consideration had been already paid by the plaintiff to Morrill, leaving the inference, that it was a transaction having no connexion with the sale or payment for the sheep.

It is only by the reception of parol testimony, that proof can be made that the consideration had not been in fact paid, as it purports to have been. The contract is not under seal and there can be no legal objection to the admission of such testimony. It is only by the like testimony, that the defendant can prove that the property, or the agreed price of it, was to be applied in payment of the first contract; and if such testimony be admitted, it follows, that it must be to prove to what

extent property has been received and not paid for, and to be so applied. Such testimony may be received, for it will not vary the terms of the written contract. A surety, by such testimony, cannot claim to have more so applied than his principal could. If the first contract were otherwise paid, Morrill could not recover by virtue of the last payment for hay, wheat, or oats, without proof of their delivery to the plaintiff; for by the contract they were in the charge and at the risk of Morrill. Parol testimony might also be received, to prove that the property, or the price of it, received on Dec. 21, 1850, was to be applied in payment of the first contract.

Exceptions sustained, verdict set aside, and new trial granted.

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

(*) MASON *versus* HAM, *Administrator, de bonis non.*

By statute of 1821, c. 52, § 12, no license granted to an administrator to convey the lands of his intestate could be in force more than one year.

Under that statute, no such conveyance could transfer the title, unless *executed* and *delivered* within the year.

A bond given by one, in his capacity of administrator, to convey land of his intestate by *warranty* deed, is unauthorized, and will not bind the estate.

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

DEBT.

On June 10, 1836, William Abbot, administrator of the estate of Alexander Townsend, "gave to the plaintiffs a bond binding himself, his heirs, executors and administrators in the penal sum of $2000, conditioned, that whereas the said Abbot had agreed to sell and convey to the plaintiffs by a good and sufficient deed of warranty, a tract of land [described,] and is to receive for the same the sum of $10,500, with interest, viz. $2000 in cash; $2000 by Oct. 1st, 1836; $2000 by Jan'y 1, 1837; $2000 by April 1, 1837; and the remainder by April 1, 1838; now if the said Abbot, upon payment of the said first installment, and upon the readiness on

the part of the plaintiffs to secure the payment of the other sums by a mortgage of the land, shall give to the plaintiffs, or to such person or persons as they may appoint, a good and sufficient deed of warranty of the premises, the bond is to be void.

Abbot had previously, in Oct., 1835, obtained license from the Supreme Judicial Court to sell land of his intestate as administrator, at public or private sale, to the amount of $35,000.

On the day of the date of the bond, June 10, 1836, the plaintiffs paid to Abbot the first installment of $2000, which sum he credited to the estate in his administration account, which account was finally settled in 1840.

One of the obligees, in 1848, called upon Mr. Abbot, who said that he could not furnish a warranty deed, and that the only deed he could give was a quitclaim.

This suit upon the bond was thereupon commenced against Abbot as administrator. He died, and the defendant was appointed administrator, *de bonis non*, and comes in to defend.

The parties then agreed that if the action is maintainable, the damages are to be assessed by the Court upon evidence to be introduced.

John S. Peters, for the plaintiff.

The bond is the bond of the estate, not the bond of Abbot. R. S., c. 91, § 14.

Abbot, having authority to sell, had, as incident to it, the power to *contract* for a sale. Such a power is necessary.

But if otherwise, the heirs of Townsend have received the two thousand dollars. Unless this suit be available, they keep that money without an equivalent, especially as, in an action for it, the administrator *de bonis non* may plead the limitation statute.

If, in any little particulars, Abbot was chargeable with neglects, subsequent to giving the bond, it is not for the defendant, representing the same estate, to make the objection.

Cutting & Fessenden, for the defendant.

This action seeks to recover against the administrator *de*

bonis non upon a bond given by Abbot, the original administrator. But Abbot had no authority to give such a bond. True, he had obtained leave to sell, but it could only be in the statute mode, and must be done within a year from the date of the license. Before the bond required the conveyance to be made, the license had ceased to have validity. The preliminary proceedings requisite for passing the title were never had. The obligation declared upon was simply the bond of Abbot as an individual. There is no privity between these parties. As there is no legal, so there is no moral claim against the estate of Townsend. The plaintiffs neglected for ten years to make the payments which were the conditions of the bond, and have never yet offered to perform, or demanded a deed. If they had fulfilled the conditions on their part, a liability might have been created against Abbot personally. But very clearly the bond can give no rights against Townsend's estate.

Hill, in reply.

Abbot had the right to sell at public or at private sale. He elected the latter mode. A contract to sell precedes the conveyance. He had a right to bind the estate by such a contract. He did so. The bond recites it, and is plenary evidence of it. Such contract for a conveyance is a sale. The sale had been agreed on before the bond was sealed. The bond bound the estate. The $2000 were paid upon it, which went to the estate. By what other mode then, than a suit upon the documentary evidence, furnished by the defendant's predecessor, can the plaintiffs obtain redress?

The bond was given while Abbot had the power to sell and convey, and it recites that "the sale had been made." The sale had then been completed, except that the deed had not been delivered. The law, indeed, limits the operation of the license to a year, but it does not require the payments to be all made within the year. When they were all completed, though after the lapse of a year, the deed should have been delivered. But in fact the conditions of the bond did not extend the performance beyond the year. The deed was to be

given so soon as the obligees should pay the first installment and *be in readiness* to secure the balance by a mortgage. The first installment was paid at the making of the bond. In order to entitle the obligees to the deed, it only remained that they should be in readiness to make the mortgage, and this readiness might occur at the very day of giving the bond. Thus the limitation of the license to a year has no application to this case. After having paid the first installment, the only further required performance consisted in a mere readiness to perform; a readiness to give the mortgage. And that there was actual readiness, is to be inferred from the payment; and also from the fact that Abbot, when called upon in 1848, did not even pretend any want of performance or demand, but framed up a different ground of excuse.

