REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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

HON. JOHN S. TENNEY, LL. D.
HON. SAMUEL WELLS,
[Resigned, March 31, 1854.]
HON. JOSEPH HOWARD,
HON. RICHARD D. RICE,
HON. JOSHUA W. HATHAWAY,
HON. JOHN APPLETON,
HON. JONAS CUTTING,

} ASSOCIATE JUSTICES.

ATTORNEY GENERAL.

HON. GEORGE EVANS.

THE following corrections should be made: —

PAGE 65, *Perry*, counselor, was also for plaintiff.

" 242, 9th line from top, for *closed*, read *cleared*.

" 244, 2d paragraph of abstract, for c. 49, read c. 48.

" 344, 15th line from bottom, for *cune*, read *cum*.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

WESTERN DISTRICT,

1853--4.

COUNTY OF FRANKLIN.

GROSS *versus* INHABITANTS OF JAY.

Chapter 32, § 48, provides, that towns shall be liable for any expense necessarily incurred for the relief of a pauper, by a person not liable for his support, after notice and request made to the overseers and until provision shall be made by them.

When provision is made upon such notice and request, the liability of the town to pay any such reasonable expense ceases.

If the person, making the request, is employed by the overseers of the poor to keep the pauper for a limited time, and he *continues* to support the pauper *after* the time agreed upon has elapsed; the town will not be liable for such support *after* the termination of their contract, without a new notice and request, although the overseers knew the alleged pauper was unable to support himself.

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

ASSUMPSIT for the support of a pauper from May 1, 1852, to May 1, 1853.

The pauper was the son of plaintiff whose residence was in Jay. He was about 26 years of age, had been insane four or five years and had always been a member of plaintiff's family.

It was admitted that the father had not sufficient property to be liable for the pauper's support.

On May 5, 1851, the plaintiff notified the defendants of the condition of his son, and requested them to furnish him with the necessary relief. The overseers contracted with the plaintiff to pay him $40, to take care of his son for the year succeeding that notice. The son remained in the family and was supported by plaintiff during the time sued for in his writ. And the overseers well knew of the pauper's inability to take care of himself since 1850.

On May 1, 1853, a new notice was given, and the overseers made a new contract with the plaintiff to support his son until otherwise agreed.

The defendants denied their liability, unless the plaintiff could show notice to the overseers, and a request for relief before the services sued for were rendered. But the presiding Judge instructed the jury; *that*, if the defendants knew that the alleged pauper remained in plaintiff's family, and also knew, that he had long been, and during the time covered by the suit continued to be, incapable of taking care of himself, and of providing for his own support, by reason of his permanent insanity and imbecility; and also knew that the plaintiff was not, during that time, of sufficient ability to provide for his (son's) support, the action might be maintained without any new notice or request.

The jury returned a verdict for plaintiff, and defendants excepted.

Linscott, for defendants.

May and *Knapp*, for plaintiff.

SHEPLEY, C. J. — Towns are by statute c. 32, § 48, made liable to pay any expense necessarily incurred for the relief of a pauper by a person not liable for his support, "after notice and request made to the overseers of the said town and until provision shall be made by them." When provision has been made by the overseers upon such notice and request, the liability of the town to pay any such reasonable

expense ceases, according to the express provisions of the statute. If it did not, the town could not be relieved from its liability to pay that particular person, whatever sum a jury might find to be reasonable. If provision were made with another person, no one could doubt, that the liability arising out of the notice and request would no longer exist. Where provision is made by agreement with the person making the request, the result cannot be different. The liability by contract supersedes that created by the statute. At the termination of the express contract the parties are left as they were at its commencement; the former liability of the town, arising out of the notice and request, having been terminated by the provision made; and the liability by the express contract ceasing by lapse of time. There must be a new notice and request before any new liability is incurred.

Upon the testimony presented in the bill of exceptions the action cannot be maintained.

Exceptions sustained, verdict set aside, and new trial granted.

HOWARD, HATHAWAY and CUTTING, J. J., concurred.

SMITH *versus* STANLEY *& al.*

Where land is mortgaged by the *grantee* to the grantor, at the time he receives his deed, or to a third person, to secure him for making a payment for the land, *he* has no such *seizin* therein, as will entitle his wife to dower.

But if the mortgagee subsequently release the land from the effect of the mortgage, or the debt secured thereby is paid, the *seizin* of the *mortgager* takes effect from the time he acquired his original title, and his *wife* will be dowable therein.

If the mortgagee subsequently release to a third person his mortgage lien to one half of the land, and receive new notes for the amount due him, and a new mortgage of the land, from the original mortgager and such third person; this will not operate as payment of the prior mortgage, so as to establish the *seizin* of the prior mortgager to more than the one half released.

ON FACTS AGREED.

WRIT OF DOWER. The plaintiff was lawfully married to Jotham Smith in 1831, and he died in 1850, and demand

of dower in the land described in plaintiff's writ was made in March, 1853.

On February 16, 1833, one Samuel Eastman conveyed the premises by deed of warranty to Jotham Smith, and at the same time, Smith conveyed them in mortgage to Samuel G. Stanley, one of the defendants, who furnished the consideration for the deed from Eastman.

On November 24, 1838, Jotham Smith conveyed by deed of warranty *one undivided half* of the same premises to William Smith, in which deed Stanley joined, "relinquishing all his interest in the premises by virtue of said mortgage."

At the same time, Jotham and William Smith gave a joint mortgage of the premises described in plaintiff's writ, and new notes signed by them for the amount then due to Stanley; the former mortgage and notes given by Jotham to Stanley were, by agreement of parties, left in the hands of P. M. Stubbs, at his suggestion, "to guard against any attachments or incumbrances, or as an escrow."

Subsequently Stanley sued out a writ of entry for the same, the mortgage not being paid, and thereby obtained possession of the premises, which he held with the other defendant at the time of suing out of demandant's writ.

R. Goodenow, for demandant.

The release of Stanley to William Smith, the taking of new notes and mortgage from Jotham and William Smith was a discharge of the first mortgage, and gave the husband such a seizin as entitles the demandant to her dower. *Hadlock* v. *Bulfinch,* 31 Maine, 246; *Gage* v. *Ward,* 25 Maine, 101; *Stanwood* v. *Dunning,* 14 Maine, 90; *Kimball* v. *Kimball,* 2 Greenl. 226; 9 Johns. 344.

Under the last mortgage the defendants claimed and hold possession.

The case shows that the defendant considered the first mortgage canceled by the last and under which he holds the land.

Whitcomb, for defendants.

1. The mortgage given by demandant's husband when he

received his deed of the premises has never been discharged or extinguished. It is to be upheld. *Poole* v. *Hathaway*, 22 Maine, 85; *Simonton* v. *Gray*, 34 Maine, 50.

2. A mortgage of land can only be discharged by payment of the debt, or by a release of the mortgage. *Hadlock* v. *Bulfinch & al.*, 31 Maine, 246; *Crosby* v. *Chase*, 17 Maine, 369, and cases there cited.

3. A renewal of the notes secured by such mortgage is not such a payment as will discharge the mortgage unless so intended by the parties. 16 Pick. 22; 8 Pick. 522.

4. If there was an inchoate right of dower existing, it was for the interest of Stanley that the old mortgage should subsist, and no merger would take place, for mergers are not favored. *Simonton* v. *Gray*, 34 Maine, 50, and cases there cited; 5 N. H. 252; 4 Pick. 505; 14 Pick. 375; Shep. Touch. 83; Co. Lit. 301; Ca. Rep. 85.

HATHAWAY, J. — If a grantee of land, at the time when he receives his deed, execute a mortgage of the same premises to his grantor, to secure the payment of the purchase money, he has but an instantaneous seizin, by virtue of which his wife does not acquire a right of dower; nor are her rights as to dower in such case any different, if the mortgage be made to a third person, who paid the consideration in pursuance of a previous arrangement between the parties. *Clark* v. *Monroe*, 14 Maine, 351; *Stow* v. *Tift*, 15 Johns. 458.

Nothing but payment in fact or the release of the mortgagee will discharge a mortgage. *Crosby* v. *Chase*, 17 Maine, 369.

When Stanley joined Jotham Smith, in the deed to William, of one half of the premises mortgaged to him, and released all his interest therein, the mortgage of that half was thereby discharged, and Jotham's seizin thereof had effect by relation, from the time of the execution of the original deed from Eastman, and the demandant became dowable of that half of the land; but Stanley released only one half of the land mortgaged; he received no payment

in fact of the debt secured by the mortgage of the other half, except by the land; and the result is that the demandant is entitled to judgment for her dower in one undivided half of the premises and no more.

Defaulted as agreed by the parties.

Judgment for dower in one moiety.

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

WENTWORTH *& al. versus* BLANCHARD *& al.*

A recorded title deed of real estate is sufficient authority for the holder to maintain an action of trespass for a wrong done to the estate.

And in *such action*, the defendant cannot controvert the plaintiff's title of record, unless the acts by him done were authorized by one having title or right thereto.

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

TRESPASS *quare clausum*, for cutting and carrying away timber from Township No. 3, Range 3, in the county of Franklin.

The defendants pleaded the general issue, and filed brief statements alleging:—

1. That the title to the premises, at the time of the alleged trespass, was in parties other than the plaintiffs:—

2. That the title was in the heirs of one Rufus Davenport;

3. That the title was in the heirs of Rufus Davenport, and that the defendants acted under license of said heirs.

The cutting of the timber was admitted.

In the progress of the trial, many rulings were made as to the admissibility of testimony, to which exceptions were taken, that need not be stated as they were not considered by the Court.

The plaintiff's title is set forth in the opinion.

The defendants introduced evidence tending to show, that the title was in the heirs of Rufus Davenport, also depositions tending to show, that the plaintiff's title under his tax deed had become inoperative.

The presiding Judge ruled that the plaintiffs had made out a *prima facie* case as *to title* and sufficient to enable them to maintain this action, so far as the question of title was involved, unless the defendants should prove that they did the acts complained of, under license or authority of some one having title or right, and that the supposed title of the heirs of Rufus Davenport would not aid the defendants, unless they showed a right in themselves under that title by license or authority, as they claimed in their brief statement and defence.

The questions of damages and license or authority were submitted on the evidence.

A verdict was returned for the plaintiffs. The jury also specially found that none of the heirs of Rufus Davenport ever gave the defendants license or authority to cut timber on the township.

Defendants excepted to the rulings.

J. L. Cutler, for defendants.

R. Goodenow and *J. S. Abbott*, for plaintiffs.

RICE, J. — The plaintiffs claim title to the *locus in quo*, by deed from William C. Whitney, sheriff of Oxford county, to John Davis, dated July 20, 1829, and through mesne conveyances from Davis to themselves; and also by deed from Samuel Cony, land agent, to George Pierce and Benjamin Goodrich, dated April 30, 1849, and a deed from said Pierce and Goodrich to themselves, dated August 23, 1849, and recorded October 11, 1849. Both these titles originated from sales for non-payment of taxes assessed upon the premises.

The cutting charged in the plaintiffs' writ is admitted by the defendants, who claim to justify under a title in the heirs of Rufus Davenport, originating in a grant from the Commonwealth of Massachusetts to Edward Blake, jr., and through mesne conveyances to said Davenport. They also deny the validity of the plaintiffs' title.

A conveyance by deed duly acknowledged and registered

is equivalent to livery of seizin. *Higbee* v. *Rice*, 5 Mass. 352.

The legal presumption is, that seizin follows the title, and that they correspond with each other. *Ward* v. *Fuller*, 15 Pick. 185; *Blethen* v. *Dwinel*, 32 Maine, 133.

By the production of their recorded title deeds the plaintiffs made out a *prima facie* case of title, sufficient to enable them to maintain this action. The instructions upon this part of the case were correct.

The defendants in no way connect themselves with the title of Davenport. They are, so far as the case finds, naked trespassers, and are not therefore in a position to controvert the validity of the plaintiffs' title, or protect themselves under that of the heirs of Davenport, being strangers to it. *Dolloff* v. *Hardy*, 26 Maine, 545; *Dunlap* v. *Glidden*, 31 Maine, 510.

In this view of the case the other exceptions presented become immaterial. *Exceptions overruled and Judgment on the verdict.*

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

HANKERSON *versus* EMERY *& als.*

If the payee of a negotiable note indorse it "not holden" when overdue; but at the time of the transfer for full value, represents that all the signers thereto are holden to pay it, when in fact, by some act of his, one or more of them have been discharged; he may still be liable upon the note, but not as an *indorser*.

A release to *such payee* under seal, as to all liability on the note, for a consideration less than the amount due thereon, will make him competent as a witness for the holder.

The full payment of the *note* indorsed, would not impair the consideration of that *release*.

Under c. 192 of the Acts of 1846, the *proof* of usurious interest, which *affects* the costs in a suit, must be adduced at the *trial*.

The indorsement upon a note, *before suit brought upon it*, of the usurious interest, which was reserved at its inception, cannot deprive the plaintiff of his costs.

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

Assumpsit on a promissory note signed "Josiah Emery, John C. Manter, James Cutts, surety."

It was payable to one Joseph Merry, and by him indorsed to plaintiff "not holden," when it was overdue.

The defendant Emery was defaulted. The other defendants pleaded the general issue, and relied for defence upon showing, that while Merry held the note, an agreement, for a valuable consideration, was made between him and Emery, to extend the time of payment, without the knowledge or consent of the other defendants; also usury in the inception of the note.

It was admitted, that when the note was given to Merry, $1,87, extra interest, was reserved in accordance with a previous agreement between Emery and him. This sum was indorsed on the note, as of its date, before this action was commenced, but neither of the defendants knew of the indorsement until the trial.

Proof was offered by defendants of the agreement by Merry with Emery, while holding the note, to extend the time of payment.

The plaintiff offered Merry, as a witness, who was objected to by defendants, and they showed that the plaintiff had said that Merry was holden upon the note; that he took it on the representation of Merry that the agreement was not absolute, and not to be binding unless assented to by Cutts, the other signer, and if it should prove otherwise, he, Merry, would be holden.

The Judge thereupon excluded the witness.

Afterwards, Merry paid plaintiff one dollar and gave him his note for $100,00, as the consideration of a discharge, which plaintiff gave him under seal, releasing him from all liability on account of the note in suit.

He was then admitted to testify, against the further objection of the defendants.

The correctness of the instructions to the jury was not contested in argument. A verdict was returned for plain-

tiff, and the defendants excepted to the ruling of the Judge. And it was agreed, that if the verdict should stand, all questions, touching the rights of the parties to recover costs on the facts in the case, should be reserved for the decision of the full Court.

May and *Cutler*, for defendants, relied upon the following points:—

1. The testimony of Merry was inadmissible; he was directly interested in this suit.

2. The release of plaintiff does not qualify him.

3. The payment of $101 by the witness to discharge himself from his liability upon the note, makes the witness an owner in the judgment to be recovered in proportion to the amount paid; viz., about three fourth parts, and the plaintiff will hold the money in trust for him when paid. Such judgment has the same effect as if the witness had paid the $101 as indorser of the note.

4. *Non constat* but that the witness paid back to the plaintiff all which the plaintiff paid for the note; and if so the whole note belongs to the witness. *Braman* v. *Hess*, 13 Johns. 52; *French* v. *Grindle*, 15 Maine, 163.

5. An indorsement is generally *prima facie* evidence of a full consideration paid; but it is otherwise when it is made without recourse; and it may well be presumed that the witness paid to the full extent of all which he received when he parted with the note; so that such payment now revests the whole interest in the note in himself. *Welch* v. *Lindo*, 7 Cranch, 159.

Upon the question of costs we say,—

1. That whoever takes a bill or promissory note after it is overdue, takes it subject to all existing equities, and, in the language of Chitty, "must stand in the situation of the person who was holden at the time it was due," and is clothed with all the advantages (and disadvantages) of the party from whom he received it. Chitty on Bills, 8th Am. ed. 243 and 245. In this case the matter relied on to entitle the defendant to costs, grows out of the incidents at-

tached to the note, and growing out of the note transaction itself, it is not a collateral matter. Stat. of 1846, c. 192; *Myrick* v. *Hasey*, 27 Maine, 9; *Hatch* v. *Dennis*, 10 Maine, 144.

2. The right of the payee of the note to his costs is incident to the note, and is such a right as the Courts will protect, and if an indorsee of a note overdue is not subjected to the same liability to costs as the indorser, then the statute of 1846 is a dead letter, and will always be avoided by an indorsement of the note. *Sawyer* v. *Bancroft*, 21 Pick. 210.

H. Belcher, for plaintiff, as to the admissibility of the witness, cited *Rice* v. *Stearns*, 3 Mass. 225; *Barker* v. *Prentiss*, 6 Mass. 430; *Parker* v. *Hanson*, 7 Mass. 470; *Williams* v. *Bugbee*, 6 Cush. 418; *Abbott* v. *Mitchell & al.*, 18 Maine, 354; *Berry* v. *Hall*, 33 Maine, 493.

In regard to the costs under the usury branch of the defence, he cited *Wing* v. *Dunn*, 24 Maine, 128, and *Cummings* v. *Blake*, 29 Maine, 105.

The damages in this case were not reduced by *proof* of usury, but by indorsement by an innocent holder for value.

TENNEY, J. — The only questions raised by the exceptions, which are relied upon in argument, are: — First, was Merry, the indorser of the note, after his release by the plaintiff, a competent witness for him? Second, is the plaintiff to be deprived of his costs of suit, and the defendants to have a judgment for their costs, on the ground of any usurious taint in the note?

The note in suit, being overdue, when it was negotiated, and indorsed by the payee, Merry, "not holden," the plaintiff, as the holder, is entitled to the amount due thereon, from the makers, unless there is proof of facts, not indicated by the note itself. If Merry, by any act of his, while he held the note, discharged one or more of the defendants, he was not liable to the plaintiff, in the character of indorser of negotiable paper, against his express stipula-

tion, before he was released. But his liability, if any, was the result of the receipt of the full value of the note, at the time of the transfer, purporting to be valid against all the signers.

If, from a belief of the indorser, that he was exposed to a suit, on account of his representation of the liability of all the makers, when a part were discharged, and he apprehended such suit would result in a judgment against him, he gave his own note for the sum of one hundred dollars and one dollar more in money for a release of the plaintiff, from all claim on account of the note, which he had transferred, as an agreed equivalent for the risk, under a full knowledge of all the facts, the note so given cannot be regarded as destitute of consideration. And the consideration would not fail by the payment of the full amount of the paper indorsed. The indorser has not paid by his note to the plaintiff, any portion of the debt, as an indorser in the legal sense of the term, having thereby an interest in the note, against one or more of the makers; but in the terms of the release, he is discharged of all liability on account of the note. It was manifestly the design of the plaintiff, and of Merry, that the former should continue to be the exclusive owner of the note, which he had purchased of the latter, who was willing to sustain a certain fixed loss in order to be relieved from the risk of a greater one; and the plaintiff chose to take the note of Merry for a sum less than that due on the note in suit, rather than be exposed to the failure of his action against the defendants, without his testimony, and thereupon driven to the uncertain remedy against him. No disqualifying interest in Merry, as a witness, is shown, after he was released by the plaintiff.