RICE, J.—The defendant is sued as the representative of the estate of Alexander Townsend, on a bond executed by William Abbot, a former administrator on the same estate. Abbot, in 1835, obtained license from the Supreme Judicial Court to sell real estate of his intestate, for the payment of debts. The bond in suit was executed within the year after the license was obtained.

Section 12, c. 52, stat. of 1821, provides "that no license as aforesaid, for the sale of real estate, granted by either of the Courts aforesaid, shall be in force for a longer term than one year from the time when such license shall have been granted."

The deed to the purchaser must be executed and delivered within the year, otherwise it is void. *Marr* v. *Boothby*, 19 Maine, 150.

No property will pass until the deed is given, and until then, in no legal sense, is there a sale. *Macy* v. *Raymond*, 9 Pick. 284.

In giving the bond in suit, if Abbot assumed to act in his capacity as administrator, he exceeded his authority, and did not thereby bind the estate; if he acted in his private capacity, the estate is not bound. *A nonsuit must be entered.*

SHEPLEY, C. J., and TENNEY and HATHAWAY, J. J., concurred.

MILLER, *in Equity, versus* WHITTIER *& al.*

Where a person, in the possession and improvement of an estate, claiming to be the agent of the owner, neglects to keep an *accurate account* of the income and expenditures pertaining thereto; in stating the account between them, the master may reject the account presented by the trustee, and exercise a sound discretion upon the whole evidence before him, in charging the trustee with the income of the estate, and allowing him for such charges and disbursements, as shall appear to be reasonable.

Where there is fault on the part of the owner in not complying with his contract, although no proper account has been kept by the *trustee, he* is not chargeable with the utmost that might have been made out of the estate.

Exceptions to the report of a master, to avail, must either be supported by the special statements in that report, or by the production of the evidence on which they rest.

The necessary expenses, incurred by a subsequent mortgagee, to redeem a prior mortgage, which it was the duty of the mortgager to cancel, are justly chargeable upon the owner of the estate.

Upon a sum acknowledged to be due at a time specified, between the *cestui que trust* and the *trustee*, interest may legally be allowed.

Where a person takes a mortgage to secure advances and credits to be made to the mortgager within a time limited therein, no advances or credits after the time so limited, will be secured by that mortgage.

Where the parties to a bill, at the time of making their contract, recognized the existence of a debt due from one to the other, the consideration of that debt cannot afterwards be a subject of inquiry.

BILL IN EQUITY. The substance of the bill may be found in 32 Maine, 203.

On answers and proof, the case was again before the Court and considered in 33 Maine, 521.

At that hearing, a master was appointed "to state an account with Whittier, since November 17, 1845, exhibiting the sums due to him by the contract, and the claims he justly has against the estate, for services and expenditures; what property, securities and means, including rents and profits, he has received from it; the conveyances made, and the amounts received and receivable therefrom. Also to state the amounts due, *bona fide*, to Jones, on the several mortgages, and the rents, profits and income received by him from the property. And to state the amount originally secured to Mrs. Whittier,

by the mortgage to Smith, and the sum justly due to her on that account."

At the *nisi prius* term in April, 1853, APPLETON, J., presiding, the master's report was returned, when exceptions to it were taken by the parties to the bill.

The master, on examination of the books and papers presented by the respondent Whittier, as to the condition of the estate, was satisfied that they afforded no correct basis on which he could state an account between the *cestui que trust* and the trustee, he therefore charged the trustee with the income of the estate from various sources, and allowed on his various claims such compensation as appeared to him just and right from all the evidence before him.

He disallowed his claim for the services of his wife and family, and also his claim for a salary of $900, per year, after the first year. The master gave his reasons at length for his rejection of the defendant Whittier's books and schedules as a basis of a statement of the account between the parties, with sundry extracts from the books.

The master found, that the defendant was not a wrong-doer, and that there was fault upon the part of the plaintiff in not furnishing such means as were proper to carry on the estate, and that the defendant should not be charged to the utmost that might have been made out of the estate, but a fair rent for the use, and to be allowed for his time and trouble in the care of it, and for debts paid and repairs and improvements made.

The master found that Whittier was indebted to the plaintiff in the sum of $23943, and that he should be credited $18150. The crops of the year 1853 to be afterwards accounted for at an appraised value, all balances on books and all notes, except for land, to belong to said Whittier.

The incumbrances upon the estate by the advances of Jones, another defendant, were found to be $1527, if it was right to include in such incumbrances, advances and charges since the service of the plaintiff's bill, if the latter portion of the account should be rejected, the amount due Jones would be $358,40. And the decision of this question was referred by

the master to the Court. The other accounts of Jones, were for money paid to redeem prior mortgages upon the same land conveyed to him which were allowed by the master. Billings & Wiggins mortgages, $4940

interest,	268
per centage and expenses,	251
Amount paid on account of Smith's mortgages,	677
to which was added Jones's account against Whittier, to remove their incumbrances,	1527
	$7663
The amount secured to Mrs. Whittier by contract Nov. 17, 1845,	3000
interest to July 1, 1853,	1365
	$4365

The respondent, Whittier, filed the following exceptions to the master's report: —

1. Because he has disregarded the terms and conditions expressed in the contract of Nov. 17, 1845; referred to in, and made a part of, complainant's bill.

2. Because he has wholly disregarded the books and vouchers exhibited to him by the respondent, and supported by his oath and other evidence, which show that the respondent realized nothing from the proceeds of all the property, real and personal, except what he had expended in improving and managing the same; whereas the said master has made and reported an estimate of receipts for rent of houses, mills, farm, &c. which greatly exceeds the actual receipts.

3. Because he has not credited the respondent with the sum of nine hundred dollars per year, as was stipulated in said contract of Nov. 17, 1845, which, up to July 1, 1853, would amount to nearly seven thousand dollars, but in lieu thereof has allowed the respondent only the gross sum of twenty-five hundred dollars, only about three hundred dollars per annum.

4. Because he has credited the respondent with only the sum of $3000, for repairs and improvements, whereas they amounted to a much larger sum.

5. Because he has made the respondent liable for all debts by him contracted, now outstanding.

6. Because he has not credited the respondent with any sum for the services of his wife and family.

7. Because, among other things, he states "that he, (this respondent,) has been industrious and economical, there is abundant evidence; he seems to have been left to manage as he pleased, without pecuniary aid, or suggestions, or advice from the owners, till the bill was filed;" yet, notwithstanding, in and by his said report, he renders the respondent insolvent to the amount of more than five thousand dollars, and that, too, wholly by his "*industrious and economical*" *agency* in this estate, since the contract of Nov. 17, 1845.

8. Because he has assumed powers not upon him conferred by this Court, or by the contract of the parties.

9. Because he has charged the respondent with interest.

10. Because he has not credited the respondent any sum for clerk hire.

11. Because he has made the respondent assume all the risk of carrying on the concern through years of peril and hardship.

12. Because he has not credited the respondent with the amount paid to Cartland.

Peleg T. Jones, another respondent, filed the following exceptions to the master's report: —

1. For that said master in and by his said report, has not allowed him his charges against Whittier for his services, trouble and expenditures in defending this suit.

2. Because he has not allowed him his expenses in instituting and carrying on the suit in equity against John and Christopher Fallon for the redemption of the mortgaged property.

The complainant also filed the following exceptions to the master's report: —

1. Because he has not charged the respondent, Whittier, with rent for the farm and mills, since the service of this bill

upon him, but has only charged what he has actually received therefrom.

2. For allowing Whittier interest upon the sum of $1500, which was to be secured to him under the contract of November 17, 1845.

3. Because he has allowed to Jones the sum of $249,67, per centage and expenses on the amount paid by him to redeem prior mortgages.

4. Because in stating the amount due to Jones, he has stated Whittier's accouut, to be paid to Jones to remove incumbrances, to be $1529; when the sum should be $358,40 only.

5. For allowing Nancy Whittier as her due $4365; when nothing is due to her.

6. For allowing interest on the $3000, to be paid on certain conditions to Nancy Whittier, by the contract of November 17, 1845.

After the hearing upon the exceptions to the master's report, it was ordered, adjudged and decreed by the Judge presiding, *that* the report of the master, and all things and matters therein, stand ratified and confirmed, excepting so much as was changed and modified by the terms and orders contained in his decree.

1. It was ordered, that the sum of $251, allowed by the master to said Jones, as commissions upon the money paid to cancel the Billings and Wiggins mortgages, be disallowed and deducted from the amount by the said master reported due to said Jones; and that the sum of $1529, stated by the master in said Jones' final account as the amount of Whittier's account to be paid to Jones, to remove the incumbrances, be reduced to the sum of $358,40.

2. It was further ordered, that upon the payment by the plaintiff, to said Nancy Whittier, of the sum of $4365, with legal interest thereon from July 1, 1853, that said Joseph and Nancy Whittier shall execute deeds of release and quit-claim of the property described in said contract and in said deed from Amos Patten to said Joseph, set out in the plaintiff's bill,

with proper release of the right of said Nancy Whittier to dower in any part of said premises, according to the form of the deed annexed thereto. And said Joseph and Nancy shall each assign to the plaintiff the bonds or agreements of Peleg T. Jones, for the conveyance to him, said Joseph, or her, said Nancy, of any portion of said lands and buildings thereon, and deliver up all plans and evidences of title which he may have.

3. It was further ordered, that said Joseph Whittier should deliver up to the plaintiff all the personal property set forth in schedule M, annexed to said report; and assign all the mortgages, and deliver and indorse to the plaintiff all the notes set out in the schedule N, hereunto annexed; and deliver up to plaintiff all the crops of the farm on lands aforesaid, which shall be gathered prior to the delivery of possession of said lands.

4. And it was further ordered, adjudged and decreed, that upon payment by the plaintiff to said Jones of the sum of $6232,40, with legal interest thereon from July 1, 1853, the said Jones shall convey to the plaintiff all the lands conveyed to him by Joseph Whittier, which by his various bonds he became bound to convey to Joseph Whittier, and shall also convey to the plaintiff all the land which he was bound, by his bond to Nancy Whittier dated July 31, 1849, to convey to her, said Nancy, excepting therefrom all those tracts of land which he has conveyed as set forth in his answer, and a lot conveyed to Keff since the answer, in pursuance of the bond to Keff, referred to in said answer, with covenants of warranty against the claims of all persons claiming by, through or under him by deed, according to the form hereto annexed.