It was admitted, that when Merry took the note, the sum of $1,87, extra interest, was reserved in accordance with the previous agreement with Emery. But this sum was indorsed under a date corresponding with that of the note, before the commencement of this action. The damages therefore cannot be reduced by proof of such usurious in-

terest. We are to understand the proof of usurious interest as used in the statute of 1846, c. 192, to be from the evidence adduced at the trial, and not that afforded by an indorsement therefor, before the institution of the suit, and this construction of the statute is similar to that given to the R. S. c. 69, § 7, in *Cummings* v. *Blake,* 29 Maine, 105. *Exceptions overruled. — Judgment for the plaintiff on the verdict with costs.*

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

WOODMAN *versus* SMITH.

The judgment of a Court having general jurisdiction of the subject matter of the suit, and purporting to be recovered against an inhabitant of the county where it is rendered, while unreversed, cannot be collaterally impeached.

Such judgment is a sufficient foundation for a levy, although there may have been some *error* in the *date* of the writ, the *service* thereon and the *term* of the Court at which the action should have been entered.

For the validity of a levy on land, it is not necessary that the appraisers should be residents of the county where the land lies.

When the defendant appears and pleads to the merits of the suit he thereby waives any objections to the want of service of the writ.

Where the deed, under which the demandant claims title, is introduced by him without objection, this furnishes *prima facie* evidence of its *execution* and *delivery* on the day of its date.

If the demandant mortgage the land sought to be recovered, to a third person, after action brought, it will not prevent his recovery.

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

WRIT OF ENTRY, for a tract of land of fifty acres, &c.

The writ was dated Oct. 5, 1852. The tenant, by his brief statement, asserted his right to retain possession of the demanded premises, by virtue of a mortgage deed from the former owner, duly executed; and further, that the demandant could not maintain the action, as he had conveyed the premises by deed of mortgage since the commencement of the suit.

The various deeds introduced, and under which the parties claimed title are enumerated in the opinion of the Court.

The deed to the demandant was dated on Jan. 30, 1852, acknowledged on April 15, 1853, and recorded April 19, 1853. It was not objected to at the trial.

A levy, upon which the demandant relied, to defeat the effect of tenant's mortgage, was made upon a judgment not otherwise defective, than that the original writ appeared to be dated on May 28, 1845; was served on May 23 and 26, 1845, and entered at the June Term, in Franklin County, in 1846.

The description of the land levied on, by the appraisers in the execution, was in these words; "a certain piece or parcel of land situated in Wilton, being fifty acres on the northerly part of the farm now occupied by J. B. Smith, and Allen Smith, with the buildings thereon standing, which was set off to satisfy an execution in favor of *O. O. Woodman* v. *Jona. B. Smith.*"

The case was submitted to the decision of the full Court.

J. S. Abbott, for tenant, maintained the following positions.

1. There was no valid attachment on the original writ of *O. O. Woodman* v. *Smith,* as appeared by reference to the return thereon.

2. Before the attachment and levy in that case, Smith had conveyed the land levied on to Allen Smith, in mortgage. Ephraim Woodman had *actual* notice of that mortgage, and the action, in the name of O. O. Woodman, was really brought for *Ephraim* Woodman, and hence no title was acquired by the levy.

3. The levy is defective. First, because there is no sufficient description of the land levied on; and secondly, because it does not appear that the appraisers were inhabitants of Franklin County. And if otherwise, it does not appear that the land levied on is the same as demanded in the writ.

4. The deed to demandant was not *delivered, acknowledged* or *recorded* before the commencement of this action. R. S. c. 91.

5. The demandant has conveyed away the land since the commencement of this action.

6. No legal service of the writ in this action was made.

J. L. Cutler, for demandant.

TENNEY, J. — The demandant claims under a deed given by Peter Haines to the tenant of lot No. 51, in Wilton, containing 115 acres more or less, dated April 19, 1832. On April 27, 1839, Allen Smith conveyed the same to Ephraim Woodman, who, on April 22, 1840, conveyed it to Jonathan B. Smith. On July 12, 1850, Oliver O. Woodman extended his execution against Jonathan B. Smith, on "fifty acres on the northerly part of the farm now occupied by Jonathan B. Smith and Allen Smith;" and, on September 16, 1850, Oliver O. Woodman conveyed to Sarah Woodman "all that portion of the farm, that Allen Smith lives on, that I have any interest in or to, in any way." Sarah Woodman, on January 30, 1852, conveyed to Ivory F. Woodman, land set off by levy on an execution in favor of O. O. Woodman *v.* Jonathan B. Smith of Wilton, being a part of the farm that Allen Smith lives on. The evidence reported satisfactorily proves, that at the time of the levy of Oliver O. Woodman's execution, Allen Smith and Jonathan B. Smith were occupying lot No. 51, in Wilton, as a farm.

It appears, however, that at the time Ephraim Woodman conveyed to Jonathan B. Smith, on April 22, 1840, the latter mortgaged the same property to the tenant as security for certain notes, and that the mortgage was assigned, and two of the notes negotiated to Charles I. Smith on July 1, 1850. This mortgage and assignment were recorded on January 10, 1852, which was subsequent to the levy and the record of the same, on the execution of Oliver O. Woodman; consequently, the mortgage to the tenant and his assignment cannot in any degree be effectual against the levy, unless Oliver O. Woodman had actual notice, that the property had been conveyed in mortgage to the tenant.

It is fully established that Ephraim Woodman had a knowledge of this mortgage, he having written the mortgage deed at the time of his conveyance to Jonathan B. Smith. But the evidence is insufficient to affect Oliver O. Woodman with actual notice. The levy, if in proper form, and in other respects valid against the debtor in the execution, will supersede the title by virtue of the mortgage from Jonathan B. Smith to the tenant, under which the latter claims to hold possession.

Other grounds of defence are relied upon. The execution against Jonathan B. Smith, extended upon the premises, was on a judgment, recovered in the action, purporting to be commenced on May 28, 1845, for the Supreme Judicial Court, next to be holden in the County of Franklin, on the second Tuesday after the fourth Tuesday of May next; the attachments of property returned upon the writ, bear date the 23d and the 26th days of May, 1845, and the certificate that a summons was left with the defendant in the action, shows that part of the service to have been made on the day last named. The action was entered at the term of the Court holden in that county, in June, 1846, and was then continued from term to term, till the term holden in 1850, when the same was defaulted, judgment rendered, and execution issued. The judgment was of a Court, having general jurisdiction over the subject matter, and the defendant is represented as being a resident of the county of Franklin. As long as the judgment stands unreversed, it cannot be impeached collaterally, and is a sufficient foundation for the levy, notwithstanding there may have been some error in the date of the writ, the services thereon, and the term of the Court, at which the action should have been entered.

The objection that the officer's return upon the execution does not show that the appraisers were resident in the county of Franklin, where the premises were situated, has no foundation in the statute. R. S. c. 94, § 4.

The statute requires no particular description of the land set off upon execution in the officer's return; but the

description and appraisement of the land shall be indorsed on the execution and signed by the appraisers. This has been done; and the evidence is such that no difficulty is believed to exist in an attempt to ascertain the parcel of land extended upon. The objection that the land levied upon is not the same claimed in the writ fails.

The deed, under which the demandant claims title, was introduced by him without objection. This was *prima facie* evidence of its execution and delivery on the day of the date, and this point in the defence is not sustainable.

The land having been mortgaged by the demandant, subsequent to the commencement of this suit, to Ephraim Woodman, is no impediment to a recovery. As between the demandant and strangers to this mortgage, he has the title. *Blaney* v. *Bearce*, 2 Greenl. 132; *Wilkins* v. *French*, 20 Maine, 111.

The last objection, that there is no service of the writ in this case, is not sustained by the facts, the return thereon showing that a legal service was made. If this point had a foundation it is waived by the appearance of the defendant, who has pleaded to the merits.

Defendant defaulted.

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

(*) GREEN *versus* WALKER.

In construing a replevin bond, to ascertain whether it conforms to the statute requirement, the intention of the parties must govern.

To ascertain that intention in case of doubt, regard must be had to the general purpose and object of the instrument.

Upon the assumption that the parties acted in good faith, the construction should be such as to render the instrument available for its purpose, rather than such an one as will defeat it.

In an instrument, intended and used as a replevin bond, a condition by which the plaintiff obligor is bound to pay to *himself*, instead of the *defendant*, the damages and costs, which may be recovered in the suit, will be deemed a

(*) Cases with this mark were prepared by JUDGE REDINGTON, former Reporter.

clerical error, and be construed as a condition to pay to the *defendant* such damages and costs as the *defendant* may recover in the suit.

Such an error, therefore, will not defeat the efficiency of the bond.

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

Trespass for taking the plaintiff's cow.

The defendant justified the taking, as an officer, by virtue of a writ of replevin in favor of one North against the plaintiff. In support of the justification he read the replevin writ and bond. The condition of the bond, *inter alia*, was that "if said North, (the *plaintiff* in replevin,) shall prosecute the said replevin to final judgment, and pay such damages and costs as the said *North* shall recover against him," &c.

The plaintiff then objected that *such* a bond, in which the *plaintiff* in replevin binds himself to pay, not to the defendant in replevin but to himself, such damages and costs as he himself might recover against himself, could not justify the officer in taking the cow. The Judge, for the purposes of this trial, ruled that, because of the defect in the bond, the replevin writ furnished to the defendant no justification.

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

Cutler, for the defendant.

Tripp, for the plaintiff.

Appleton, J. — The defendant, as an officer, replevied the property in dispute, on a writ in favor of Daniel North, from the possession of the plaintiff, who commenced his action for such taking, on the ground that no such replevin bond as the statute requires has been given.

To justify the taking of property by virtue of a replevin writ, it must be averred and proved that a bond, for the return of the property replevied and for the payment of costs and damages, was delivered with the writ to the officer or was in his hands before the service was completed. The bond is the security required for the protection of the per-

son from whose custody the property is taken, and if not given in accordance with the statute, the officer is a trespasser.

That a bond was given in this case is admitted, but the plaintiff denies that it affords the security required, or that it can be regarded as a statute bond. The intention of the parties must govern in its construction. To ascertain that intention, in case of doubt, recourse must be had to the general purpose and object of the instrument. It may be assumed that the parties did not intend to enter into idle and nugatory stipulations. The presumption of law is, that they acted in good faith. Such a construction therefore should obviously be given, as will render the contract in question available for the purposes for which it was made, rather than such an one as will destroy its efficiency. In *Bullen* v. *Wigge*, 1 Saund. 65, the Court held that, to support the condition of an arbitration bond, they would transpose or reject insensible words, and construe it according to the intention of the parties. In *Bache* v. *Proctor*, Doug. 384, BULLEN, J., approved a decision in the Common Pleas, where the condition of a bond was that it should be void if the obligor did not pay, and performance being pleaded on the ground of the literal expression, the Court held that "the palpable mistake of a word should not defeat the true intent of the parties." In *Waugh* v. *Bussel*, 5 Taunt. 700, the insertion of the word "hundred" was deemed an immaterial alteration in a bond, as, says GIBBS, C. J., "it is sufficiently manifest that the word 'hundred' is there accidentally omitted, and what has preceded has sufficiently shown what was to be done. The sentence is made intelligible by the context." In *Coles* v. *Hulme*, 8 B. & C. 568, in the obligatory part of the bond the word pounds was omitted; it merely stated that the obligor became bound in 7700, without stating what description of money. Lord TENTERDEN, C. J., says, "it appears that the intent was that the defendant should enter into a bond for securing P. Coles various sums of money described in these recitals as being composed

of pounds sterling and other money of a smaller denomination. That being so, I cannot entertain any doubt that the obligor should, in order to secure the payment of these sums, become bound in a penalty also consisting of pounds sterling; and if that were so, then the bond ought to be read as if the word pounds were inserted in it." In *Loveland* v. *Knight*, 3 C. & P. 106, BAYLEY, J., says, "if on looking at the whole instrument, we see that there is a mistake and the context shows what it should be, we are bound to read it correctly." "When a word is omitted in the condition of a bond without which the condition is insensible, if it appears from other parts of the bond what the meaning of the parties was, the Court will supply or add the word to the condition," per GREEN, J., in *Kincannon* v. *Currel*, 9 Yerg. 13. So a senseless or repugnant condition will not affect the true intent of the bond; as if the condition be that the obligor do not pay. *Stockton* v. *Turner*, 7 J. J. Marsh. 192.

"Where the words of a bond are not sufficiently explicit," says PARKER, J., in *Teal* v. *Van Wyck*, 10 Barb. 379, "or if literally construed, their meaning would be nonsense, it must be construed with reference to the intention of the parties. In doing this, it is allowable to depart from the letter of the condition, to reject insensible words and to supply obvious omissions."

The bond in this case gives the names of the parties to the replevin suit, describes the property and its value, and is for the required sum. It specifies the name of the magistrate before whom, and the time when, and the place where the cause was to be heard, and conforms in all respects to the requirements of the statute, except that in the condition the name of the obligor is inserted, where that of the obligee should have been. It was given and received as a replevin bond, and accomplished its purpose by enabling the plaintiff in replevin to obtain possession of the property replevied. We cannot presume the mistake was made with a fraudulent intent to defeat the obligation. That the substitution of

one name for the other is a mere clerical error, is manifest, unless we suppose the obligors intended an absurd and idle stipulation, for they must have known that the plaintiff in replevin could not recover cost against himself, and must have been aware of the folly of a condition that he should pay such sum as might thus be recovered. The error of the scrivener is manifest. No one who reads the bond can avoid perceiving it. It is patent on the face of the instrument. If we ignore it or refuse to perceive it, we alone do it. The condition itself shows the mistake. There is no need of parol evidence for its correction. It corrects itself by the context. "A court of law, in the construction of an instrument, will correct a palpable mistake and give it the meaning intended by the parties." *Marion* v. *Faxon*, 20 Conn. 487. "It explains itself readily," says STORRS, J., in that case, which was on a receipt for goods attached and where a mistake like the one under consideration occurred. Such too, is the rule of the civil law which provides that if the error of the notary in writing is manifest, the contract ought to be supported." Dig. 50, 17, 92. The bond must be regarded as a valid bond. The instructions given in reference to the writ and bond were erroneous, and a new trial must be had.

Exceptions sustained. New trial granted.

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

WOODMAN *versus* INHABITANTS OF THE COUNTY OF SOMERSET.

Of the distinction between Courts of record and not of record.

The Court of County Commissioners is not a Court of record.

To actions commenced on the judgments of that Court, after the lapse of six years, the statute of limitations may legally be interposed.

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

DEBT, on a judgment of the County Commissioners of Somerset county, rendered in March, 1838. The writ is

dated July 18, 1851. The defendants put in three several pleas, the last of which was the statute of limitations, to which there was a demurrer and joinder. There was also an issue upon the plea of *nil debet*. The plaintiff introduced evidence of the laying out of a road by the County Commissioners across his land, upon proceedings had, and a judgment of that Court for the damages sought to be recovered in this action. He also introduced the records of the County Commissioners for opening the road; and the report of the committee appointed to open it.

It was admitted that the Clerk of the Courts could find no evidence on his files or in his records of the opening and making of the road.

It was also admitted, that the plaintiff took an order from the clerk of Somerset county on the 13th of November, 1839, for the amount of his claim, on the county treasurer of Somerset, and on the same day demanded payment of the treasurer, who refused to pay the same, and an action was brought thereon, a report of which appears in 25 Maine, 300.

The plaintiff demanded payment of the said judgment of the treasurer of Somerset on the seventh day of April, 1851.

After this testimony was out and these admissions made, it was agreed, that the presiding Judge should report the case for the consideration of the whole Court, the Court to draw such inferences from the evidence admissible, as a jury might draw, and to enter such judgment as the law and evidence might require.

The cause was argued at great length by the respective counsel employed, upon all the points arising in the case, but it will only be necessary to report the substance of the arguments touching the point on which the action was decided.

J. S. Abbott, for the defendants.

The third plea is the statute of limitations in usual form, to which plea the plaintiff has filed a general demurrer,

which is joined. Under such a demurrer no defects in form in the plea can be taken advantage of. The defendants therefore claim judgment upon the third plea, irrespective of any proofs in the case.

The statute of limitations is a bar to this action, as provided in R. S. c. 146, § 1, which is substantially a re-enactment of the statute of 1821, c. 62. And if it were not, as it affects the remedy only, it would be applicable to this case.

It is contended, that the Court of County Commissioners is not a court of record within the meaning of the R. S. c. 146; but that by a "court of record, within the meaning of that chapter, is intended a court whose proceedings are according to the course of the common law, and whose judgments, when erroneous, may be reversed.

By implication, the statute cited treats some courts in this State, other than those of a justice of the peace, as *not* courts of record; for it speaks of "actions upon judgments rendered" in a court, not being a court of record. It is not perceived that there are any courts in this State, having power to render judgments, and still not to be regarded as courts of record within the meaning of this statute, unless the Court of County Commissioners is such a court.

In accordance with this view, the legislature has from time to time provided that, in certain specified cases, an action of debt may be brought upon an order or judgment of the Court of Commissioners, in the same manner, and under the same regulations that actions of debt may be brought and maintained upon judgments of other Courts in this State. Laws of 1833, c. 64, § 2.

Other similar laws might be cited, *though none of them embrace this case,* for no warrant was issued, or ordered to be issued in this case, as provided in c. 64 of the laws of 1833.

Now, why such legislation, if the Court of County Commissioners is a court of record, within the meaning of the statute? For, if a court of record, might not an action be

brought and maintained upon its judgments, without such legislation, just as well as upon a judgment of any other court of record?

Again, this action is not "brought upon the judgment or decree of some court of record," even if the Court of County Commissioners should be held to be a court of record.

It is brought partly upon an order, decree or judgment of the court, and partly upon proof of notice that the road was opened, and that a demand for payment was made. The three allegations in each count in the writ, (except the last,) viz.:—the judgment, the notice that the road was opened, and the demand, are all material and necessary to be proved.

The exception in the statute is, "actions founded upon judgments;" that is, upon judgments exclusively; not upon judgments and other facts jointly, which other facts are material to be alleged and proved.

Such, it is contended, is the obvious meaning of the statute; and such a construction is required by the object and intent of the statute.

One important object of the statute of limitations evidently is, to relieve both parties to any action, within the six years limitation, from the necessity of procuring oral testimony more than six years from the time the cause of action accrued.