5. And it was further ordered, adjudged and decreed, that said Joseph Whittier was liable to and should pay to the plaintiff the sum of $4624,40, except so far as the same sum should be reduced by credits on account of crops of that season, according to the appraisement of the master as afterwards provided; and said master was to appraise such por-

tions of said crops as might be delivered by said Whittier to the plaintiff, and to direct the allowance to be made therefor.

6. It was further ordered, that said Nancy Whittier should not be entitled to costs, nor compelled to pay costs.

7. It was further ordered and decreed that the plaintiff recover his costs, including his costs before the master, and also the master's costs and fees against Joseph Whittier.

8. It was further decreed, that all the exceptions filed by the parties not sustained by this decree, were overruled and set aside.

To so much of the decree of the Judge presiding, as required the plaintiff to pay said Nancy Whittier $4365 and interest, before he should be entitled to a conveyance from said Joseph Whittier and wife; and to so much of said decree as overruled the plaintiff's exceptions to the master's report; also to the refusal of the Judge to decree costs in favor of plaintiff against said Jones, the plaintiff excepted.

The defendants, Whittier and Jones, also filed exceptions to the decree overruling their exceptions to the report of the master, and also to the rulings of the Judge allowing certain exceptions taken by plaintiff to the master's report.

Cutting, for respondents.

Rowe & Bartlett, for plaintiff.

Rice, J. — This case which has been before this Court on two former occasions, 32 Maine, 203 and 33 Maine, 521, now comes up on exceptions to the rulings of the Judge before whom the report of the master was presented, with the exceptions filed to that report by several parties to the bill. The exceptions to the rulings of the Judge below, present for the consideration of this Court, all the exceptions which were taken to the report of the master.

The instructions under which the master acted, were "to state an account with Whittier since Nov. 17, 1845, exhibiting the sum due to him by the contract, and the claim which he justly has against the estate for services and expenditures; what property, securities, and means, including rents and

profits he has received from it, and the conveyances made, and the amounts received and receivable therefrom. Also to state the account due *bona fide* to Jones on the several mortgages, and the rents, profits and income received by him from the property. And to state the amount originally due to Mrs. Whittier by the mortgage to Smith, and the sum justly due to her on that account."

Whittier claims to have acted as the agent of the owners of the estate, and as such to be entitled to a stipulated sum, $900, as an annual salary for himself, and also to be entitled to compensation for the services of his wife and minor children upon the estate.

The contract to which both parties refer as the basis of their claims, is dated Nov. 17, 1845, and is recited, at length, in 32 Maine, 203. The parties to that contract, at the time it was executed, evidently contemplated an arrangement which was to continue one year only, during which Whittier was to receive a salary of $900, and it was the expectation of the parties that at the end of the year, all the affairs connected with the estate should have been finally adjusted and closed up. But the year expired and neither party made any movement to procure a final settlement, and the master states in his report, that from the end of the first year, the defendant seems to have treated the estate as his own. The papers and evidence show no claim on his part to the salary, and no recognition of his right to it on the part of the owners. For this reason, perhaps, the accounts of Whittier have been so loosely kept, as to present no satisfactory basis upon which the master could state an account between him and the estate, and he came to the conclusion, that as the actual receipts and expenditures with which the estate should be charged could not be ascertained and stated from the books and papers, it only remained to charge the defendant Whittier, with such items and income of the estate from various sources, by him received, as he should be rightfully charged with, and to make for him such allowances on the various

claims as will be a just compensation for his services and expenditures and claims against the estate.

Most of the exceptions of the defendant Whittier, are founded upon objections to the basis assumed by the master, on which to state the account between the parties. It will therefore be unnecessary to notice all of them in detail.

It was the duty of the defendant, who claims to have acted as the agent and trustee of the owners, to have kept an accurate (account) of all his transactions with the estate. He had the power, and could have so kept his accounts as to have made all his transactions plain, and to have presented his claim upon his principal in such a manner as to preclude all uncertainty as to the rights of the parties. This he has failed to do, and the master has been compelled, in order to state an account, which should be satisfactory, to adopt the basis upon which he has acted. Having no certain and reliable data upon which to proceed, he was authorized to exercise a sound discretion, upon the whole evidence presented, and so to state his account, as to do justice to all parties, as nearly as practicable. *Dexter & al.* v. *Arnold & al.*, 2 Sum. 108; *Lupton* v. *White*, 15 Ves. 440. And the defendant, who by his negligence has caused this necessity, is not in a position to complain.

As to the fourth exception, it does not appear that the $3000 allowed by the master, was not sufficient to cover all the expenses for repairs and improvements made by the defendant. Exceptions are to be regarded so far only, as they are supported by the special statements of the master, or by evidence which ought to be brought before the Court by reference to the particular testimony on which the exceptor relies. *Harding* v. *Hanley*, 11 Wheat. 103. There is nothing contained in the report, nor any evidence presented to the Court, which would lead to the conclusion that the master erred in this matter.

The sum secured by the Cartland mortgage, referred to in the defendant's 12th exception, was paid several years before the adjustment in 1845, though the mortgage was not dis-

charged by Cartland at that time. This claim was not filed among the schedule of liabilities, at the time of that adjustment, and the bill and answers contain no reference to that debt. The presumption therefore is, that the claim had been settled by the parties, before the present controversy arose. At least there is no sufficient evidence to show that it should now be deemed an existing charge upon the estate.

The other exceptions of Whittier arise from objections to the basis assumed by the master. That basis being sustained, the exceptions necessarily become unavailing.