Now in the case at bar, two of the material facts, on which the action is founded, which are alleged in the declaration, and without proof of which the action cannot be maintained, namely, the notice that the road was opened, and the demand of payment, are provable by parol only.

Hence it is considered, that this action cannot be regarded as "an action upon a judgment," but an action upon a judgment and other material and alleged facts, provable by parol, and hence clearly within the meaning of the statute cited, limiting the time within which the action must be brought to six years.

Under this branch of the case, it remains to be considered, whether six years did pass after the cause of action accrued and before the commencement of the action. The Court can only look at the declaration, the plea, the demurrer and joinder.

As the plea is demurred to generally, the allegations in the plea are to be regarded as true, which alleges that no cause of action set forth in the plaintiff's writ and declaration accrued to the plaintiff at any time within six years next before the commencement of said action.

This allegation the demurrer admits to be true. Hence it follows that judgment must be rendered for the defendants, unless, upon inspecting the declaration, it appears that the action is such an one as not to be within the six years limitation statute.

J. H. Webster, for plaintiff.

The defendants claim that the limitation of six years applies to this action, and allege that the County Commissioners are not a court of record.

It would seem that the County Commissioners' Court of this State is a court of record, as by the statutes creating and modifying it, it is required to keep the same record as any other court of record, and by that requirement is as much constituted a court of record as any in the State. No statute of this State in express terms provides that the court constituted or modified by it, shall or shall not be a court of record.

By statutes of 34 Edward 3, c. 1, passed in the year 1361, sessions of justices of the peace were constituted courts of records, and after that a *custos rotulorum* appointed to keep the records. Such they remained till the time of Blackstone, and for aught I know exist in England at the present day in all their original vigor. These justices' sessions were afterwards called general sessions and quarter sessions, and had jurisdiction of highways, to alter, widen and keep them in repair, to award damages to the owners of land injured by alterations of roads, and to

assess a tax for their payment upon those bound to pay these damages. They had jurisdiction of the prudential affairs of the county. Com. Dig. *Chemin passim.*

All the justices in the county might sit at any session, although two would sometimes constitute a session for some purposes. Com. Dig. Justices of the Peace, D. 1. Sometimes it required four or five. Ibid, *Chemin.*

This Court, with its powers, authority and duties, and characteristics, was well known to our ancestors when they came from England here. And when they established it here by the distinctive name it bore, and gave it the jurisdiction it possessed in England, they gave it the power and distinctive character it had there. The Act establishing it provides, that "a Court of General Sessions shall be held," and not that a court having such power shall be held and called General Sessions, but a Court of General Sessions.

Such was the law, and the character and nature of this court at the time of the Revolution, and such it continued until 1781, Nov. 2, when the General Court of Massachusetts, by an Act of that date, Laws of Mass. vol. 1, p. 63, recognized the Court of General Sessions as a well known and established court, and imposed upon it the burden of making county estimates for county taxes. July 3, 1782, the General Court of Mass. passed a law, requiring a Court of General Sessions to be held at the times and places appointed by law by the justices of each county, (the same as in England,) for criminal jurisdiction. Laws of Mass. vol. 1, p. 74.

From time to time, laws have been enacted touching this court, and I refer the Court to stat. of March 5, 1787, Feb. 28, 1808, June 19, 1809, June 25, 1811, June 14, 1814, Feb. 20, 1819.

This last act was in force at the time of the separation, and by force of it, the Court of Sessions existed at that time.

By § 6, of Act of separation, passed June 19, 1819, all officers who held commissions, or exercised jurisdiction in

Maine, March 15, 1820, except Judges of S. J. Court, were within the State of Maine to continue to exercise and enjoy all the power and authority, granted them by the laws under which they held their appointment until others were appointed in their stead, or their offices abolished. 6 Laws Mass. 245. This section of that Act is made a part of the Constitution of Maine, by Art. 10, § 5, of Constitution of Maine, and by Art. 10, § 3, of Constitution of Maine, all laws of Massachusetts, not repugnant to the Constitution, are retained until repealed or expired by limitation. On the 27th June, 1820, the Legislature of Maine passed an Act, establishing a Court of Sessions in each county in the State, to consist of one chief justice, and not over four, nor less than two associate justices, and changing the times of holding their courts, but in other respects very similar to the Act of Mass., Feb. 20, 1819. Laws of Maine, 349.

On March 2, 1821, the Legislature passed an Act, modifying and limiting the jurisdiction over highways of the Courts of Sessions. Ibid, 509. On February 25, 1825, the Court of Sessions was slightly modified, and the number of justices limited to three in all. Statute of 1825, c. 306.

On the 10th of March, 1831, the Legislature changed the style of the Court, from that of Court of Sessions to County Commissioners, and also the tenor of office to three years, but retained all the powers, authorities and duties, except so far as the same was modified and altered by that Act. Statute of 1831, c. 500. But nothing in that Act indicates an intention to change the Court from a Court of record, to a Court not of record. This Court, as thus provided for and constituted, remained with little or no variation until the statutes were revised in 1840, when the law of 1831 was in substance reënacted by R. S. c. 99, and the court now exists. Here we have a court established by competent authority, 493 years since as a court of record, and existing under the same name 470 years, with some modifications, but none indicating a change from a court of record to a court not of record, and all this time having

jurisdiction over highways and the prudential affairs of the county until 1831, when the name or style is changed, and also the tenure of office; or, if you please, a new court is created, having the same powers, authorities and duties, to be exercised in the same way, but exhibiting no intention in the Act creating it, to constitute the substituted court a court not of record.

If this parentage, lineage and history, supported by all the legal enactments that we find concerning it, having existed 470 years under one name, and 23 under another, do not entitle the Court of County Commissioners to be called a court of record, I should like to know what parentage, lineage or legal enactments could entitle a court to that dignity.

It would seem that a court recognized as a court of record 493 years, would thereby gain a pretty sure title to that distinction. If the Commissioners' Court is a court of record, there is an end of defendant's case.

SHEPLEY, C. J. — The action is debt upon a judgment of the Court of County Commissioners rendered in the month of March, 1838. The suit was commenced on July 18, 1851. The declaration contains four counts, the last of which is assumpsit. The pleas are *nul tiel record, nil debet,* and the statute of limitations. The first concludes with a verification, which is joined by a *similiter* without any replication. On the second an issue to the country is joined. To the third there is a demurrer and joinder.

If the case may be decided upon the third plea, it will not be necessary to notice the defects in the declaration and pleadings.

The statute of limitations, c. 146, § 1, requires that "all actions upon judgments rendered in any court not being a court of record, except justices of the peace, in this State," shall be commenced within six years next after the cause of action shall accrue.

If upon the facts reported, any action has accrued to the

plaintiff, it did so more than six years before the commencement of this suit. Although the cause of action may have accrued before they were in force, the provisions of the Revised Statutes are applicable to it. *Crehore* v. *Mason*, 23 Maine, 413.

The rights of the parties may depend upon a determination, that the Court of County Commissioners is or is not a court of record.

Whether a court be a court of record, does not depend upon the fact, that it does or does not keep a record of its proceedings, or that it is or is not required by law to do so.

All inferior courts, not being courts of record, cause their proceedings and judgments to be recorded, or should do so. The distinction between courts of record and courts not of record, is recognized in the statute. It is not a formal and technical one only, but most important rights and practical results arise out of it.

After final judgment in a court of record, proceeding according to the course of the common law, the only remedy for a correction of its errors is a writ of error. When it is not a court of record, or does not proceed according to the course of the common law, a writ of error will not lie. The remedy is by writ of *certiorari*. 29 Maine, 288; 15 Pick. 234. A writ of error is one of right, while a writ of *certiorari* is not. 8 Greenl. 292.

When the judgment of an inferior court is reversed upon error brought, the court of errors should render such judgment as the inferior court ought to have rendered. 1 Salk. 401; 2 Saund. 256; Com. Dig. Pl. 3, B. 20.

Upon a writ of *certiorari*, the Court can only quash the proceedings. It cannot render such judgment as the inferior court ought to have rendered. *Drown* v. *Stimpson*, 2 Mass. 445; *Commonwealth* v. *Bluehill Turnpike*, 5 Mass. 423; *Hopkinton* v. *Smith*, 15 N. H. 152.

If the Court of County Commissioners were to be considered a court of record, proceeding according to the course of the common law, a party aggrieved would of right

be entitled to a writ of error, for the correction of its proceedings; and it would become the duty of this court upon a reversal of any of its judgments, to render such judgment as it ought to have rendered. This would subject all its proceedings to a rigid scrutiny in form and substance, and bring many of its proceedings and judgments before this Court for revision and adjudication anew. If a writ of *certiorari* only can be maintained, on account of its not being a court of record, this Court having a judicial discretion may refuse it, and allow the proceedings, if informal or defective, to remain undisturbed, unless justice requires an interference; and in such case its jurisdiction will not be assumed, but it will be left to commence its proceedings *de novo*, when it judges it to be expedient to do so.

A court of record is one, which has jurisdiction to fine or imprison, or one having jurisdiction of civil cases above forty shillings, and proceeding according to the course of the common law. 1 Inst. 117, b, 260, a; *Groenvelt* v. *Barwell*, 1 Salk. 144; S. C. 1 Ld. Ray. 467; *Same* v. *College of Physicians*, 12 Mod. 388; 2 Saund. 101, a; Viner's Ab. title Court, I.

It is insisted that the Courts of Sessions were courts of record, and their former jurisdiction having been conferred upon the Courts of County Commissioners, that those courts thereby became courts of record.

Courts of General Sessions of the Peace were established in each county in the Province of Massachusetts Bay, by the Act of 11 Will. 3, c. 1. These were superseded in that State by an Act passed on July 3, 1782, establishing similar courts. These courts were attended by a grand jury, and they had jurisdiction to punish offences by fine or imprisonment, and were therefore courts of record. Although powers were conferred upon them respecting highways, and other business in their respective counties, requiring proceedings not according to the course of the common law, they were not thereby deprived of the character of courts of record.

By an Act passed on March 9, 1804, these courts were deprived of all their criminal jurisdiction, which was conferred upon the Courts of Common Pleas, and the Courts of Sessions had jurisdiction thereafter, respecting highways, and the business of their respective counties, and no other; and they ceased to be courts of record. Those courts were superseded in this State by the establishment of courts of sessions, having a similar jurisdiction, and without any civil or criminal jurisdiction at common law. Statutes of 1821, c. 73. These were not courts of record. They were abolished and new courts of sessions, having similar jurisdiction, were established, by an act approved on February 25, 1825. These were abolished and Courts of County Commissioners were established by an Act, approved on March 10, 1831, having similar jurisdiction. These, with certain modifications have been continued to the present time, without any jurisdiction in civil or criminal cases, in which proceedings according to the course of the common law were required, and without any jurisdiction to fine or imprison. The judgment on which this action is founded, not being the judgment of a court of record, the third plea is adjudged to be good.

Judgment for the defendants.

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

INHABITANTS OF WELD *versus* INHABITANTS OF CARTHAGE.

R. S. c. 32, § 1, provides, that upon the division of any town, and the incorporation of a portion of its territory into another *town*, the settlement of persons residing upon such territory at that time, shall be in the town into which it is incorporated.

But the settlement of persons residing on territory set off from one *town*, and *not incorporated into another*, is not changed by such dismemberment.

ON FACTS AGREED.

ASSUMPSIT, for supplies furnished to paupers, whose settlement was alleged to be in the defendant town.

Notice was legally given of the supplies furnished, and a denial of the defendants' liability seasonably made.

On July 17, 1849, the paupers had their legal settlement in the town of Carthage. On that day an Act of the Legislature was approved to set off a part of Carthage, and to incorporate the same into a plantation by the name of plantation No. 4. The paupers resided, at that time, on the territory so set off, and ever had, while living in Carthage.

If on these facts the plaintiffs are entitled to recover, the judgment is to be rendered for the amount sued for, otherwise for the defendants.

R. Goodenow, for the plaintiffs.

The Act of July 17, 1849, does not change the settlement of the paupers by any of the modes of acquiring a new one, specified in c. 32, R. S. The 4th mode in § 1, relates only to acquiring a settlement by the division of any town into two or more *towns;* and by the incorporation of a new town out of it.

The Act of July 17, 1849, is not a division of the town of Carthage in the sense in which the term division is used in the R. S. in the 4th mode. It does not contemplate the forming of one part of a town into a plantation.

No powers are given to the inhabitants set off by the Act of July. They are in an anomolous condition, having neither the powers of towns or organized plantations, and remain to this day without any kind of organization for political or municipal purposes.

The 17th rule of construction of the R. S., is not to be construed so as to change, alter or enlarge the powers, duties and liabilities of organized plantations as set forth and defined in other chapters of the R. S. Act of *March* 22, 1843, c. 20.

Plantations are said to be *quasi* corporations with limited powers. They have none, except what are given by statute, or implied from such as are given. The general provisions of the pauper law cannot be extended to plantations without further legislation. The statute does not require plantations to relieve and support their poor, none of its pro-

visions extend to them. The 53d §, c. 32, R. S., empowers them to raise money for the relief of the poor therein, but does not impose it as a duty. *Blakesburg* v. *Jefferson*, 7 Maine, 125, also *Means* v. *Blakesburg*, same vol., p. 132.

The facts find the settlement of the paupers in Carthage, since which, in none of the modes specified in R. S., c. 32, have they gained another.

J. S. Abbott, for the defendants.

It is admitted the paupers were inhabitants of and acquired their settlement in that part of Carthage which was "set off into a plantation" by a special Act of the Legislature of 1849, c. 214.

By that Act the town of Carthage was divided, and a certain part, together with the inhabitants, set off as aforesaid. Of the inhabitants so set off the paupers were a part.

If the part so set off had been annexed to another town, the settlement of these paupers would have no longer continued in Carthage. R. S. c. 32, § 1, Art. 4; *Great Barrington* v. *Lancaster*, 14 Mass. 429; *New Portland* v. *Rumford*, 13 Maine, 299; *New Portland* v. *New Vineyard*, 16 Maine, 69; *Smithfield* v. *Belgrade*, 19 Maine, 387; *Belgrade* v. *Dearborn*, 21 Maine, 334.

It is contended that the same principle applies in this case.

HOWARD, J. — It is conceded that the paupers, to whom supplies were furnished by the plaintiffs, had a legal settlement in Carthage, on July 17, 1849. On that day a portion of that town, on which the paupers resided, was "set off into a plantation by the name of plantation number four," by an Act of the Legislature which does not contain any provision respecting their settlement.

All settlements acquired under the laws of this State, remain until lost by gaining others, in some of the modes provided by statute. R. S. c. 32, § 2. In the fourth mode of § 1, of the same chapter, it is provided that, upon the

division of any town, and the incorporation of a portion of its territory into another town, the settlement of persons residing upon such territory, at that time, shall be in the town into which it is incorporated. But no provision has been made for a change of settlement of persons residing on territory set off from one town, and not incorporated into another. Their settlements legally acquired, will remain unaffected by such dismemberment. The paupers, therefore, retain their settlement in Carthage.

Judgment for the plaintiffs, according to the agreement.

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

COUNTY OF OXFORD.

PROPRIETORS OF ROXBURY *versus* HUSTON.

The corporate character of a plaintiff proprietary is admitted by pleading the general issue.

Where the plaintiffs organized themselves into a proprietary, and claimed and exercised control over a township, making sales of the land, holding possession of the contracts made by their agents, and of the notes given on such contracts, and have received payments for the land; it was *held*, that the tenant, holding under one who had recognized their rights, could not dispute their title.

The law will not presume a conveyance to have been made to a party in possession of land for many years, against his express admissions that no such conveyance has been made.

Where a party, in possession of land under a contract with the owner, has paid the amount due for the purchase money, the land is held in trust for the benefit of the party in interest, and his rights may be obtained by proceedings in equity.

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

WRIT OF ENTRY, for the recovery of lot No. 14, R. 11, in Roxbury.

The tenant pleaded the general issue, with a claim of betterments. It was stipulated, that upon so much of the evidence as was legally admissible, the Court might draw such inferences as a jury would be authorized to do, and render judgment by nonsuit or default, as the law will authorize.

The material facts in the case are sufficiently stated in the opinion of the Court, SHEPLEY, C. J., and TENNEY, WELLS and APPLETON, J. J., which was drawn up by

APPLETON, J. — This is a real action, in which the plaintiffs claim to recover lot No. 14, R. 11, and a tract of land east of Swift river, as fully described in the writ. Both of these tracts are within the limits of Roxbury. The defendant claims title under B. Palmer, who from the evidence has been in the possession of the premises demanded since 1814, and who claims to have acquired a title by adverse possession. This claim is resisted on the ground that he entered under a contract with the proprietors through their agent, and that consequently he cannot set up a title by adverse possession. The contract referred to, and which comes from the possession of the plaintiffs, is dated May 12, 1814, and is between Palmer and John Peck, agent of the proprietors of No. 7, now Roxbury, by Eben Poor, his attorney. By this, Palmer agrees to purchase, and the plantiffs to sell lot No. 13, R. 11, containing one hundred and fifty-six acres, and also a part of lot No. 16, R. 10, adjoining Swift river, and containing seventy-nine acres. Two plans have been introduced differing very materially, and from the evidence it is entirely doubtful, which is prior in time, or to which the greater credit should be given. The writ evidently refers to one plan, the contract between the plaintiffs and Palmer, to the other. According to the plan referred to in the contract, lot No. 13, R. 11, was sold by Palmer to Phineas Taylor, and is not demanded in the present action. According to the same plan, lot No. 16, R. 10, is on the west side of Swift river, as is the seventy-nine acre tract, which

is last described in the contract. The contract of 1814 does not refer to the tract described in the writ as on the eastern side of Swift river. The occupation of this tract by Palmer has been open, notorious and adverse for over forty years, and his title to this portion of the premises demanded is unquestioned.

By a comparison of plans it is very apparent that what in the writ is described as lot No. 14, R. 11, is identical with the tract of seventy-nine acres, to which the contract of 1814 refers.

From the evidence reported, it is manifest that Palmer, during the whole period of time which has elapsed since his contract was made, has recognized the title of the plaintiffs, and that his occupation was in subordination to their rights. He has made payments in part performance of that contract; he has uniformly treated it as subsisting, and does not seem to have done any act necessarily inconsistent with their title, or adverse thereto.

The right of the plaintiffs as a corporate body, to maintain the present suit, is admitted by the pleadings. When the proprietary was organized does not appear. It is however in proof, that those in whom the title is shown to have vested as tenants in common, have acted as members thereof. The proprietary has claimed and exercised control over the township; they have been in possession of the contracts made by their agents, and of the notes given on such contracts, and have received payments made by the contracting parties, and have allowed them in part performance thereof. The title of the plaintiffs may well be considered as established under the circumstances of the case, as against the tenant, or Palmer, under whom he claims. *Copp* v. *Lamb*, 3 Fairf. 312.

It has been urged that the deed from Mary Gilman to George Blake, dated March 16, 1816, is of eight thousand acres, in one of eight lots; that consequently Blake was not a tenant in common of the whole tract, and that there were two different sets of tenancies in common in the township, and

that it did not appear to which, the lot in dispute belonged. Upon examining the deed to Blake, it will be perceived that he held his interest as tenant of the whole township. The supposed fact upon which the argument rested, does not exist.

It has been further urged, that the amount due the proprietors has been paid, and that from the lapse of time a deed may be presumed. The evidence tends to show that the plaintiffs have been nearly, if not entirely paid. But at the same time, it is manifest from the admissions of Palmer, made within a few years, that he has not received any conveyance, and we know of no principle of law which would justify us in inferring a conveyance against the express admissions of the party, that one has not been made. If the amount due has been paid, the proprietary must be viewed as holding the land in trust, for the benefit of the party in interest, and may be compelled in equity to execute a conveyance upon such terms and conditions as the just rights of the parties may require.

The plaintiffs are entitled to recover lot No. 14, R. 11, which is identical with the tract of seventy-nine acres referred to in the contract made with the proprietary.

Defendant defaulted.

Shepley and *Dana*, for plaintiffs.

May, for defendant.

GILBERT *versus* CURTIS.

In an action involving the boundaries of the land, the grantor is a competent witness for the grantee, after he is released from his covenants of warranty, notwithstanding he has reserved in his deed the right to retake possession, and have the use of the same during his life, should he need it for his support.

In determining the place where a monument, described in a deed, stood, the acts of the proprietors of the adjoining lots, in ascertaining and establishing the old boundary, many years before a question concerning its location arose, are admissible in evidence.

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

TRESPASS *quare clausum.*

The plaintiff introduced a deed of the premises, from James D. Gilbert to himself, containing the usual covenants of warranty, and in which the grantor reserved the right to take possession and have the use of the land during his life, in case he should fall into a condition of need.

Objection was made to the witness, 1, on the ground of interest as warrantor, and 2, as incompetent on account of the reservation in the deed.

When the witness produced a release from his covenants of warranty, he was allowed to testify.

The defendant introduced a deed from Elijah Gilbert to Caleb Gilbert, dated Dec. 17, 1816, describing a line running from a birch tree, northerly parellel with the end line of the lots, to the side line of lot No. 161; *thence westerly, on said line, about forty rods to a stake and stones.*

The principal question was as to the length of this last line. The plaintiff contended that it should be extended about fifty-two rods; and offered testimony tending to show that in the fall of 1826, after the death of Elijah Gilbert, his three sons, his grantees, viz.: Josiah, Caleb and James D. Gilbert, being the proprietors of the adjoining lands, erected a monument at that point, intending to conform to the description in the deed from Elijah to Caleb Gilbert, and run a line northerly from it, parellel with the end lines of the lots.

The defendant objected to this testimony as inadmissible, but the Judge received it, submitting it to the jury, to determine from the evidence in the case, whether the monument was placed upon the spot referred to in the deed to Caleb Gilbert, as where the stake and stones were situated.

The defendant claimed under Caleb, and the plaintiff under Josiah and James D. Gilbert.

The counsel for defendant requested the instruction, *that* monuments, mentioned in the deed, and not then existing, and which were not erected until ten years after, in order to

conform to the deed, will not be regarded as the monuments referred to, and will not control the distances given in the deed.

The Judge declined so to instruct the jury, but did instruct them, that the testimony in reference to the erection of boundaries, ten years after the deed was made, by proprietors of the adjoining lands, being the parties to the deeds from Elijah Gilbert, was proper for their consideration, in determining the true boundaries of the land mentioned in the deed, but that it was not conclusive and might not control the rights of the parties.

A verdict was returned for the plaintiff.

The defendant excepted.

Ludden, for defendant. — 1. The grantor under the reservation in his deed, ought not to have been admitted to testify. *Lunt* v. *Brown*, 13 Maine, 236; *Freeman* v. *Blanchard*, 21 Maine, 446.

By the terms of the deed he reserved a life estate. — What else can be made of it? In reserving the *right* to enjoy, he reserved the enjoyment itself, with the condition between himself and his grantee as to his need of it, which is at most a question between themselves.

2. The requested instruction should have been given; it had reference to the *time when*, and the parties *by whom* monuments may be erected in order to conform to monuments mentioned in the deed, which are in law to govern the extent and control the length of the line named in the deed. If monuments are mentioned in the deed and afterwards erected in order to conform to it, that must be done immediately and by the parties to the deed. *Ken. Purchase* v. *Tiffany*, 1 Greenl. 219; *Frost* v. *Spaulding*, 19 Pick. 445; 1 Greenl. Ev. 301, note.

3. The instruction given was wrong. The construction given by parties themselves to boundaries is always proper testimony in reference to the true boundary; but never in order to conform to a monument mentioned in the deed, unless made by the parties to the deed. *Makepeace* v. *Bancroft*, 12 Mass. 469; *Blaney* v. *Rice*, 20 Pick. 62.

None but parties to the deed could *ever* erect a monument in order to conform to a call in the deed. Proprietors of adjoining lands may perform acts which may be proper evidence in determining the true boundary if they have not a common grantor, but they may not in any case except *with* the grantor, determine a call in the deed.

And then the proprietors of adjoining lands cannot determine the true boundaries against those deeds. If the monuments do not exist, the *distance* must control until it is shown that monuments intended to conform to those in the deed were *forthwith* erected by parties to the deed.

W. Gilbert, for plaintiff.

CUTTING, J. — It is contended, that James D. Gilbert, after being released from his covenants of warranty, was still an interested witness, because, in his deed to the plaintiff, he reserved to himself "the right to resume possession of the premises conveyed, and hold the same in case he should fall into a condition of need, and hold the same to his use, so long as he may be in need of the profits thereof during his life." But the witness stands indifferent as to the legal effect of the judgment, whether favorable or otherwise to the plaintiff, for it will settle nothing except the rights of the parties in this suit; and besides, whether the witness will ever be under the necessity of resorting to his reservation, is a fact too uncertain, remote and contingent to render him incompetent.

The principal question at the trial was, as to how far westerly on the north line of lot numbered twenty a certain line extended, described in Elijah Gilbert's deed to Caleb Gilbert, of December 17, 1816, as "about forty rods to a stake and stones."

The plaintiff offered testimony tending to show that the proprietors of the adjoining lands, in the fall of 1826, erected a monument at a point some twelve rods further westerly, intending to conform to the description in the deed. This, together with some testimony as to the defendants' claim, constituted all the evidence touching the termination

of that line, or the actual original location of the stake and stones. The plaintiff's testimony was clearly admissible, as showing the acts of the adjoining owners; and the instructions, that such was proper for the jury to consider in determining the true boundaries of the land mentioned in the deed with the qualification, that it was not conclusive, were unexceptionable. The length of the line was uncertain; the monuments referred to in the deed, (supposing them originally to have existed,) had been destroyed. How were the parties then to ascertain the true boundary, unless it were by evidence of the subsequent acts of the adjoining proprietors in amicably ascertaining and establishing the old boundary, more than twenty years before the commencement of the present action? The proof was not admitted to establish a new corner, but to show where the old one originally existed; to "determine the true boundaries of the land mentioned in the deed," and the ruling was more favorable for the defendant than the opinion of the Court in *Stone* v. *Clark*, 1 Met. 378, that "when both parties agree as to the boundaries and lines of a lot, they must be taken to be the true boundaries and lines, unless the contrary can be clearly shown."

The requested instruction was based on the hypothesis, that no monument was erected at the date of the deed, as to which there was no evidence, and the instructions given were all that the case required and the exceptions must be overruled, and judgment on the verdict.

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

TWEED *versus* LIBBEY.

The degree of certainty required in a plea in abatement is such, as to exclude all such supposable matters, as would, if alleged on the opposite side, defeat the plea.

Thus, when the plea is to the mode of service of the writ, that the defendant's property was attached, but by the return thereof, no summons in the form of

law was delivered to him, or left at the place of his last and usual abode, it is defective, although in the writ, he is declared against as an inhabitant of this State.

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

ASSUMPSIT, on a note of hand.

The writ was dated August 30, 1850, and described the defendant of "Byron, in the county of Oxford."

The officer's return thereon was in these words:

"Oxford ss., Sept. 21, 1850.

"At 8 o'clock in the forenoon, by virtue of this writ, I have attached all the right, title and interest the within named Daniel P. Libbey has, in and to any and all real estate in the county of Oxford, and have made return thereof to the registry of deeds, agreeable to statute."

At the Nov. Term, 1852, the defendant filed a plea in abatement, wherein he prayed judgment, and that the writ abate, "because, he says, his estate has been attached by virtue of said writ, and yet by the return thereof, it does not appear that any summons in form of law has been delivered to him, or left at his dwellinghouse or place of his last and usual abode as the law directs, whereupon he prays judgment of the same writ, and that it be quashed, and for his costs."

To that plea there was a demurrer, and joinder in demurrer.

Upon the writ, officer's return and pleadings, it was agreed that the case should be heard by the full Court, and such disposition made of it as shall be in accordance with the law.

C. W. Walton, for defendant.

The appearance of the defendant in this case is special, and there has been no waiver of defects in the service of the writ, or want of legal notice to the defendant. In this case the defendant has put in a plea in abatement, to which there is a demurrer, and if it is contended by plaintiff that the plea in abatement is insufficient, in not averring that the defendant was an inhabitant of the State; our answer is, that the defendant is described by plaintiff as an inhabitant

of the State in his writ, and that the case is not presented to the Court in the usual manner, upon plea in abatement, but upon a report or agreed statement, by which the Court is authorized to look into, and examine all the facts of the case as presented by the report.

Virgin, for plaintiff.

The only question that can rightfully arise in this case is, whether the plea in abatement is *good* or *bad.*

It is defective in not alleging *that defendant was not an inhabitant of the State* when the attachment was made. If he was not, service of the writ may be made, and the service and return complete and sufficient, without a summons being left or delivered in either mode stated in the plea, or in the section of the statute on which the plea appears to have been framed. Every allegation in the plea may be true, and yet the service and return be good; which cannot be the case with a *good* plea in abatement, since it must contain such technical accuracy, as shall exclude all supposable matters, which, if alleged on the part of the plaintiff, would defeat it. *Adams* v. *Hodsdon & al.* 33 Maine, 225.

TENNEY, J. — The defendant pleaded in abatement, that his estate had been attached, by virtue of the writ; and by the return on the same it does not appear that any summons in form of law has been delivered to him, or left at his dwellinghouse, or place of his last and usual abode, as the law directs. To this plea there is a general demurrer and joinder.

The degree of certainty required in a plea in abatement, is such as to exclude all such supposable matter, as would, if alleged on the opposite side, defeat the plea. Gould's Pl. c. 3, § 57.

The plea in this case is clearly bad. Every allegation therein may be true, and the service of the writ sufficient. By R. S. c. 114, § § 27 and 28, other modes of service are provided. When the defendant in the writ has never been an inhabitant of the State, or has removed therefrom, both

when he has and when he has not a tenant, agent or attorney within the same.

It is insisted, that this objection to the plea cannot avail, because the defendant is described in the writ as being of Byron, in the county of Oxford. The provisions referred to, are applicable to the time, when an attempt may be made to complete the service of the writ, and not when the writ is made out. The date of the writ in this case, is on Aug. 30, 1850, and the attachment of real estate is subsequent to that time. *Plea adjudged bad.*

Respondeas ouster.

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

BIGELOW *versus* HILLMAN *& als.*

Although no evidence is produced of the legal laying out of a town way, that fact may be inferred after a long series of years, in connexion with other facts tending to show that it was a town way.

The mere *use* by the public of a town way for many years, will not divest the town of its jurisdiction over it.

An unrestricted vote to discontinue a town way, takes effect from its passage; though the meeting at which it is passed, may be adjourned to a subsequent day.

Whether such a vote can be reconsidered, after the rights of third parties have intervened, *quere.*

Where one enters on land to which he has no title, nor justifies such entry under one claiming title, he cannot controvert the right of the party in possession.

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

TRESPASS, *quare clausum.*

The brief statement filed by the defendants set forth, that the *locus in quo* was a common and public highway, &c., and the acts by them done, were what they might lawfully do in passing and repairing the same.

Before the alleged trespass the town of Livermore had discontinued the way, and the plaintiff had enclosed it and put it in a state of cultivation.

The plaintiff derived his title to the premises from two

deeds of warranty, one from E. G. Howard, in 1836, in which was this clause — "reserving roads as now traveled through said premises;" the other from Oliver Pettengill, in 1850, in which was the following, — "reserving a privilege for all public highways legally across the same." [The facts proved appear in the opinion.]

The case was submitted to the Court, upon the evidence reported, for a decision in accordance with the law.

Walton, for the defendants.

1. The right of way may be acquired by *user,* and the right thus acquired will be coëxtensive with the use. When such *use* continues twenty years, the presumption in favor of the right becomes conclusive. *Coolidge* v. *Learned,* 8 Pick. 504; *Sargeant* v. *Ballard,* 9 Pick. 251; *Bolivar Manf. Co.* v. *Neponset Manf. Co.,* 16 Pick. 241.

This rule is recognized in our R. S., c. 147, § 14.

2. The use of this way in Livermore was never limited so as to make it a private way, nor was it limited in its use to the inhabitants of Livermore so as to make it a town way. It was used as a *thoroughfare* from Kennebec to Paris and the western part of Oxford county. Therefore the town of Livermore had no power to shut it up, and their vote discontinuing it was void.

3. But the plaintiff has introduced some records of the town here from which it may be contended, that this way was laid out by the town of Livermore. To this we have two answers. — 1. May not a laying out or dedication of a way, *coextensive with its use,* be presumed and be as effectual for all practical purposes, as if such proceedings had been had, provided such use has been continued, open and notorious for upwards of 30 years; a private way may be enlarged by *user* into a town way, and a town way into a highway or thoroughfare. 2. But the original laying out was not in conformity with law. It does not appear, that any report to the town of the laying out by the selectmen was made previous to the vote of acceptance. The article in the warrant "to accept and discontinue roads," was too

general in its terms to authorize the acceptance of any road that might be prepared. There is no width given for the road, it is a mere line. Neither is it stated in the vote of acceptance whether the "road" was understood to be a highway, town way or private way. The character of the way is not attended to and *none* of the proceedings are conformable to law. *Todd* v. *Rome*, 2 Maine, 55; *Harlow* v. *Pike*, 3 Maine, 438; *Young* v. *Garland*, 18 Maine, 109; *State* v. *Sturtivant*, 18 Maine, 66; *Christs Church* v. *Woodward*, 26 Maine, 172; *Carlton* v. *The State*, 8 Blackford, 208; *Hayes* v. *Shackford*, 3 N. H. 10.

4. We contend, that the Court should make a distinction in records that are legal as far as they go, and are only deficient in not stating *all* the requirements of law, and those which show proceedings *none* of which are conformable to law. If those of the latter class are put in, they should not be allowed to rebut the presumption of law arising from more than 30 years use of the road by the public.

5. The plaintiff fails to prove his title to the *locus in quo*. There is a reservation in his deed not only of the right of way, but of the land itself covered by the way.

6. The town meeting at which the vote of discontinuance took place, was continued till after the road was fenced up by the plaintiff and till after the obstruction had been removed by the defendants. Such a vote commonly takes effect from the time when the meeting was finally adjourned, because during all that time, the article could not be considered as disposed of, the town having the right to re-consider the vote of discontinuance at any time during the same meeting; and that pending such meeting the road could not legally be shut up.

Washburn, for the plaintiff.

RICE, J. — The *locus in quo*, was, at the time of the alleged trespass, within the inclosure, and under the cultivation of the plaintiff. Prior to that time, and for a period

of more than thirty years, it had been used as a way over which the inhabitants of the town of Livermore, and the public generally, had, at their pleasure, passed and repassed. The town of Livermore in 1851, prior to the time when the plaintiff inclosed the premises, had, at a meeting legally called, voted to discontinue the way over the land enclosed by the plaintiff. The principal question raised for consideration is, whether it was such a way as could lawfully be discontinued by the town.

Our statute recognizes three distinct classes of ways, to wit; public highways, town ways and private ways, and prescribes the mode by which each may be established.

The existence of either is ordinarily proved by the record of the proceedings, by which such ways are laid out, located and established. The existence of either class may also be established by proof of dedication, or such long continued use as will raise the presumption that they were originally legally established, but at a period so remote that the record evidence thereof has been lost by lapse of time.

Where the existence of a way is proved by record, the record will of course determine its character, whether it be a public highway, town way or private way. But when evidence of usage is relied upon to establish the existence of a way, the character of that usage and the purposes for which it has been used, will have a tendency to distinguish the class within which it will fall.

The law confides the duty of laying out private ways and town ways, which are designed principally for private convenience, or the accommodation of particular localities, to the town, or local authorities. Whereas, the establishment of public highways, which are designed for the accommodation of the great public, by opening thoroughfares from locations and sections of country remote from each other, and in which private and local convenience is made subordinate to the more enlarged necessities of the whole public, is confided to County Commissioners.

These distinctions apply more particularly to the manner of establishing and discontinuing ways, than to their use when established. Thus when a way is once opened, whether it be a public highway or a town way, it is alike subject to the use of the whole public. All citizens having occasion, may lawfully pass thereon, irrespective of the particular authority under which it had its origin. The rightful use of a town way is not limited to the inhabitants of the town in which it is located, nor are such inhabitants excluded from the use of public highways. Nor does the fact that the general public have used a town way for a long period of time change its character, or make it a public highway, otherwise all town ways would in process of time lose their distinctive character, and the jurisdiction of town officers over the ways, be wholly transferred to County Commissioners. Something more, therefore, than mere user by the general public, is required to divest towns of their jurisdiction, and convert established town ways into public highways. That change can only be effected by the official interposition of the County Commissioners.

The material questions presented by the case at bar are, how, and by what authority, was the way in question originally established? What was its original character? The defendants contend, that inasmuch as there is evidence that strangers had been accustomed to pass upon it, and as it had been used as a thoroughfare for travelers from different counties, and inasmuch as the plaintiff had failed to produce a record showing that it was legally laid out and established by authority of the town, the presumption of right must be as extensive as the use, and therefore it must be deemed to be a public highway, and as such, subject only to the jurisdiction of the County Commissioners.

The plaintiff on the other hand, contends that he does show the origin of the way, and although the records are incomplete, and do not show all the proceedings necessary to constitute a legal laying out by authority of the town, yet these records do show enough to raise the presumption

that the way was at its origin legally established by authority of the town, which presumption is confirmed and strengthened by the acts of the town and county since that time.