The defendant Jones has received conveyances of different portions of the estate from Whittier, some of which are in form absolute, and all of which the plaintiff alleges were fraudulent. But this Court, when this case was before it on a former occasion, 32 Maine, 521, found that the charge of fraud in these conveyances was not sustained by the proofs, but that the conveyances referred to, operated as mortgages to secure the amount in which Whittier was, or might be, indebted to Jones. The mortgages in the hands of the Fallons were of an earlier date than those conveyances to Jones, and he must have had knowledge of their existence before he made any advances under the securities which he held upon the estate.

To preserve his own securities, it became necessary to redeem the estate from the Fallons, and to effect that object he instituted and prosecuted a bill in equity. Though this proceeding was for his own benefit, to protect himself against prior incumbrances, it also enured to the benefit of other parties, whose duty it was to have redeemed the estate from these mortgages. They cannot, therefore, justly complain, that they are required to pay the reasonable and necessary expenses by which the estate was preserved from forfeiture. The defendant's exceptions to the decree of the Judge, on this point, are sustained, and the report of the master affirmed.

As to the charges made by Jones against Whittier, for his services, trouble and expenditures in defending this suit, no satisfactory reason has been suggested for allowing them

against the plaintiff. Those transactions were entirely between Jones and Whittier and should be adjusted by the parties interested.

The exceptions of Jones to the decree of the Judge, with the exception above, are overruled.

The exceptions of the plaintiff to the master's report are also brought before us.

To the first of plaintiff's exceptions it may be remarked, that he does not place himself in a position to claim the utmost that might have been made out of the estate. He is not himself free from fault. By failing to comply with the terms of the contract of 1845, he left the defendant in a situation of difficulty, so that the estate was not made as productive as it otherwise might have been. It was, therefore, proper that the master, in stating the account between the parties, should exercise a sound discretion, in view of all the circumstances and facts in the case. Our attention has not been called to any evidence in the case which shows, that the master has fallen into error, in the result to which he has arrived in this branch of the account.

The inference to be drawn from the contract of Nov. 1845, is, that Whittier had a claim then due against the estate for $1500. This sum was to have been secured by mortgage on the property, at such time as should be agreed upon. That mortgage was never executed, probably for the reason, that the affairs of the estate were never closed up as contemplated by that contract. But that would seem to be no good reason why the sum then due Whittier should not be upon interest. We think it should. The plaintiff's second exception was therefore properly overruled.

The plaintiff's third exception is sustained for reasons already stated for overruling the second exception of the defendant Jones.

The plaintiff's fourth exception is also properly sustained. By reference to the several conveyances from Whittier to Jones, it will be perceived, that they only purport to secure what may be due by note, account or otherwise, by the 23d

of November, 1849. Advances made and credits given to Whittier after that time, are not covered by these mortgages, and cannot, therefore, be justly chargeable upon the estate. In the most favorable view that can be taken for Jones, advances and credits to Whittier, under these mortgages, should have ceased on the service of the plaintiff's bill on Jones. The allowance of $1527, is therefore properly reduced to $358,40.

The plaintiff's 5th and 6th exceptions refer to the amount allowed to Nancy Whittier. The contract of Nov. 17, 1845, was intended to be an adjustment of the affairs of all parties interested in the estate up to that time. The stipulation, for the payment to Nancy Whittier of three thousand dollars, was evidently intended to be a substitute for her existing rights in the estate. What those rights were, was then well known to Wendell & Co., the plaintiff's assignors, and having been thus recognized and provided for, it is now too late to inquire into the consideration upon which they originally rested. Those exceptions were properly overruled.

The items which are deducted from the account of Jones, having been charged by the master to Whittier, are to be deducted from the balance due from Whittier to the plaintiff.

The plaintiff is also to produce and deliver up to Whittier the notes formerly held by Grant and Stone against him, stated, in the contract of 1845, to amount at that time to $10500.

The master is also to find and state what amount, if any thing, shall be charged to Whittier for the use and occupation of the estate for the additional year, and add the sum to the account.

The decree of the Court below is to be modified so as to conform to these principles, and will then stand as the decree of the Court.

Shepley, C. J. and Tenney and Hathaway, J. J., concurred.

TORREY *versus* BERRY *& als.*

Where a poor debtor makes a disclosure, before two justices of the peace and quorum, of property liable to attachment, and the same is demanded by the creditor within thirty days from the disclosure, the creditor is not restricted to the officer's return on the execution, for proof of a demand and refusal to deliver the property, but may show those facts by parol evidence.

If a poor debtor makes a disclosure, and still commits a breach of his bond, by not delivering the property disclosed, though no evidence is offered of the value of such property, the obligee is entitled to recover the real and actual damage upon all the evidence submitted.

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

DEBT, on a poor debtor's relief bond.

A disclosure was made within the six months allowed in the bond, by the debtor, and the oath prescribed by law administered to him, on Dec. 8, 1851.

The plaintiff introduced a written statement of the Justices of same date, that the debtor disclosed one grindstone, one brass clock, between three and four hundred pounds of hay, two bushels of oats, one mill chain, six thousand pine shingles, and two bedsteads, liable to be levied on by the creditor's execution, on which the debtor was arrested, and that they adjudged the same necessary for the security of the creditor.

The execution upon which the arrest was made and bond given, was dated Oct. 25, 1851, and the release of the body by giving the bond, Nov. 1, 1851.

On this execution was a return dated Jan. 6, 1851, by a constable, certifying that he then made a demand on the debtor, for the property disclosed, and he refused to deliver it, which the plaintiff offered as evidence of those facts.

This was objected to by defendants, but admitted by the Judge.

The plaintiff also produced a witness, who testified, against the objection of defendants, that at the request of the officer signing that return, he wrote it, and it was signed on January 6, 1852.