The defective records of the proceedings of a town may be introduced, as well as other testimony tending to prove that a way was laid out as a town way. *State* v. *Bigelow*, 34 Maine, 243; *Avery* v. *Stewart & al.* 1 Cush. 496.

The records of the town of Livermore, show that the town, in 1816, voted to accept the road in question. It was proved that said way was opened in 1818, by said town, and continued to be repaired by the inhabitants of said town from time to time, until discontinued; and was fenced out about three rods wide. It also appeared that said road was made on the ground where the selectmen run it out, before the vote of acceptance in 1816. It further appeared from the records of the court of sessions, that two of the inhabitants over whose land said road passed, appealed from the adjudication of the selectmen of said town, in regard to damages, and the question was referred to a committee agreed upon between the agent of said town, and the petitioners, and that said committee awarded damages in favor of the appellants, which damages, thus awarded, were afterwards paid by the town.

These facts all tend directly to prove that the road was originally established as a town way, and to repel the conclusion that it was a legally established public highway. Nor are these facts overcome, or materially weakened, from the consideration that it was, after it was opened, used by everybody who chose to use it; or that it was used as a thoroughfare for persons passing from Kennebec to Paris and the western part of Oxford county; or that it connected at each end with other public thoroughfares. As has already been remarked, all town ways are subject to the use of the general public, but do not by that use lose their distinctive character of town ways; nor are towns thereby divested of their jurisdiction over them.

We are therefore of opinion, that the legitimate inference

to be deduced from the facts in the case is, that the way in question was a town way, and as such it was competent for the town to discontinue it.

But it is objected that the town meeting at which the vote was passed to discontinue this way, was adjourned to a day subsequent to the time when the plaintiff erected his fences, and subsequent also to the day on which the defendants committed the alleged trespass, by removing said fences, and that said vote could only take effect from the day of the final adjournment of the meeting; because, it is contended, it was in the power of the town, at any time during the continuation of the meeting, to reconsider their vote by which the road had been discontinued.

Without considering whether it would be competent for a town to reconsider a vote, after the rights of third parties had intervened, dependent upon such vote, which may well be doubted, it is sufficient in this case, that the vote discontinuing this road was absolute in its terms, and at most, could be liable only to the contingency of being reconsidered at the adjourned meeting. That contingency never happened. The rights of the plaintiff under that vote, if deemed contingent until the final adjournment of the meeting, then became absolute, and related back to the day on which the vote was actually passed.

The case finds that the plaintiff was in the actual possession and occupation of the premises, and the defendants show no title thereto, nor do they claim to justify under any party who does claim title. They are not therefore in a position to contest the validity of the plaintiff's title. *Dolloff* v. *Hardy*, 26 Maine, 545.

A default is therefore to be entered, and damages assessed according to the agreement of parties.

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

CHAPMAN *versus* TWITCHELL.

Where the plaintiff referred to a third person to show the corner boundary of his land, and such third person pointed out a stump as such corner; the act is in the nature of an admission, and admissible in evidence against the plaintiff.

Traditionary evidence, in relation to the boundaries of a private estate, when not identical with one of a public nature, cannot be received.

The authenticity of a plan cannot be established by certificates made upon it by one deceased, who was not the surveyor.

Neither the declarations nor certificates of a deceased person, concerning the limits and boundaries of lots between individuals, of which he was never owner nor possessor, are admissible as evidence.

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

TRESPASS *quare clausum*, and cutting down and carrying away pine trees.

The cutting was admitted, and the question in the case was one of the eastern boundary of lot No. 18, in the town of Bethel.

The defendant, with other testimony, introduced one James Walker who testified, that in conversation about this lot, he requested the plaintiff to show him where the north-east corner of the land was. The plaintiff made some excuse, said "that Twitchell's boys had cut down the corner, and said Twitchell can show you where the corner is." Twitchell went and showed us the corner and the white pine stump. This stump was claimed as the corner by the defendant. To this testimony the plaintiff objected, but the Judge admitted it. The plaintiff having proved, that one Joseph Twitchell had been long dead, and was a surveyor, who originally run lines in said Bethel; that he was the father of Eli Twitchell, and that Eli, during his life time, kept the plans and records of the proprietors of Bethel, and that Eli had long since deceased and was an old man when he died; introduced one M. B. Bartlett. A plan was exhibited to the witness having upon it this certificate.—"This plan is the original one taken by Capt. Joseph Twitchell, it being the first plan of the town of Bethel. "Eli Twitchell."

The witness said the plan appeared to him to be the one he had seen in the possession of Eli Twitchell. He thought it was the one. The signature to the certificate, he knew to be the handwriting of Eli, whom he had often seen write. He had often seen him consulting this plan at the town clerk's office in Bethel where it then was.

The plaintiff then offered to introduce said plan, but it was objected to and excluded by the Court.

The jury returned a verdict for defendant and the plaintiff excepted.

Shepley & Dana, for the plaintiff.

1. The plaintiff is not in any manner connected with the transaction testified of by Walker. The whole is *res inter alios acta*, and has no legitimate bearing either on his rights or on this case. He is not bound by their going, in his absence and without his direction, to one corner rather than another. It is of no consequence to him what stump or tree was shown by Twitchell as the corner. He was not there, nor was the fact communicated to him afterwards. This evidence should have been excluded.

2. The plan should have been admitted. The preliminary proof was full. It was an ancient plan. It was not a mere private paper. Its public nature is to be remarked from the place in which it was usually kept, the town Clerk's office, where it was consulted as a plan of the original division of the town. Coming from that place, it has every stamp of being what it purports to be, and was in fact the best evidence of the actual original division of the town, that ever existed.

If Eli Twitchell had been present at the trial and testified, that this was the original plan made by the surveyor, it would have been sufficient. We have his declaration to that effect, made long since, and in questions of boundaries hearsay must, to a certain extent, be adopted as evidence to designate them. 17 Vin. Abr. 86; 2 Rolle. Abr. 186.

It is common to admit declarations of old people, who are dead; for then, as to ancient bounds, this is the best

evidence the nature of the case admits. *Blyther* v. *Sutherland*, 3 McCord, R. 258 and 229; *Porter* v. *Warren*, 2 Root, 22; *Boardman* v. *Reed's lessees*, 6 Peters, 341.

May, for defendant, made an elaborate argument in writing, sustaining the rulings of the Court. As to the introduction of the plan, it was a sufficient objection, that *no such plan was referred to in any of the deeds in the case.* And there was no more reason why the certificate of Eli Twitchell should be received as evidence in this case, as to the issue between these parties, than why any man's certificate of any fact should not be received as evidence in a court of law after his death in any case whatever. This certificate does not fall within any former rule for the admission of statements not under the sanction of an oath. *McKenney* v. *Waite*, 20 Maine, 349; *Oldtown* v. *Shapleigh*, 33 Maine, 278.

It is a certificate in no way against the interest of the party making it, nor was it "made by a person in the ordinary course of his business of acts or matters, or which his duty in such business required him to do for others. *Nichols* v. *Webb*, 8 Wheat. 337; *Patteshall* v. *Turford*, 3 Barr. & Ad. 8, 90.

WELLS, J. — The question between the parties was, how far eastward lot numbered eighteen extended. The defendant contended, that one of its eastern bounds was a white pine stump. James Walker, introduced by the defendant, testified that he and others went to the plaintiff, and asked him to show the north-east corner of the land bonded; that he said, Twitchell could show them where the corner was; that Twitchell went and showed them the corner, and the white pine stump. It does not appear by the exceptions, whether Twitchell was the defendant or some other person, but it is said in argument, that he was not the defendant. Twitchell made no declaration, that what he pointed out was the boundary. It is not stated that he said any thing, but it may be implied, that he was not entirely silent while he performed the acts. The language of the plaintiff would indi-

cate, that confidence could be reposed in the knowledge and fidelity of Twitchell. If Twitchell had gone with Walker and had pointed out the boundary, and the information, concerning what he did, had been communicated to the plaintiff, who should admit the accuracy of Twitchell, no doubt could exist, that such an admission could be legally received in evidence. What the plaintiff did say is equivalent to admission, that Twitchell knew the boundary, and would point it out truly. An admission, that one will perform an act correctly, is very nearly allied to an admission, that it has been so done, after it has taken place.

The admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed fact. In such cases the party is bound by the declarations of the person referred to, in the same manner, and to the same extent, as if they were made by himself. 1 Greenl. Ev. § 182; *Williams* v. *Innes*, 1 Camp. 364.

In the present case the conversation was between the plaintiff and the witness Walker. But it is to be regarded as an admission, and on this principle it is to be received, although not made to the party to the suit. *Brock* v. *Kent*, 1 Camp. 366, in note.

The testimony of the acts of Twitchell was properly admitted. The estimate of timber west of the white pine stump, and the certificates of it, do not appear to have any bearing upon the question at issue; they are immaterial facts, and could not in any manner have prejudiced the rights of the plaintiff.

The authenticity of the plan offered in evidence by the plaintiff, could not be established by the declarations of Eli Twitchell. The fact, that he had long since died, would not authorize their reception, any more than the declarations of deceased witnesses in ordinary cases. Assuming that the plan, which is not exhibited with the papers in the case, purports to delineate the lines of the several lots in Bethel, and that the certificate of Eli Twitchell, made upon it, is an

affirmation of their correctness, it could not be regarded as legally admissible. Traditionary evidence may be admissible in relation to the boundaries of parishes, manors, and the like, which are of public interest, and generally of remote antiquity, but it is inadmissible for the purpose of proving the boundary of a private estate, when not identical with one of a public nature. 1 Greenl. Ev. § 145. It would be a new element in the law of evidence, to admit the diagrams or declarations of deceased persons for the purpose of proving the limits or boundaries of lots between individuals, when those persons were never the owners or possessors of them.

Exceptions overruled.

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

PIERCE *versus* FAUNCE.

Construction of deeds.

Of the terms "more or less," in a deed.

The quantity of land named, governs the construction of a deed, in the absence of a reference to monuments, or of other more definite description.

Where no practical construction of a *conveyance* is given by the parties, by establishing monuments or boundaries, their acts upon the land and declarations concerning it, are not admissible in evidence to affect *its legal construction.*

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

TRESPASS *quare clausum*, and cutting two trees.

The cutting of the trees was admitted, and their value; and both parties claimed title to the land on which they stood.

The plaintiff claimed title under a levy made in 1842, upon the land as the property of William Prince, on an execution in favor of William Cousins, and by a deed of the land levied upon, from said Cousins to himself, dated in 1845.

The defendant traced his title, by introducing a deed of

warranty from James Dunn to Robert Waterman, for the consideration of $500, dated May 3, 1814, in which the description was in these words, "a certain tract of land situated in Hebron, in the county of Oxford, containing sixty-seven acres more or less, and being on the north side of the lot marked 'G,' in said Hebron, (now Oxford) with privilege of a road or roads through the same if necessary, and being the same land I purchased of Joshua, Abba and Godfrey Grosvenor."

Also a deed from said Waterman to *William Prince*, dated May 12, 1817, for the consideration of $450, containing the same description in the deed of James Dunn, excepting that it concluded thus, "being the same I purchased of James Dunn."

Also a deed from said Prince to Mary Chipman, dated Oct. 26, 1836, for the consideration of $167, in which the description read thus: "a certain tract of land situated in said Oxford, containing twenty-five acres, (more or less,) and being on the north side of the lot marked "G," in said Oxford, with the privilege of a road or roads, if necessary, through the same, it being the same land I purchased, and was deeded to me by Robert Waterman."

Also a deed from said *Chipman* and her husband to Orville Byram, dated April 24, 1838, for the consideration of $200, in which the description read thus; "a certain tract of land situated in Oxford, containing twenty-five acres, more or less, and being on the northerly side of lot marked 'G,' in said Oxford, with the privilege of a road or roads, if necessary, through the same, it being the same land that William Prince, of said Oxford, bought of Robert Waterman."

Also a deed of mortgage of the same premises from said Byram to Amos Chipman, the husband of said Mary, with the notes unpaid and assignment of the same to the defendant.

The plaintiff then introduced a deed to the defendant, of Diana Byram, dated Feb. 23, 1847, conveying to him her

right of dower in the land described in Chipman's deed to Byram. Also a deed from the defendant to Harriet H. Faunce, dated August 12, 1848, for the consideration of $200, the description being the same as that in the deed from William Prince to Mary Chipman.

There was much evidence introduced tending to show by Byram's declarations, while he occupied under his mortgage deed, that he claimed only 25 acres off lot "G," and the acts of *William Prince*, during that time, as to his occupancy of part of lot "G," by pasturing and cutting wood, and Prince's declarations to the officer who made the levy, "that he sold off 25 acres only of lot "G." Chipman also testified, that in 1850, in answer to defendant, he told him "that he bought only 25 acres of William Prince."

There was much other testimony introduced by both parties, as to the acts and declarations of those connected with these several conveyances, and all the parol testimony was seasonably objected to by one or the other party.

After all the evidence was out, it was agreed, that the case should be reported by the Judge, and submitted to the full Court, upon so much of the testimony as was legally admissible, and a nonsuit or default to be entered as the law may require. And in case a default shall be entered, the amount of damages was agreed.

N. Clifford, for plaintiff.

1. The levy conforms in all respects to the requirements of law and includes the land where the trespass was committed.

2. Where a deed is of doubtful construction as to boundaries, the construction given by the parties, as shown by their acts and admissions, is deemed to be the true one, unless the contrary is clearly shown. *Stone* v. *Clark*, 1 Met. 378; *Rockwell* v. *Adams*, 6 Wend. 467; 3 Mass. 362; 10 Mass. 149; 1 Term R. 701; 8 Cow. 273; 7 East, 199; 7 Met. 484.

3. Parol evidence of the practical construction given to a deed, by the parties thereto, or those claiming under them,

is admissible, when the language thereof, especially in the description of the land conveyed, is doubtful. 16 Johns. 17; 8 Conn. 439; 10 Met. 27; *Clark* v. *Withey*, 19 Wend. 320; 4 Dana, 336; 13 Cow. 309; 7 Barr. 185.

4. Deeds are to be construed so as, if possible, to effectuate the interest of the parties. *Bryan* v. *Bradley*, 16 Conn. 474; *Thomas* v. *Sumner*, 3 Sum. 170; *Moore* v. *Griffin*, 22 Maine, 350.

5. The declarations of a former owner of land, made while he was proprietor of the estate, respecting the extent and boundaries thereof, are competent evidence against those claiming title under him. *Treat* v. *Strickland*, 23 Maine, 234.

6. The defendant is limited by the terms of his deed, to twenty-five acres, and the land is situated according to the location at the time of the conveyance. 2 Ham. 327; 7 Wend. 136; 14 Wend. 625; 4 Monr. 63; 13 Ala. 31; *Hackett* v. *Sawyer*, 14 N. H. 65.

May, for defendant.

1. The levy on which plaintiff relies, gives no title; because the officer's return does not show, that the debtor, whose land was taken had any notice to select an appraiser, or that he did select one. R. S. c. 94, § 4; *Munroe* v. *Reding*, 15 Maine, 153; *Bannister* v. *Higginson*, 15 Maine, 73; *Dwinel* v. *Soper*, 32 Maine, 119.

2. The deed from Dunn to Waterman conveys "sixty-seven acres, more or less," on the north side of lot G. If there be no language in the deed more certain as to quantity than the words "sixty-seven acres, more or less," the words "more or less" will be rejected, and exactly sixty-seven acres will pass by the deed. *Jackson* v. *Loomis*, 18 Johns. 81; 19 Johns. 449; *Worthington & al* v. *Hyler*, 4 Mass. 205; *Blaney* v. *Rice*, 20 Pick. 62; *Cutts* v. *King*. 4 Maine, 482; *Stone* v. *Clark*, 1 Met. 378.

3. The reference in the deeds from Dunn to Waterman, and from Waterman to Prince, and from Prince to Chipman, shows that it was the intention of the parties in each deed,

to convey the same tract or parcel of land that each grantor had before had conveyed to him. These references being more certain than the number of acres mentioned in the deeds, as qualified by the words more or less, must control and pass the whole land which had been conveyed by the previous deed. *Abbott* v. *Pike*, 33 Maine, 204.

4. The parol evidence in the case, to the construction, is inadmissible, and if admitted would not change the case.

HOWARD, J. — The plaintiff claims title under a levy of execution upon the *locus in quo*, as the property of William Prince, in July, 1842. The defendant not denying the acts of alleged trespass, justifies under one deriving title from Prince, in 1836. It is assumed by the parties that the premises are a part, at least, of "lot marked G, in Hebron."

In 1814, Dunn conveyed to Waterman by deed of general warranty, "a certain tract of land situated in Hebron, (now Oxford,) in the county of Oxford, containing sixty-seven acres, more or less, and being on the north side of the lot marked "G," in said Hebron, with privilege of a road or roads, through the same, and being the same land I purchased of Joshua Albee and Godfrey Grosvenor." It appears by the plan and survey submitted, that lot G, contained sixty-seven acres only.

In the absence of a more definite description, or of other monuments, the quantity of land named must govern in the construction of the deed. The terms "more or less" neither limit nor extend the grant, but are generally used, in the absence of definite knowledge of the boundaries and extent of the land intended to be conveyed, to exclude a construction that the quantity named in the conveyance should be conclusive upon the parties. *Cutts* v. *King*, 5 Maine, 482; *Blaney* v. *Rice*, 20 Pick. 62. The conveyance of Dunn would, consequently, embrace the whole of lot G.

Waterman, in 1817, by a like deed of warranty conveyed to Prince, describing the premises in the same terms used in the deed of Dunn to himself, and closing the description

with, "it being the same land I purchased of James Dunn." By that conveyance, Prince acquired title to all the land in lot G. This is not controverted; but in 1836, he conveyed to Mary Chipman, by deed with general covenants of warranty, "a certain tract of land situated in said Oxford, containing twenty-five acres, more or less, and being on the north side of the lot marked G, in said Oxford, with the privilege of a road or roads, if necessary, through the same, *it being the same land I purchased, and was deeded to me by Robert Waterman.*"

It is a legal maxim, that every man's grant shall be taken by construction of law most forcibly against himself. Coke, 1 Inst. 183, a. By referring to the deed of Waterman to him, Prince made that a part of his conveyance; and it must be so regarded by legal construction. *Field* v. *Huston*, 21 Maine, 69; *Marr* v. *Hobson*, 22 Maine, 321. The description, though not agreeing in all respects, is sufficiently definite to show what estate was intended to be conveyed; and is broad enough to embrace the whole tract contained in lot G. The number of acres mentioned, when qualified by the terms *more or less*, furnish but slight evidence of the extent of the grant; and when followed, as in the deed from Prince, by a more definite description, it may be regarded as an estimate merely, by the parties, of the quantity of land in the absence of reliable information, rather than a designation of the extent of the tract conveyed. Particular recitals do not restrict a grant, when the general language of the conveyance is intelligible and effective.

There is not satisfactory evidence, that the parties gave a practical construction to the conveyance of Prince, by establishing monuments or boundaries, and their acts and declarations do not affect its legal construction. The declarations of Prince and Chipman, after they had conveyed, tending to show the extent of their claims, and the construction of their deeds, were not admissible. The fence across lot G, was not proved to have been a division fence, limiting the occupancy of the different tenants; nor was the

occupation, and cutting trees upon the land by Prince, proved to have been under claim of title, with knowledge of those claiming through his conveyance. By that conveyance, Prince parted with his title to lot G, and the subsequent levy upon it, by his creditor was inoperative. The plaintiff having neither title, nor possession, cannot maintain the action of trespass *quare clausum fregit.* *Plaintiff nonsuit.*

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

LARRY *versus* LUNT.

A right of way cannot be established by *user*, where such use arose by reason of a legal location.

A town way, which had its origin and continuance by virtue of a legal location, may be discontinued, although *used* for more than twenty years.

ON FACTS AGREED.

TRESPASS *quare clausum.*

The plaintiff was in possession of the Forbes farm, so called. The defendant with his team passed over a portion of it, but within the side lines of a way which had been traveled upwards of twenty-four years, in going to and returning from the Roberts farm, (so called,) and for other purposes. There the road terminated.

The defendant owned the Roberts farm, at the time of the alleged trespass, and also a forty acre lot adjoining. There was no other road by which to get on and off the said Roberts farm, but there was a county road which run across one corner of said forty acre lot.

By the town records, this way, on which the defendant was traveling, was laid out by the selectmen in 1825, and discontinued in 1849, and before the trespass complained of.

The Court were at liberty to draw such inferences as a jury might, and to order a nonsuit or default according to law.

Black, for the plaintiff.

1. The way was a town or private way, located by the authorities of the town, and duly accepted. It was opened, publicly used and acquiesced in for a series of years. Statute of 1821, c. 108, § 9; 3 Maine, 438.

2. If there was any informality or defect in the proceedings establishing the way, all objection on that account has been waived by neglect to take advantage of them. 11 Mass. 447; 9 Pick. 51; 20 Pick. 71; 10 Pick. 519; 11 Pick. 269; 1 Met. 336.

3. If any way had been acquired by prescription, it was a private way. It does not appear that there were any buildings of any description upon it, but it simply led across the Forbes farm to the Roberts farm and there terminated. It could consequently have been used for no other purpose than for the benefit of the occupant of the Roberts farm, and for the purposes of its own repairs.

4. It would not be a way of necessity. Convenience alone is not sufficient to create or continue a way. 24 Pick. 102.

5. The town may discontinue a town or private way at a meeting duly called for that purpose, without any action of the selectmen. The R. S. do not differ essentially from the statute of 1821, in that respect.

The town did discontinue the way in question before the alleged trespass. R. S. c. 25, § 30; *Latham* v. *Wilton*, 23 Maine, 125.

Walton, for the defendant.

SHEPLEY, C. J. — Upon the facts presented by the agreed statement, the defendant will find no justification for his passing across the farm of the plaintiff, unless he had acquired a right to do so, upon an existing way, established by usage, or laid out by the selectmen, and accepted by the town of Peru.

No town way can be considered as established by its being used as a way, when such use appears to have had its

origin and continuance by virtue of a legal location, and when such way appears to have been legally discontinued. A way appears to have been laid out by the selectmen of that town on June 15, 1825, across the farm now owned by the plaintiff, and to have been accepted by the town at a meeting holden on September 12, 1825. The warrant contained an article to accept any roads laid out by the selectmen and reported at that time.

It does not appear by the return of the selectmen, that the owners of the land were notified. There appears to have been an acquiescence in its location and use, for more than twenty years, and the presumption of law is, that due notice was given. *Harlow* v. *Pike*, 3 Greenl. 438. No fact is presented tending to rebut that presumption.

The return of the constable upon the warrant does not state how he notified the qualified voters. It does not appear, that the town had agreed upon any mode, in which it should have been done. There appears by the record, to have been a meeting at the time and place, at which business was transacted. The presumption therefore is, that the voters had been summoned in such manner as the town had agreed upon. *Ford* v. *Clough*, 8 Greenl. 334.

A town meeting appears to have been summoned to be holden on March 5, 1849, by virtue of a warrant containing an article to see if the town would discontinue this way, and at the meeting a vote was passed to discontinue it. It is not perceived that it was not legally notified, as required by statute, c. 5, § 6. The town was authorized to discontinue such a way by statute, c. 25, § 30.

The defence failing, the defendant is to be defaulted.

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

HOUGHTON *versus* HOUGHTON.

To make an award upon a parol submission binding, it must be proved that the parties mutually and concurrently agreed to abide by it.

What words were used in making *such agreement*, and the meaning attached to them by the parties, under the circumstances of their utterance, can only be determined by the jury.

A claim in set-off, to be available, must be due and payable at the time of the *commencement* of the plaintiff's action.

But a mere *liability* as surety, existing at the time, but not discharged till *after* the plaintiff's suit, cannot be allowed in set-off.

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

ASSUMPSIT, for services rendered, on account annexed to the writ.

The defence set up was, that the whole matter in suit had been referred under a parol submission to referees, who had made up and notified the parties of their award, allowing the plaintiff $50, and that this action was not upon the award.

An account in set-off was also filed, for paying a note for the plaintiff, on which the defendant was surety, to the amount of $105. At the time of the commencement of this suit, this note was outstanding, and before the sitting of the Court to which the writ was returnable, the defendant paid and took up the note, and filed the claim for money paid in set-off.

The presiding Judge instructed the jury, *that* if they should find that the parties had agreed to submit the claim sued for in this action to referees, and that the referees had met and heard the parties and made up an award, and that the parties had mutually agreed, that the award should be final, such award would be a bar to this action, the amount of such award not being included in it, although neither the submission nor the award were reduced to writing; *that* it was not necessary that the parties should have used the words "promise, or abide by, or stand to it," in order to constitute a mutual agreement, that it should be final; but

that they must be satisfied that some words were used by the parties which constituted an agreement that it should be final.

He further directed them, *that* they should not allow any thing in set-off for the money paid by defendant as surety of the plaintiff, as charged in his account, because it was paid since the commencement of this action.

The jury returned a verdict for plaintiff and defendant excepted.

May, for defendant.

1. The Judge erred in saying to the jury that they must be satisfied that some words were used by the parties, which constituted an agreement that it (the award,) should be final. By law the jury were not, and should not have been confined to the words used, but should have been left to infer such an agreement from the agreement to refer, and from all the facts and circumstances in the case, or from words in connection with the acts of the parties. *Herbert* v. *Ford*, 33 Maine, 90; *Copeland* v. *Hall*, 29 Maine, 93.

2. The Judge erred in directing the jury to disallow the demand filed in set-off for money paid as surety, between the bringing of this suit, and the entry of the action. The right of set-off depends upon the construction of the statute, and by that any demand which the statute allows may be filed in set-off, if due and payable when filed. *Call* v. *Chapman*, 25 Maine, 28; R. S., c. 115, § 24, and on.

C. W. Walton, for plaintiff.

To the point that an award of referees is not binding upon the parties where the submission is by parol, unless they agreed at the time of the submission that it should be final, he cited 2 Greenl. on Ev. § § 69 and 72; Bouvier's Law Dict. title Submission. And to the point that the money paid by defendant as surety for plaintiff, after the commencement of this suit, could not be allowed in set-off, he cited *Varney* v. *Brewster*, 14 N. H. 49; *Cox* v. *Cooper*, 3 Ala. 256, and other authorities cited in U. S. Dig. sup. vol. 2, p. 758, § § 14 and 15.

APPLETON, J. — This case comes before us on exceptions to the rulings of the presiding Justice. The only question for consideration is, whether they were in accordance with the legal rights of the parties.

The defence to the plaintiff's claim rested upon an award made by referees under a parol agreement to refer. The jury were instructed that "it was not necessary that the parties should have used the words promise, or abide by, or stand to it, in order to constitute an agreement that it should be final, but they must be satisfied that some words were used by the parties, which constituted an agreement that it should be final." To the rest of the charge, so far as it related to the award, no objections were made in argument. When the submission is by parol, to sustain the award, it must be proved that the parties mutually and concurrently agreed to abide by it. It is the province of the jury to determine what words were used, and the meaning attached to them by the parties, as it may be gathered from the circumstances attending their utterance. In the first clause of the instruction, the jury were informed that no particular or prescribed words were necessary to constitute an agreement. The utmost latitude was given them, in affixing the meaning of the words by which the agreement to abide might be substantiated. The words used, with the accompanying facts and circumstances, so far as they might aid in giving a construction to the language of the parties, were before the jury, and no restriction or limitation was imposed as to the meaning they should affix. In *Copeland* v. *Hall*, 29 Maine, 93, the Court left the jury to find the words, but withdrew the consideration of their meaning from the jury, and determined their construction as matter of law, and this was deemed erroneous. But such was not the case here.

When the plaintiff sued out his writ, there had been no payments made by the defendant, which could have been filed in set-off. Since that time, the defendant has paid a note of one hundred dollars, which he signed as surety for

the plaintiff, and upon which he was then liable. That amount he has filed in set-off, and claims to have allowed in reduction of the plaintiff's demand.

The rights of parties are ordinarily to be determined upon the state of facts, as existing when the claim in controversy was put in suit. "It may be considered as a settled rule of pleading," says Lord ELLENBOROUGH, in *Le Bret* v. *Papillon*, 4 East, 506, "that no matter of defence arising after action brought, can properly be pleaded in bar of the action generally." All such matters should be pleaded in bar of the further maintenance of the suit. The set-off of mutual demands is determined by statute, and the rights of parties must depend upon the provisions by which it is regulated. It was determined in *Evans* v. *Prosser*, 3 T. R. 187, that a plea of set-off, that the plaintiff was indebted to the defendant at the time of the plea pleaded was bad, and that it should state that he was indebted at the commencement of the action. In *Speedbury* v. *Gillam*, 4 Eng. Law and Eq. 464, PARKE, B., says, "the plea of set-off applies to an account taken at the commencement of the suit."

The R. S., c. 115, do not require a set-off to be pleaded, as in the English practice. By § 41, it is provided that "all cases of set-off may be tried upon the issue joined, without any further plea; and in all actions except assumpsit, when an issue to the country is not otherwise formed, the defendant may plead that he does not owe the sum demanded by the plaintiff; which shall be deemed a good plea or general issue, for the purpose of trying the merits of the cause." As the general issue relates to the rights of the parties as existing at the commencement of the suit, the set-off must have reference to the same period of time. By § 44, the statute of limitations, "if applicable to the set-off," is to "be applied in the same manner, as if an action thereon had been commenced at the time when the plaintiff's action was commenced." The set-off when filed is to have relation back to the date of the plaintiff's writ, and its effect is to be the same as if then filed. Though the set-off may be

outlawed when filed, yet if that was not the case when the plaintiff commenced his action, the bar of time will not apply. It is obvious that it was the intention of the Legislature, that the set-off should be deemed as of the date of the writ, and that nothing subsequently accruing could be filed. *Varney* v. *Brewster*, 14 N. H. 49. It was decided in *Bigelow* v. *Folger*, 2 Met. 255, that when, after a suit is commenced by an administrator, the estate is insolvent, the defendant may set off a note which falls due pending the suit, though not due and payable when the action was commenced. "This," says SHAW, C. J., "does not stand upon the law regulating set-off generally, but on the law respecting the settlement of insolvent estates."

The set-off was rightfully rejected.

The defendant may commence a suit on his claim, if not allowed by the plaintiffs, and the Court have the authority to order a set-off of the respective judgments, if justice shall require it. *Exceptions overruled.*

Judgment on the verdict.

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

(*) CHAFFIN *versus* CUMMINGS.

An execution against a Rail Road Company may be levied upon the property of an owner of shares to the amount of his stock, for debts contracted during his ownership.

To the validity of a levy made on such an execution upon the property of an individual, it must appear —

I. That he was a share holder to the amount levied. —

It is not necessary, however, that such fact be shown by the corporation records or by the officer's return. It is provable by parol.

II. That the levying officer, forty-eight hours before the levy, gave him notice of the amount of the debt and of an intention to make the levy. —

It is not requisite, however, that the levy be made at the end of the forty-eight hours. A levy was sustained, though not made till twenty-four days after such notice. Neither will such notice become ineffectual by an intermediate payment of a part of the debt.

III. That there was no attachable property of the corporation. —

Held, that the levying officer's return upon the execution, that he cannot find such property, is conclusive evidence that there was no such property.

In a controversy as to the validity of such a levy, it is not competent for the stockholder to object that the creditor had reserved and secured usurious interest in his contract with the corporation.

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

WRIT OF ENTRY for possession of a tract of land.

The land formerly belonged to the demandant.

It is, however, claimed by the tenant under a levy to himself, on an execution, issued upon a judgment of $2449,46, which he had recovered, on contract, against the Buckfield Branch Rail Road Company, of which company the demandant was alleged to be a member. The land was set off at the appraised value of $1000.

The demandant offered to prove that, in the contract between the tenant and the Rail Road Company, usury was reserved and secured by the tenant. This evidence was excluded.

To show that the demandant, at the time of the contract between the Rail Road Company and the tenant, was the owner of shares to the amount of $1000, the tenant introduced evidence having some tendency to prove, *that* the demandant, before the organization of the Company, had subscribed to "take and fill" shares to that amount; *that* he attended the meeting to organize the Company; and *that* he had admitted his ownership of stock to said amount. But no record of the corporation was found, showing that he had ever been a stockholder.

The demandant then contended, that by reason of certain defects in the proceedings, the levy passed no title.

1. That the levying officer does not state in his return that the demandant was an owner of stock.

2. That the notice required by the statute does not appear to have been to the demandant as owner of stock.

[MEMO. — The provision of the statute is, that the officer may cause the property of the stockholder to be levied upon, "after giving him forty-eight hours previous notice of his intention to levy, and of the amount of the debt or defi-

ciency, unless the stockholder shall show to the creditor or officer, attachable corporate property or estate."]

On this point the officer's return is as follows:—

"On the 4th day of April, 1851, I notified the following persons, stockholders in said corporation, to wit: Rodney Chaffin, (and twenty-one others,) by giving to each of them verbal notice of the amount of the debt, to wit: of the amount of the within execution, and of my intention to levy the within execution upon their several individual property, rights, credits and estate, to the amount of the stock owned by them severally in said corporation, unless they should on demand and notice aforesaid, disclose and show to the execution creditor, within named, or to me, as an officer, attachable corporate property or estate belonging to the said corporation, sufficient to satisfy the within execution, and all fees; and now, forty-eight hours from and after the time of giving the notices as aforesaid, to each and all of said stockholders above named, has expired, and they each and all have neglected to disclose and show to me, as an officer, or to the within named execution creditor, attachable corporate property or estate, belonging to the said corporation, sufficient to satisfy the within execution and all fees."

After the giving of that notice, and before the levy, which was on the 28th of April, some of the other stockholders paid to the officer some considerable sums upon the execution.

3. That the company itself had attachable property.

In this respect the demandant offered to show, that, at the time when the levy was made, the Rail Road Company were the owners of a right in equity to redeem their road and franchise from a mortgage, which they had given to Francis O. J. Smith, for $35,000, and that the same being attached, prior to the tenant's levy, on a writ in favor of Porter and Benson, was sold after the levy, upon an execution issued on the judgment, which they recovered in their suit, for the sum of $6005.

On this point, the officer returns that he had "made diligent

search for corporate property or estate, belonging to the within named Buckfield Branch Rail Road Company, wherewith to satisfy the within execution, and having demanded the same of Stephen Emery, as treasurer of said corporation, wherewith to satisfy the same, I have first ascertained and hereby certify, that I cannot find corporate property or estate belonging to the said corporation."

The cause was thereupon taken from the jury, by agreement of the parties, with authority for the Court to enter judgment upon nonsuit or default, or to order a new trial, as justice may require.

May, for the demandant.

1. There was no competent evidence that the demandant, whose land was taken, was ever a stockholder.

No book nor record of the corporation exhibited such an ownership. And the levying officer dared not to certify it, though his return should state all the facts necessary to establish title.

If the demandant was a stockholder, there must have been recorded evidence to show it, and by such evidence, being in its nature of a higher grade, the fact ought, by the rules of law, to be proved.

But the parol evidence, even if admissible, was insufficient to show such an ownership, even to the amount of a single dollar; and especially was it insufficient to show ownership at the time the plaintiff's usurious debt was contracted.

2. Between the time at which the officer notified the demandant of the amount of the debt, and the time of the levy, he had collected a large part of the execution, some by levies on the property of stockholders, and some by payments made in cash. Thus, when he levied the demandant's land, a much smaller sum was due than that of which he notified the demandant. In such case it was the officer's duty to give him a new notice of the balance due. To pay a balance so reduced, he might have shown sufficient property of the corporation.

3. The levy, if made at all, must be made immediately

after the lapse of the forty-eight hours notice of the intent to levy, for want of corporate property.

The certificate of such want of corporate property has relation to that time. It nowhere appears by the officer's return or otherwise, that on the day of the levy, the corporation had not an abundance of attachable property to pay its whole debts.

4. We next say, that the right to take individual property for corporation debts is only given in case of deficiency of attachable corporate property or estate. If such property does exist, then no proceedings can authorize the officer in any case to seize that of the individual. His right to seize such property does not depend upon the officer's return, but upon the fact. Stat. c. 76, § 18. The report in this case shows, that, notwithstanding the return of the officer, the corporation had attachable estate, to wit: a right in equity to redeem their road and franchise from a mortgage held by F. O. J. Smith, or rather that the plaintiff offered to show this, and that it subsequently sold in Feb. 1852, for six thousand dollars. The officer's return upon this point is not conclusive, because his right to act at all in seizing individual property depends upon this fact, and without such deficiency of attachable corporate estate, he has no right or authority to make such certificate. In other words, the jurisdiction of the officer, so to speak, depends upon the fact of such deficiency of corporate estate, and without that all his acts and return in reference to a stockholder are merely void. This case, therefore, differs from that class of cases where the acts of an officer come within the range of his duties, inasmuch as without an actual deficiency of corporate estate he has no right to proceed. Should it be said that this right was subject to an attachment of Porter & Benson for its full value, we reply that a creditor before taking individual property should have waited until that right was sold, and then proceeded and sold the company's right to redeem from that sale. If the corporation have corporate attachable property, the right to take individual

property does not exist, nor is the case at all altered by the statute, if that property happens to be at the time in a condition that it cannot be seized and levied upon at once. If the corporation have property that is in its nature attachable, it must first be disposed of and appropriated according to law, before the individual stockholder can be made to pay, or his property be subjected to be taken in execution. It is the evident intention of the statute, that the stockholder shall be liable only in the last resort. We say, therefore, that it being apparent, (for what is offered to be proved by the demandant must be taken as proved,) that the corporation had attachable estate to the value of six thousand dollars when the defendant made his levy, that levy could give him no rights; it was premature. It could not then be told whether Benson & Porter would obtain judgment, and if they did, whether they would levy on the road and franchise. It would most clearly be an interpolation of the statute to require the attachable estate of the corporation to be unincumbered or liable to be immediately levied upon or sold.