On this branch of the case, the Judge instructed the jury, that they might take into consideration the date of the execu-

tion, and of the other return in connection with the date of that return, and if they found it was dated in 1851, by mistake, when it was really made on Jan. 6, 1852, then it would be conclusive evidence of the demand and refusal as stated therein.

No evidence was submitted of the value of any of the articles mentioned in the return.

The Court instructed the jury that if they found, from the testimony in the case, *that* a demand within thirty days from December 8, 1851, was made by said officer, on said execution, upon the debtor, to deliver said articles, and he refused to surrender them, or any of them, or if he concealed them, or any of them, or had otherwise disposed of them, then the bond was broken, and the plaintiff was entitled to a verdict for nominal damages at least.

The defendants requested these instructions: —

1. That as plaintiff claimed to recover the value of said articles, as damages, or a part of the damages, in this action, the burden of proof was on the plaintiff to show their value, and there was no testimony in the case to prove their value, he was not legally entitled to recover any thing as damages for said articles; and 2d, that if he was legally entitled to recover any sum as damages for said articles, it was only a nominal sum as the value of said articles. These instructions were refused. But the Court did instruct the jury that they might render a verdict for such damages, as, from the whole testimony in the case, they might believe the plaintiff was entitled to recover.

The verdict was for plaintiff, for $36,48, and defendants excepted.

A. Sanborn, for defendants.

The date of the officer's return was a material part of it, and parol testimony cannot be admitted to contradict an officer's return. *Fairfield* v. *Paine*, 33 Maine, 506.

A breach of the bond having been proved, under the law of 1848, c. 85, § 2, the plaintiff was entitled to recover "the real

and actual damage and no more." *Hatch* v. *Lawrence*, 29 Maine, 488.

What were those damages? Plainly the value of the property disclosed, for the principal defendant had taken the oath, and there was nothing else left for plaintiff.

Will it be said, that in the absence of proof of their value, the jury might legally presume that the property was of the average value of a similar denomination? Presumptions of law or fact are founded on reason. What reason was there for supposing that the grindstone, for instance, was of average value of grindstones? There is no standard to judge by. So of the hay, the jury could not know what kind it was. Suppose that the plaintiff had owned the property, and had proved a conversion of it by the defendant, in an action of trover, and did not prove the value of it, what could he recover? Clearly only nominal damages. *Gowen* v. *Newell*, 2 Maine, 13.

In actions on policies of insurance, if there is no proof of the amount of the loss, the plaintiff will recover only nominal damages. 4 Maine, 51, and 5 Maine, 94.

To sustain the defendants' views, the case of *Waldron* v. *Berry*, 22 Maine, 487, is a strong case, and to the same point may be cited *Burbank* v. *Berry*, same volume, 483.

The case of *Sargent* v. *Pomeroy*, 33 Maine, 388, does not in effect militate against those authorities.

C. P. Brown, for the plaintiff.

TENNEY, J. — The exceptions are attempted to be sustained on two grounds. — First, that after the return of an officer, upon the execution against the debtor, was introduced to prove the demand for the personal property disclosed, of a debtor, and his refusal to deliver it, dated January 6, 1851, it was incompetent to show, that it was at a different time. — Second, that the instructions touching the damages requested, and withheld, were correct, and those given erroneous.

1. It was necessary for the plaintiff's recovery upon the land to show a demand of the property within thirty days after the disclosure, and a refusal, by an officer, having the

execution, and while it was in force. It was not necessary, that the evidence of this should be in an officer's return. Consequently, if from other evidence, it was satisfactorily proved to the jury, that there was a mistake in the date, they would be authorized to treat it as an error, and render their verdict upon the truth of the case. It was competent for the plaintiff to introduce the documentary and parol evidence upon that point, which was objected to by the defendants, and the whole was proper for the consideration of the jury.

2. The property demanded by the officer, had been specifically disclosed by the debtor, as owned by him. It is not shown, that the plaintiff ever saw it or knew where it was to be found. No evidence of the value of these articles was introduced by either party, excepting so far as the name of each and the quantity of some of them would imply.

The Judge was requested to instruct the jury, that the burden of proof was on the plaintiff to show their value. And as there was no testimony on that point, he was not legally entitled to recover any thing; and if any thing, nominal damages only. This request was not granted, but the jury were instructed, that they could render a verdict for such damages, as, from the whole testimony in the case, they might believe the plaintiff was entitled to recover.

If a breach of the bond in any case is proved, when there has been a disclosure before two justices of the peace and of the quorum, the damages are not restricted necessarily to the value of the property, which the plaintiff has been wrongfully deprived of by the debtor, as he has proved it to be, or as the jury shall find that value under all the evidence adduced; but the amount assessed shall be the real and actual damage, and no more; and any legal evidence upon that point may be introduced by either party. The instruction given was not inconsistent with this provision, and those requested were properly withheld. *Exceptions overruled.*

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

FIELD *versus* BISSELL.

Chapter 138, § 2, of R. S. requires the report of the referees under that Act to be made to the District Court for the county, within one year from the date of the agreement.

The Court intended, by that section, is the one, holding its regular session, for the transaction of its ordinary business for the county.

And a report, not made to *such Court*, within the year, is inoperative.

When *such report* is made *after the time* limited in the submission, though recommitted to the referees by the presiding Judge, this will not give them subsequent jurisdiction.

ON FACTS AGREED.

SUBMISSION, and award of referees, under c. 138, § 2, of R. S.