5. The debt of the defendant was usurious to a large extent, as we offered to prove. The statute never could have contemplated that stockholders should be individually liable for debts, the creation of which the statute forbids. The defendant cannot shield himself under his judgment, against the *corporation*, against the well founded complaints of the *stockholders*, that the debt to which he is in the last resort made a party, was not honestly and *bona fide* due. It would be a reproach to the law if it were so. It would be against the policy of the law to subject the minority in a corporation to the deprivation of their property, from an unlawful exercise of power on the part of the majority.

The stockholders should have the power somewhere to resist such legal injustice and extortion; and although the corporation, as such, might be estopped after judgment to say that it was usurious; still the stockholder, who by force of the statute is made a party to that judgment *without no-*

tice, should have the power to look into the legality of demands. In the case before the Court, the levy upon the plaintiff's property, has connected him with the judgment, and gives him a right to look into it. *Rankin* v. *Sherwood*, 33 Maine, 509; *Merrill* v. *Suffolk Bank*, 31 Maine, 57.

Cummings and *Shepley & Dana*, for the tenant.

SHEPLEY, C. J. — The tenant claims title to the land demanded, by levy thereon of an execution, issued on a judgment recovered by him against the Buckfield Branch Rail Road Company.

It is provided by statute, c. 76, § 18, that "in case of deficiency of attachable property or estate, the individual property, rights and credits of every stockholder thereof, shall be liable to be taken on execution, to the amount of his stock and no more, for all debts of the corporation contracted during his ownership of such stock."

The debts, upon which the judgment was recovered, appear to have been contracted by the corporation during the months of August, September and October, 1849.

The first question presented is, whether the demandant was the owner of stock in the corporation, when the debts were contracted. He was one of the persons named in the Act of incorporation, approved on July 22, 1847. The Act being made a public one by statute, did not become operative until thirty days had elapsed after the close of that session of the Legislature on August 3, 1847. He would not become an owner of stock, by being named in the Act as one of the corporators.

A paper entitled "Subscription to Buckfield Branch Rail Road," bearing date on August 21, 1847, and containing certain stipulations, was signed by the demandant. Among them was the following; — "the undersigned hereby agree to take and fill the number of shares set against their names respectively, in the capital stock of the Buckfield Branch Rail Road corporation, on the terms and conditions following." There can be no doubt, that this paper had reference

to the corporation, whose future legal existence had been provided for. The demandant appears to have attended a meeting for the organization of the corporation, and to have taken a part in the proceedings; to have stated to one of the appraisers, when the levy was made, that he was the owner of ten shares of the stock, and that he had paid for them; to another person at another time, that he had taken a thousand dollars in the stock, and had worked more than that; to have made a settlement with the treasurer of the corporation, on May 12, 1851, allowing the amount of ten shares of its stock to be deducted from his account against the corporation.

A person, who before its organization, subscribes for stock and afterwards claims to be a stockholder, and acts as one in meetings of the corporation, and whose claims are admitted by it, by allowing him to act as such, and by receiving payment for his stock, must be regarded as the owner of the stock thus subscribed for and acted upon. *Chester Glass Co.* v. *Dewey*, 16 Mass. 94; *Spear* v. *Crawford*, 14 Wend. 20; *Kidweller Canal Co.* v. *Raby*, 2 Price, Ex. R. 93; *Kennebec & Portland R. R. Co.* v. *Palmer*, 34 Maine, 366. To make him an owner, it is not necessary that he should have paid for his stock. A corporation may give credit for its stock, as well as for any other property sold by it. Nor is it necessary that certificates should have been issued. These only constitute proof of property, which may exist without them. When the corporation has agreed, that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract, made upon a valuable consideration.

It is insisted, that parol evidence cannot be received, to prove that a person has become the owner of shares; that the records or books of the corporation are the only legal evidence of that fact, and the case of *Stanley* v. *Stanley*, 26 Maine, 191, is relied upon as having so decided. That

case decides, that the transfer of stock from one person to another, is by statute required to be entered upon the books of the corporation, before it can be effectual to discharge or incur certain liabilities, and that the transfer can be proved only by the books; not that a title to stock originally acquired from the corporation should be so proved.

The decision upon the facts, as well as the law, being submitted, the Court cannot but conclude, that the testimony introduced is sufficient to prove, that the demandant was an owner of ten shares of the stock, when the debts, on which the judgment was founded, were contracted by the corporation.

It is further insisted, that the tenant did not acquire any title by the levy, on account of defects in the proceedings.

The first alleged defect is, that the officer does not state in his return, that the demandant was an owner of stock. No provision of a statute has been presented or is known, requiring that all the facts necessary to constitute a title to real estate, should appear of record. When such titles are acquired by the enforcement of liens created by statute, they may be established without full proof from records. An officer cannot be required to state in a return of his official doings, any act not performed by him, or any fact not officially known to him, unless required by law so to do. Although the statute requires the clerks of corporations to communicate to him information respecting the ownership of stock, it does not make it his official duty to ascertain and determine who are owners. He could not be held responsible for the truth of any such statement, and cannot therefore be required to make it.

Another alleged defect is, that the notice required by the statute does not appear to have been given to the demandant as the owner of stock.

The provision of the statute is, that the officer may cause the property of the stockholder to be levied upon, "after giving him forty-eight hours previous notice of his intention, and of the amount of the debt or deficiency," unless the

stockholder shall show to the creditor or officer, attachable corporate property or estate.

The amount due when the notice is given is to be stated, and a payment made during the forty-eight hours, cannot destroy the effect of a notice given in strict conformity to the provisions of the statute, and deprive the creditor of the right secured to him by it, and require a new notice to be given. If such a construction were made, the corporation or a stockholder, might by payment of a very trifling sum, made once in forty-eight hours, occasion delay and expense for a long time, when the debt was large. No such construction is required to preserve the rights of the owner of stock. Any payment made after notice, will operate favorably for him. Nor will his estate be exposed for an indefinite time to be taken. The notice cannot be effectual, after the return day of the execution by virtue of which it has been made; and it is not perceived, that it can be injurious to the owner of stock to be allowed a longer time than forty-eight hours, during which he can avoid a seizure of his by showing corporate property.

Another objection made to the title of the tenant is, that the corporation appears to have had "attachable corporate property or estate," and that it is only in case of deficiency of such property, that the property of the owner of stock is liable to be taken.

The statute does so provide and it also provides, that his liability shall continue for one year after a record of the transfer of his stock, and for six months after judgment recovered in any suit commenced within that year, "provided, that in every such case the officer holding the execution shall first ascertain and certify upon such execution, that he cannot find corporate property or estate."

When this clause is considered in connexion with the other provisions, there can be little doubt, that it was intended to make the creditor's right to resort to the property of an owner of stock depend upon the officer's return, that he could not find corporate property or estate, and not upon

his ability to prove by other testimony, that no such property existed. If this were not the true construction, it would always be in the power of a corporation to protect the property of its stockholders from being taken to pay its debts, by keeping a small amount of attachable corporate property secreted, so that neither the creditor or officer could ascertain its existence.

The return of an officer respecting a duty expressly required of him, must be conclusive upon other parties of the fact that no corporate property or estate was to be found.

The proof of usury offered and excluded, if it had been offered by the corporation, could not have prevented the recovery of a judgment. It could only have diminished the amount recovered. This cannot be done collaterally.

Demandant nonsuit.

TENNEY, WELLS and APPLETON, J. J., concurred.

(*) EASTMAN *versus* INHABITANTS OF STOWE.

To recover for damage done to a land-holder, by the location of a town road, he must pursue the mode prescribed by R. S., c. 25, § 31.

Such recovery cannot be had by a statute submission of the claim to referees.

ON EXCEPTIONS from the late DISTRICT COURT, COLE, J.

Motion to accept an award of referees.

The heirs of Asa Eastman claimed to recover for the damage done to their land, by the establishment of a town road across it.

The plaintiff was one of the heirs, and acting both for himself and the others, presented the claim before the defendants in a town meeting, by whom it was rejected. He then, acting in the same capacity, joined with one O. H. Day, in submitting the claims to referees. Day was the general agent of the town, but had no special authorization as to this claim.

The submission was entered into in the statute form. The referees awarded that the damage was $100, and should be

paid by the town. A majority of the selectmen were present, and assisted at the trial before the referees.

Eastman presented the award and moved for its acceptance. The defendants resisted it, and offered evidence of the facts above stated. The Judge ruled such evidence inadmissible, and accepted the award, and the defendants excepted.

Hastings, in support of the exceptions.

A. R. Bradley, contra, cited R. S., c. 25, art. II, § 31; *Knowlton* v. *Plantation No.* 4, 14 Maine, 20; *Buckland* v. *Conway,* 16 Mass. 396; *Pittston* v. *Clark,* 15 Maine, 460.

TENNEY, J. — The acceptance of the report of a majority of the referees was opposed by a special agent of the town, duly elected for that purpose, on the ground that the town agent, who entered into the agreement to submit the claim annexed to the submission, had not authority to bind the defendants in the premises, not having special authority therefor. No authority to enter into the agreement was shown; although it was admitted, that the person who signed the submission was at the time the general agent of the town.

The statute c. 25, § 31, has provided the mode in which a party, who has sustained any damage in their property, by the laying out, altering or discontinuing any town or private way, may ascertain who is liable therefor, and the amount he is entitled to receive. The mode adopted in this case is clearly one not embraced in the provision. Neither does it appear that the road was one, on account of the location of which the town was liable to the payment of damages, alleged to have been sustained.

Exceptions sustained.

Proceedings dismissed.

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

HARLOW *versus* YOUNG.

By R. S., c. 73, § § 12, 14, selectmen are required to appoint a sealer of weights and measures in their town, and are made liable to a forfeiture of ten dollars for each month's neglect.

It is also provided by c. 6, § 62, that "in no case, shall any officer of any city, town, or plantation, incur any punishment or penalty, or be made to suffer in damages, by reason of his official acts, or neglects, unless the same shall be unreasonable, corrupt or wilfully oppressive."

The latter provision, although found in the chapter "of the regulations of elections," is general in its character, and comprehends all the official acts of such officers.

Where the selectmen omit to perform an official duty, and from the facts presented, their motives in the omission are so explained, as to show that it was neither unreasonable, corrupt, nor wilfully oppressive, no penalty will be incurred.

Thus where the selectmen omitted to appoint a sealer of weights and measures, and it appeared that the inhabitants, by their vote, did not wish any appointed; and the treasurer of the town had never provided any weights and measures for the town; under these facts no penalty is incurred by such omission.

ON FACTS AGREED.

DEBT. A *qui tam* action to recover a penalty for neglecting to appoint a sealer of weights and measures.

The defendant was chosen one of the selectmen of Byron at the annual town meeting in March, 1852, and was duly sworn and acted as such for the next seven months.

The defendant and his associates neglected for all that time to appoint a sealer of weights and measures within that town. The selectmen of the previous year had also been guilty of the same omission.

The defendant was never requested or called upon by any person, jointly with his associates, to appoint such sealer; and the town never had any weights or measures provided for them by their treasurer, or in any other way.

The town also at their meeting aforesaid, by a vote, directed the defendant and his associates not to appoint a sealer of weights and measures for said town.

The Court were authorized to draw such inferences as a

jury might from the facts and admissions, and make such disposition of the case, as the law might require.

Bolster, for defendant.

We respectfully submit, that the neglect of the selectmen of Byron, to appoint a sealer of weights and measures, cannot, upon the question of fact, be deemed unreasonable. The facts show that the town never had any weights and measures; that there is no public house, tavern or store in said town; that it is a small back town in the county of Oxford, with but few inhabitants, consequently, the appointment would have been, at most, a mere form, no one could have been benefited by the appointment, and no one suffer by the neglect. The facts show clearly, that there was no necessity for the appointment of such officer.

The neglect in the premises, was not corrupt, or wilfully oppressive, as may be fairly inferred from the facts, that the defendant was never requested or called upon, or requested by any person jointly with his associates to appoint a sealer of weights and measures; that he never jointly or severally refused to appoint such officer. R. S., c. 6, § 62.

Walton, for plaintiff.

1. The law requiring the selectmen to appoint a sealer of weights and measures is imperative. R. S., c. 73, § § 12, 14. The facts admitted show a violation of the law in this particular.

2. If it be contended, that by force of c. 6, § 62, it is incumbent on the plaintiff to show, that this neglect of defendant was unreasonable, corrupt, or wilfully oppressive, our answer is, that although general in its terms, that section occurs in a chapter "*regulating elections*," and under the fourth article of said chapter, entitled "*penal provisions and regulations affecting the purity of elections*," and that section 62 refers to such official acts and neglects as are provided for in said chapter and no others. That such was the intention of the Legislature cannot admit of a doubt.

3. But the facts in this case show this neglect to have

been unreasonable and wilful, if not corrupt. Was it not unreasonable for the defendant to obey the illegal vote of the town of Byron instead of the public laws of the State? Is not a *wilful* violation of law by a sworn officer always *corrupt* and *oppressive?* What can be more corrupt than to thus inculcate, by precept and practice, that our laws may be violated at pleasure, and that the voice of a town is more to be regarded than the voice of the Legislature, and this, too, in violation of a solemn oath? I contend that a *wilful* violation of law is always unreasonable. It cannot be winked out of sight, that there is a growing disregard, on the part of our citizens, (and public officers even,) of law, which is threatening the very foundations of our civil government, and no one thing would do more to strengthen the hands of the lawless, than a decision by the Supreme Court, that a violation of public law, wilfully and knowingly committed, is not unreasonable, and that no penalty is thereby incurred. Such a principle would repeal all law. It would make towns and town officers supreme judges whether any given law was worthy to be obeyed or not.

To obey all laws while they remain in force is always *reasonable.* Knowingly to disobey them, is always *unreasonable.*

4. Hence I contend we are entitled to recover, if the Court are of opinion, that the neglects referred to in the chapter on elections, § 62, includes the neglects provided for in the chapter on weights and measures.

HOWARD, J. — It is required by statute, that the selectmen of each town, shall appoint, annually, a sealer of weights and measures, within the same; and that any selectman, who shall neglect the duties of his office, in that respect, shall forfeit ten dollars for each month's neglect. R. S., c. 73, §§ 12, 14. It is admitted that the defendant and his associates, as selectmen of the town of Byron, jointly and severally, neglected to make such appointment, for the period

of seven months; and this suit is instituted for the forfeiture supposed to have been incurred by such neglect.

It is provided by R. S., c. 6, § 62, that "in no case, shall any officer of any city, town or plantation, incur any punishment or penalty, or be made to suffer in damages, by reason of his official acts or neglects, unless the same shall be unreasonable, corrupt, or wilfully oppressive;" provided, that certain specified neglects to prepare, deposit, and post up the list of voters, or to call meetings for elections, or to cause returns of votes to be made as required by the constitution and laws of this State, or to make the records by law required, shall be deemed unreasonable, unless the contrary appear.

As these provisions are in the chapter bearing the title, "of the regulation of elections," and under the fourth article, entitled "penal provisions and regulations, affecting the purity of elections," it is now urged, in argument for the plaintiff, that they are limited to such official acts and neglects as are mentioned in that chapter.

Neither its title, nor the preamble, forms any essential part of an Act of the Legislature. The latter has fallen into disuse with us, and the former can never be regarded as a safe expositor of a law which is plain and positive in its provisions. *Mills* v. *Wilkins*, 6 Mod. 62; *United States* v. *Fisher*, 2 Cranch. 386; 1 Kent, 460.

The R. S., c. 1, § 3, provide that "the titles of the several chapters, and the abstracts of the several sections, are not to be construed as essential parts of the revised code;" and thus furnish a rule of construction, which is applicable to this case, on this point.

The terms of the sixty-second section, before quoted, are general, and apply to all cases, and to all the official acts of every officer of every city, town or plantation, in the State; whether his official duties are connected with elections or otherwise. They are not to be restricted by the title of the Act; and to avoid a forfeiture, they should receive a fair and liberal construction. If standing alone, as a separate enactment, there could be no doubt that they would apply to all

cases of official neglects, by the class of officers mentioned; and as they stand now, upon the statute, unrestricted by the title, and unconnected with other sections, they are to be construed in the same manner, and by the same rules, as if they constituted an independent enactment.

It appears that no treasurer of Byron ever procured, and that the town never had, as standards, the weights and measures required by law. R. S., c. 73, § 8. And it is admitted that the town directed their selectmen not to appoint a sealer of weights and measures. Now, though the neglects of other officers furnish no excuse for the non-performance of his duties by the defendant, and although the vote of the town, directing the neglect of duties required by law was unauthorized, and could constitute no justification for the defendant, yet, these facts tend to explain the motives of the selectmen in neglecting to meet the requirements of the statute, in the matter alleged against them. Until the town standards were procured, the appointment of a sealer of weights and measures would be useless; for he could perform no duties officially. While the treasurer of the town neglected his duties, and while his remissness was overlooked or countenanced by the town, the selectmen might well suppose that their action upon the matter would be fruitless. The facts agreed tend to show, and in our opinion, satisfactorily show, that their acts and neglects in this respect, were neither unreasonable, corrupt, nor wilfully oppressive; and by such acts and neglects, the defendant has not incurred a penalty.

Plaintiff nonsuit.

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

CHAPMAN *versus* ATLANTIC AND ST. LAWRENCE RAIL ROAD COMPANY.

By § 5, c. 9, of laws of 1842, rail road companies are made liable for injuries by fire, communicated by their locomotives, to buildings or *other property*, and may effect insurance thereon in their own behalf.

This statute liability is limited to property of a *permanent* nature, and on which insurance may be effected.

For injuries to *other property*, by fire, they will only be responsible in consequence of negligence, unskilfulness or imprudence in running or conducting their locomotives.

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

CASE for the recovery of damages for loss by fire, of a quantity of cedar posts.

The plaintiff in the winter of 1851, deposited a lot of cedar posts upon the land of another, by his consent, some five or eight rods from the rail road track of defendants. In October, 1852, fire was communicated from the defendants' locomotive, rightfully running upon their track, to some combustible matter near the posts, which afterwards reached and consumed them.

The defendants requested several instructions to the jury, all of which were refused.