The submission was dated on May 10, 1850. An award thereon in favor of plaintiff, dated May 5, 1851, was made to the Court at its May term of that year, which commenced on the twenty-seventh day of the month. On the fourteenth day of the term the report was offered, and recommitted, because the defendant did not receive sufficient notice of the time appointed for the hearing, and did not attend.

On April 13, 1853, the parties, having been duly notified, appeared before the referees, the plaintiff with his proofs, and the defendant to object to any proceedings by the referees, as the year had expired in which the report was to have been made. The referees overruled the objections, heard the case on the part of plaintiff, the defendant declining to take any part in the matter, and made their award again for the plaintiff, to the acceptance of which the defendant objected.

It was stipulated that the Court should render judgment according to the legal rights of the parties.

W. C. Crosby, for defendant, maintained this position; that the Court has no jurisdiction or authority to accept the report offered, or render any judgment upon it, because it was not made within one year from its date, May 10, 1850, "to the Court," as the submission required.

He also maintained, that the section of the statute, under

which this submission was made, was unlike that of Massachusetts, and that formerly in force in this State, and the decisions on this subject would not apply.

J. H. Hilliard, for plaintiff.

1. The statute of 1845, c. 168, cannot be construed so as to allow exceptions to be taken now to proceedings at the original presentment and recommitment.

2. The report was made within the year. It bore date on May 5, 1851, and was returnable to the Court next holden thereafter. This was all the referees could do, and all the law required. The law only requires the report to be *made*, not *returned* within the year. The statute contemplates they shall have a full year. There was no error in the action of the referees after the report was recommitted; they then acted by order of Court having jurisdiction, and the law does not require their action within the year.

3. But if there was error in the time of the return of the referees' doings, it should have been objected to before the Court to which the award was returned, at the time of its return. The Court took jurisdiction, no objection was then taken, and it must be considered as waived. It was tantamount to an agreement to prolong the time. *Whitney* v. *Cook*, 5 Mass. 139.

4. The correctness and justice of the award is not denied, and unless sustained, plaintiff is without remedy, on account of the statute of limitations.

TENNEY, J. — By the R. S., c. 138, § 2, the parties may sign and acknowledge an agreement, to submit any demand existing between them to referees; the report of whom, or the major part of whom, being made within one year, from the day of the date of the agreement, to the District Court for the county, named in the submission, the judgment shall be final.

These parties submitted in this mode demands claimed by one and the other, on May 10, 1850. The referees made an award, after two hearings of Field, at neither of which Bissell

was present, purporting to be signed, on May 5, 1851 ; but the Court to which it was returned did not hold its next regular session afterwards, till May 27, 1851. The report of the referees was offered on the fourteenth day of that term. The matter was recommitted for want of sufficient notice to Bissell, to appear before the referees. On a hearing afterwards of Field, Bissell appeared and denied the power of the referees, to proceed under the submission, on the ground that more than one year had elapsed from its date, and omitted to offer any testimony. The referees overruled the objection and made an award in favor of Field, and returned the same to Court. Bissell appeared and made objections to the acceptance thereof.

The Court, referred to, in the statute and in the submission, cannot on any proper construction be the clerk of the Court, or a Judge thereof in vacation. The report must be made to the Court when holden for the ordinary business of a session of the same, within one year from the time of the submission, in order to meet the requirement.

It is contended on the part of Field, that Bissell has waived the right to make this objection, inasmuch as the matter was recommitted on another ground, and he is to be treated as if an agreement had been made by the parties, to vary the time, when the report should be made, according to the provision of the statute, c. 138, § 6. The case does not find, that the recommitment was made upon objection in behalf of Bissell; or that he appeared in any manner at the time the report was offered. Hence he cannot be considered as having waived any right to object, even if such waiver would have given effect to any award which the referees made.

The agreement under the statute, that the award should be made within one year, is matter of substance, and cannot be disregarded. The submission, and the award under it, when the latter was made to the Court, was entirely inoperative, and the referees had no subsequent jurisdiction.

Proceedings dismissed.

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

INDEX.

ABATEMENT.

ACTION.

See COVENANT, 6. CREDITOR AND DEBTOR, 5, 6. DAMAGE, 1. MORTGAGE, 22. OFFICER, 11. POOR DEBTOR'S BOND, 16.

ATTACHMENT.

ATTORNEY.

AWARD.

BAILMENT.

BANGOR.

BANK.

BANKRUPTCY.

See TRUSTEE PROCESS, 15, 16.

BASTARDY.

BILLS AND PROMISSORY NOTES.

BURGLARY.

BY-LAWS.

CASHIER OF BANK.

CERTIORARI.

COMMITTEE.

COMMON VICTUALLER.

COMPLAINT.

See SPIRITUOUS LIQUOR, 1, 2, 3.

CONDITION.

An unsealed agreement to convey land to the plaintiff at a specified day, and reciting that it was in consideration of a sum paid by the plaintiff and of another sum *to be* paid by a third person, (who in fact had never agreed to pay it,) is upon a condition that the latter sum be paid before the making of the conveyance. *Gilman* v. *Schwartz*, 541.

CONSIDERATION.

1. An agreement by the grantee, made at the time of the conveyance of the land, to pay an additional sum to that expressed in the deed, is valid and binding. *Nickerson* v. *Saunders*, 413.
2. Nor is its validity impaired, though the additional sum rests in contingency. *Ib.*
3. And such contract may be enforced, though made by parole only. *Ib.*
4. Where the parties to a bill, at the time of making their contract, recognized the existence of a debt due from one to the other, the consideration of that debt cannot afterwards be a subject of inquiry. *Miller* v. *Whittier*, 577.

See ACTION, 4, 5, 6. EVIDENCE, 13. POOR DEBTORS' BONDS, 9, 10 11. TRUST AND TRUSTEE, 1, 2, 3.

CONSTRUCTION OF DEEDS.

1. In construing a deed of conveyance, the legal rule is, to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated. *Pike* v. *Munroe*, 309.
2. Such intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties to it. *Ib.*
3. Whatever, in a conveyance, is expressly granted, cannot be *diminished* by subsequent restrictions. But general or doubtful clauses may be *explained* by subsequent words or clauses, not repugnant to the express grant. *Ib.*
4. Doubtful words and provisions in a grant are to be construed most strongly against the grantor. *Ib.*
5. In the construction of deeds, *monuments* control courses and distances. *Haynes* v. *Young*, 557.
6. And when a *line* is described as a monument, the course and distance given, must yield to the line. *Ib.*
7. A *definite* boundary by monuments, courses and distances will limit the *generality* of a term previously used in the deed. *Ib.*

CONTRACT.

CONVEYANCE.

COPARTNERS, &c.

CORPORATION.

CO-TENANTS.

COURT, AND COURT AND JURY.

COVENANT.

CREDITOR AND DEBTOR.

EQUITY.

ERROR.

ESTOPPEL.

EVIDENCE.

EXCEPTIONS.

EXECUTION.

EXECUTOR AND ADMINISTRATOR.

FIRE WOOD.

FLATS.

See BOUNDARIES OF LAND, 1, 2, 3.

FLOWING LANDS.

FORCIBLE ENTRY AND DETAINER.

FOREIGN LAWS.

See TRUSTEE PROCESS, 15, 16.

FORFEITURE.

FRAUD AND FRAUDULENT REPRESENTATIONS.

FRAUDULENT SALE AND FRAUDULENT TRANSFER.

FRESH WATER STREAMS.

GEORGES CANAL COMPANY.

GRAND JURY.

LIFE.

LIMITATION.

LIQUOR.

LOGS AND LUMBER.

See LIEN, 4, 5, 6, 7, 8.

LORD'S DAY.

In a civil suit, on an issue received and discussed by the jury on Saturday, their verdict may be affirmed and recorded on the next Court day, though it was finally agreed upon and sealed up on the morning of Sunday. *True* v. *Plumley*, 466.

MALICIOUS PROSECUTION.

1. Whether there was probable cause for a criminal prosecution, is a question of law upon the facts; if, as to the facts, there be no disagreement in the testimony, the question is one of law only. *Taylor* v. *Godfrey*, 525.
2. In an action for a malicious prosecution, if there be no testimony that the accused committed the crime, or that the prosecutor had been informed or knew of any fact inducing a belief that he had, the law itself pronounces that there was no probable cause, and leaves nothing to be submitted to the jury. *Ib.*

MANDAMUS.

If, in a bill of exceptions, presented at *Nisi Prius*, for allowance, the Judge make wrongful alterations to the injury of the excepting party, a correction cannot be had by motion to the Court. It can be had by writ of mandamus only. *True* v. *Plumley*, 466.

MARRIAGE.

1. In proving title to real estate by descent, a legal marriage may be established, by proof of facts from which it may reasonably be inferred. *Pratt* v. *Pierce*, 448.
2. When the fact of a marriage by a settled, ordained minister of the gospel has been proved, the legal presumption is, that it was done in accordance with the law. *Ib.*

MARRIED WOMEN.

1. A marriage contracted since the statute of 1844, c. 117, confers upon the husband no ownership in property, which, at the time of the marriage, belonged to the wife. *Southard* v. *Plummer*, 64.
2. The right to the exclusive possession and to the exclusive control of such property remains to her after the marriage as fully as before. *Ib.*

MASTER IN CHANCERY.

MILLS AND MILL-DAMS.

NAVIGABLE WATERS.

OFFICER.

PARTIES.

See TRUSTEE PROCESS, 8, 9.

PARTITION OF LAND.

PARTNERS AND PARTNERSHIP.

See ACTION, 6.

PAUPER.

PAYMENT.

PLANTATION.

PLEADING.

POOR.

See PAUPER.

POOR DEBTORS AND POOR DEBTORS' BONDS.

PRACTICE.

REVIEW.

RIGHT OF ENTRY.

See RENTS AND PROFITS, 1, 2, 3, 4. SEIZIN, &c. 7.

ROADS.

See WAYS.

RULES OF COURT.

See BILLS AND PROMISSORY NOTES, 12, 13, 14. EVIDENCE, 2, 3.

SALE.

SCIRE FACIAS.

SEAL.

SEIZIN AND DISSEIZIN.

SET-OFF.

SETTLEMENT.

SHIPS AND SHIPPING.

SHORE.

See Boundaries of Land, 1, 2, 3.

SLANDER.

SPIRITUOUS LIQUOR.

See ATTACHMENT, 7, 8, 9, 10, 11.

STATUTE OF FRAUDS.

STATUTE OF LIMITATIONS.

STOCKHOLDERS.

See CORPORATIONS.

STREETS.

SUNDAY.

See LORD'S DAY.

SURETY.

TAXES.

TENANCIES AND TENANTS

TENDER.

See TRESPASS, 2.

TREASURER OF A CORPORATION.

See GEORGES CANAL COMPANY.

VENDOR.

VERDICT.

VESSEL.

WARRANT.

WARRANTY.

WASTE.

See Executor and Administrator, 2. Tenancies and Tenants, 3.

WAYS.

See Warranty, 4.