It becomes necessary to state only the second and tenth refused instructions.

2. That if the jury find the defendants were fully authorized to run their locomotive on and over the rail road at the time and place mentioned, for the transportation of passengers, they are not to be held liable in this action, unless there is satisfactory proof that the defendants or their agent or agents were guilty of negligence, unskilfulness or imprudence in running or conducting said locomotive at the time.

10. That the statute of 1842, c. 9, § 5, does not apply to wood or movable property, but to permanent property or erections made on the land.

A verdict was returned for plaintiff, and the defendants excepted to the refusal of the Court to give the instructions by them requested.

O'Donnell and *W. P. Fessenden*, for defendants, argued in support of the positions taken by them at the trial, which were drawn up in their requested instructions. They cited R. S., c. 81, § 21; *Batchelder* v. *Heagan*, 18 Maine, 32; *Clark* v. *Foot*, 8 Johns. 421; *Barnard* v. *Poor*, 21 Pick. 378.

May, for plaintiff, submitted a written argument, in which he maintained that the plaintiff's remedy depended upon the statute alone, and that all the ingredients which the statute contemplates concurred in favor of his client.

1. Here was an injury done to a building or *other* property belonging to *some* person.

2. That person was the plaintiff.

3. The injury was done by fire communicated by a locomotive engine of some rail road corporation.

4. That corporation is the defendants.

5. That the property injured was "along its route," or in other words adjacent or near it.

There is nothing in the statute to limit its meaning to *permanent* property. The words "other property" include any visible, tangible property liable to take fire.

The principles on which the case should be decided, are fully sustained in *Hart & al.* v. *Western R. R. Co.* 13 Met. 99; *Lyman* v. *Boston & Worcester R. R. Co.* 4 Cush. 288.

RICE, J. — This action is founded upon the fifth section of chapter nine of the laws of 1842, which is as follows: —

"When any injury is done to a building or other property of any person, or corporation, by fire communicated by a locomotive engine of any rail road corporation, the said corporation shall be held responsible in damages to the person or corporation so injured; and any rail road corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf."

The language in the first part of this section is very broad and general in its terms, and if applied without qualification or restriction will include injuries to every species of property by fire communicated by a rail road locomotive engine.

No case has heretofore been presented for adjudication in this State under this section of the statute. In Massachusetts, under a statute of which the section above quoted

is an exact transcript, it has been held that a rail road corporation is liable for injuries occasioned to buildings situated along the route of its road, by fire communicated, directly or indirectly, by its locomotive. *Stewart & als.* v. *Western R. R. Co.* 13 Met. 99.

It is contended by the defendants, in this case, that the liability imposed by the statute extends only to permanent property, or erections made on the land, but does not apply to wood or movable property.

In determining the true construction of a statute, all its provisions should be taken into consideration, in order to ascertain the true object and intention of the Legislature.

For this purpose the latter clause of the section referred to is of much importance, as it may serve to explain, and to some extent qualify, the first clause of the same section.

By the principles of the common law, persons in the legitimate pursuit of a lawful business, or in the performance of acts authorized by law, are only liable for such injuries resulting therefrom to others, as are occasioned by negligence, misconduct or carelessness. Independent of special statute provisions, such only would be the liability of rail road corporations. By the terms of their charters, they are authorized to use locomotives propelled by steam. If it be said that owners of property along the route of such roads are subjected to greater hazards from these locomotives, than from other agents used for propelling vehicles for transportation of passengers and merchandise, it may be answered, that an equivalent compensation is supposed to have been rendered in the form of damages, when the road was originally located. That in estimating such damages, the purpose for which the land taken was to be used, and the manner of its use were as well to be considered, as the amount of land actually taken.

The statute does, however, impose additional liabilities upon corporations using this kind of motive power. But while it thus, probably for the purpose of insuring extraordinary care, imposes these additional liabilities upon rail

road corporations, it also authorizes them to protect themselves from loss, by insuring the property along their route, for injury to which by fire, they are made responsible. Their right to insure is coëxtensive with their liability, in case of loss. To make this right to insure property, of any practical value to the corporation, the property must be of such a character and so situated, as to render insurance practicable by the use of reasonable diligence. The locomotive is confined to the track of the road and cannot be diverted from its course to avoid combustible materials which may be deposited along its route. To hold that the liability extends to those articles of movable property, which have no established location, but may be deposited and removed with such facility as to render insurance impracticable and unavailing, would be unreasonable, as it would extend the liability of those corporations far beyond the means afforded for their protection. This manifestly is not the intention of the statute.

In the case already cited from the 13 Met., the Court, in speaking of this clause of the statute, say, "those latter words, we think, describe buildings being near and adjacent to the route of the rail road, so as to be exposed to the danger of fire from the engines, but without limiting or defining their distance." Again, in the same case, the Court remark, the "effect of the statute is to diminish the specific risk to which buildings may be exposed, &c." These citations are not made as *direct authority* in this case, because the point now under consideration was not then distinctly before the Court, but as tending to elucidate the construction we now give to the statute.

In view of these considerations, the conclusion to which we have arrived is, that the liability of rail road corporations, under this statute, extends only to property permanently existing along their route, and capable of being insured, and that as to movable property, having no permanent location, the liability of such corporations is to be determined by the principles of the common law. The second requested in-

struction should therefore have been given. It is not deemed necessary to discuss the other points raised in the case.

Exceptions sustained. Verdict set aside, and a new trial granted.

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

DWINAL, *Pet'r for Partition, versus* HOLMES.

At common law, the death of a sole party, *pendente lite*, abated the writ.

The process by petition for partition not being a *personal action*, comes not within the provisions of R. S., c. 120, § § 10, 15.

Neither is it a process to *demand possession of land*, and cannot therefore be embraced in R. S., c. 145, § 19.

Nor can the heirs or devisees of such petitioner deceased, be *compelled* to come into Court and take upon themselves the prosecution of the suit.

Unless they voluntarily appear after the death of the petitioner, the process must abate.

ON FACTS AGREED.

PETITION FOR PARTITION.

This case was heard at the October term, 1850, and continued on report. The questions arising thereon were argued before the full Court at the May term, 1851, and the opinion of the Court certified to the clerk on April 17, 1852, directing judgment for partition in lot No. 3, as prayed for, and the denial of the petition as to another lot.

The clerk thereupon made the entry on the docket under the petition.

The petitioner having died before the promulgation of the opinion, the case was continued from term to term. At the Nov. term, 1852, the respondent, on leave, cited in the administrator of the estate of the petitioner. He declined to come in. It was then moved that he be made a party to the record, but the counsel for the petitioner insisted that the action abate.

The Court were to render such judgment, and order and decree as the rights of the parties might require.

Perry, and *Clifford* and *Appleton*, for the petitioner.

1. Independent of any statute provision to the contrary, the death of a party, either petitioner or respondent, in a proceeding by petition for partition, abates the petition. *Nason* v. *Willard*, 2 Mass. 479; *Mitchell & al.* v. *Starbuck & al.*, 10 Mass. 9; Dane's Abr. 6, c. 191, a. 4; 6 Wheaton, 260; Gould's Pleadings, 264; *Frohock* v. *Justine*, 8 Watts' (Pa.) R. 121.

2. There is no provision in the Revised Statutes which saves a petition for partition from abatement on the death of a sole petitioner. R. S., c. 120, § 12, refers only to *personal* actions. *Nason* v. *Willard*, 2 Mass. 478. R. S., c. 145, § 19, refer to actions wherein "the possession of land is or may be demanded," and such is not this case. *Alley* v. *Hubbard*, 19 Pick. 243. R. S., c. 121, § 16, provide for amendments of a petition, but cannot save this process from abatement.

May, for the respondent.

1. By the facts in the case, the respondent would be entitled to costs, but for the death of the petitioner. Does his death abate the process? By § 16, c. 121, tenants in common may join or sever in petitions for partition, and in case of the death of a *petitioner*, whether joint or *several*, the heirs, devisees or grantees may be inserted as petitioners, instead of the deceased.

It may be that our motion should have been to cite in the heirs rather than the administrator, and if so, a motion can hereafter be made in the Court where the petition is pending. It appears from this statute, that the petition does not necessarily abate.

2. But we say that this process, when the respondent has appeared and made an issue, so that the proceedings have assumed an *adversary* form, is an action within the meaning of R. S., c. 145, § 19.

HOWARD, J. — At common law, the death of a sole party, *pendente lite*, abated the suit. The inconvenience resulting from the application of this rule has been remedied by stat-

ute law, in a great measure. So that now, in *personal actions*, the cause of which, by law, survives the death of a sole plaintiff or defendant, before judgment, will not abate the suit; but the administrator or executor of the deceased party may appear and prosecute or defend the action; and he may be cited for that purpose; and if he do not appear judgment may be rendered against him upon nonsuit or default. R. S., c. 120, § § 10, 15; and statute 17 Car. 2, c. 13, and 8 and 9 W. 3, c. 10, § § 6 and 7.

In respect to *real actions*, the inconvenience of abatement, by the death of parties, is remedied by R. S., c. 145, § 19; which provides that no action, wherein the possession of land is, or may be demanded, shall at any stage of its progress, after having been entered in court, be abated by the death or intermarriage of either party thereto, &c.

If a petition for partition may be regarded as an action, in a legal sense, it is not a personal action, and by it the possession of land is not demanded. The petitioner must be seized in fee simple, or for life, of the estate, or have a right of entry, in order to maintain his process. R. S., c. 121, § 1. It is plain, therefore, that the provisions of the statutes referred to, do not embrace petitions for partition.

By R. S., c. 121, § 16, and the Act of amendment, 1842, c. 31, § 14, it is provided, that "tenants in common, joint tenants and co-partners may, all, or any two or more of them, join or sever in petitions for partition; and whenever they join, and either petitioner shall decease, or convey his share pending the petition, the Court may allow an amendment of the petition; and his name may be erased, and the names of his heirs, devisees or grantees, respectively, inserted in his stead; and they, with the other petitioners, may proceed in the cause for their respective shares; and the heirs, devisees or grantees of a several petitioner may be inserted as petitioners, instead of the deceased grantor." But there is no provision for citing in the heirs, devisees or grantees, or compelling them to appear, or proceeding to judgment without their voluntary appearance. Unless they do appear there is but one party in Court, and the petition abates, under the

general rule of the common law, by the death of the petitioner. The Act of April 19, 1854, is prospective in terms, and does not reach the infirmities of this case.

Respondent's motion denied.

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

NOTE. By Act of 1854, c. 97, petitions for partition are not to abate on account of the death of a party thereto; but the Court may cite in either the heirs, or the executor or administrator of such deceased person, and they may be made parties to the process.

FRENCH *versus* SNELL.

By the R. S., c. 116, § 10, a party, appealing from the judgment of a justice of the peace, is required to recognize, "with condition to prosecute his appeal with effect, and pay all costs arising after the appeal."

Where the magistrate required as a condition of the appeal, that the party should "personally appear" at the appellate court, and pay "all intervening damages and costs," such recognizance was unauthorized, and the appeal void.

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

ASSUMPSIT, on account, brought before a justice of the peace, where the plaintiff obtained a judgment and the defendant appealed to the Supreme Judicial Court.

When the action came on for trial, the plaintiff moved that the action be dismissed for want of a legal recognizance. This motion was overruled, and furnished the ground of the exceptions. A verdict was returned for defendant.

The recognizance, filed with the papers in the case, recited that the principal and sureties "acknowledged themselves severally to be indebted to Nathaniel French of Auburn, in the sum of thirty dollars each, to be levied, &c., if default be made in the performance of the conditions following;" "now therefore, if the said Caleb Snell, 2d, shall appear at the court aforesaid, and shall prosecute his said appeal with effect, and shall pay all intervening damages and costs, then this recognizance shall be void, otherwise remain in full force and virtue."

T. Ludden, for plaintiff.

A recognizance taken for a purpose not authorized by law is void. *Harrington* v. *Brown*, 7 Pick. 232.

1. There is no authority for a recognizance like this. The law is, that the condition shall be "to prosecute his appeal with effect, and pay all costs arising after the appeal. R. S., c. 116, § 10.

This requires the appearance of a *person* at the appellate court, when an appeal may be prosecuted without his appearance.

2. This recognizance requires the appellant to prosecute his appeal with effect, and to pay all intervening damages and costs, which is not authorized or required by the statute, either in letter or substance. *Owen* v. *Daniels*, 21 Maine, 180.

3. It does not in effect answer the requirements of law. "To pay all intervening damages and costs" cannot be tantamount "to paying all costs arising after the appeal." The statute does not require an obligation "to pay damages," and it is therefore void. Can it be said that we cannot object to this, because the defendant has obligated himself to do too much? That is not our objection, but that the *too much* vitiates the whole upon demurrer to a *scire facias*, or an action of debt upon such a recognizance.

S. C. Andrews, for defendant, to sustain the ruling of the Court, cited the following authorities: —

R. S., c. 116, §§ 9 and 10; Howe's Practice, 443; Maine Justice, 96 and 97; Colby's Practice, 90; *Dodge* v. *Kellock*, 10 Maine, 266; *Libbey* v. *Main*, 11 Maine, 344; *Dodge* v. *Kellock*, 13 Maine, 136; *Green* v. *Haskell*, 24 Maine, 180.

SHEPLEY, C. J. — The party appealing from a judgment of a justice of the peace, was required by the statute of 1821, c. 76, § 10, to recognize "to pay all intervening damages and costs, and to prosecute his appeal with effect," before his appeal could be allowed. An alteration of the law was made by R. S., c. 116, § 10, and the party appealing was re-

quired to recognize "with condition to prosecute his appeal with effect, and pay all costs arising after the appeal," before his appeal could be allowed. The substantial difference being, that the appealing party is not now required to give security for the payment of any intervening or additional damages, which may be recovered against him in the appellate court. This is an important difference.

The recognizance presented in this case, contains two provisions not authorized by law. One for the personal appearance of the appellant in the appellate court, the other for the payment of "all intervening damages."

The justice of the peace was not authorized to require such recognizance; and the appellee could not enforce it against the appellant. The appeal was not perfected. *Owen* v. *Daniels*, 21 Maine, 180; *Harrington* v. *Brown*, 7 Pick. 232. *The exceptions are sustained.*

Verdict set aside, and appeal dismissed.

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

CHUTE *& al. Ex'rs, versus* PATTEE *& als.*

Where the holder of a promissory note, for a valuable consideration, without the knowledge of the sureties, contracts with the principal, to enlarge the time of payment beyond that fixed in the note, the sureties are no longer liable thereon.

And the agreement of the principal to pay interest on such note, for a specified time after it became due, is *a sufficient consideration* for a promise of delay.

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

ASSUMPSIT, on a promissory note, dated May 8, 1846, for $500, payable to Benjamin Webber with interest, in one year from the seventh day of June following, signed by Pattee as principal, and the other defendants as sureties. On the back of the note was indorsed "June 7, 1847, received the interest. June 8, 1848, received the interest."

The note was read to the jury. Pattee made no defence. But the sureties alleged that they were discharged in conse-

quence of an agreement, for a sufficient consideration, between Webber, the plaintiff's testator, and the principal, after the note was due, for a promise of delay of payment, without their consent.

Evidence was produced that on June 7, 1846, Pattee assigned to Webber a mortgage and notes as collateral security for notes to the amount of $700, given to Webber by him on May 8, 1846, and on the day of the assignment, Webber made a written agreement to reässign said mortgage upon the payment of the notes it was assigned to secure.

On the back of this agreement, on June 7, 1847, Webber signed this memorandum. — "Whereas Moses Pattee has paid the interest on the within up to date, and also on a note for $500, against the said Pattee, David Hammons, N. K. Farrington and J. S. Farrington, and has agreed to pay interest on the same for one year more, I hereby extend said obligation and the payment of said note for one year more from this date."

David Hastings, called by defendant, testified, that he was present when said memorandum was written by Hammons at the request of Webber, that he said he had seen Pattee and had made an arrangement with him to extend the time of payment of the notes for a year, that Hammons objected strongly to the extension. At the end of that year Webber called again at the office, while Hammons was absent at Washington, and said he had made another extension with Pattee, on the same terms as the first one. He wanted me to find the first paper and write a new extension like the first one. I could not find it and did not write it, though he called several times for that paper. During the two years of the extension Pattee was somewhat embarrassed, but debts could be collected of him. Since, his debts are not good.

The case was thereupon taken from the jury, with the agreement that the Court should render judgment against the principal defendant for debt and costs, and that on the testimony and evidence in the case, or so much as may be

legally admissible, judgment may be rendered against such of the sureties, if any, with said Pattee, as are justly and legally liable; that the Court might draw such inferences from the evidence as a jury might; and that if the Court should be of opinion, that either or all the sureties are not liable, the plaintiffs are to discontinue as to them, and they to have judgment for one bill of cost only.

Gerry, for the plaintiff, contended, that there was no consideration for the alleged agreement between Webber and Pattee for Webber to give time of payment. There is no pretence that Pattee paid any thing, or promised to pay any thing for the alleged promise of extension, except what he was legally bound to pay by the terms of the notes.

The notes transferred by Pattee to Webber, with the mortgage assigned were *on interest*, and it will be observed that the note in suit was on interest. Therefore nothing was *paid* or *promised* for the promise of extension. That promise of extension was merely gratuitous and without sufficient consideration. Chitty on Con. 6th Am. ed. 51 and 52; *Hall* v. *Constat*, 2 Hall, 185; *Pebodie* v. *Ring*, 12 Johns. 426; *Russell* v. *Buck*, Vermont, 166; *Pomroy* v. *Slade*, 16 Vermont, 220.

D. Hammons and *G. H. Shepley*, for defendants.

1. The payee of the note by giving time to the principal debtor discharged the sureties. Pattee had no right to pay the money with interest then accrued, at any time before the expiration of the additional year, for he had agreed to keep the money "and pay interest on the same for one year more." This was a new, separate and distinct contract on the part of Pattee from any existing in the note before, and therefore formed *of itself* a consideration for the extension of the time by Webber. The payee received a benefit in having his money invested for a year, and determined to keep it as it was, against the remonstrance of the surety.

Whenever, without the consent of the surety, the creditor extends the time of payment to the principal by such an agreement as could be enforced at law or in equity, the

surety is discharged. 13 Maine, 208; *Leavitt* v. *Savage*, 16 Maine, 72; 5 Greenl. 130.

2. The agreement for the extension of time to the principal has been executed, and has actually resulted to the injury of the surety, the principal in the meantime having become insolvent. This discharges the surety.

HOWARD, J. — It is agreed that the plaintiff may take judgment against Pattee, the principal defendant, for the amount of the note in suit, with interest and costs. But the other defendants, who are sureties upon the note, claim to have been discharged by the operation of an agreement made between the testator and the principal, without their assent. They, only, make defence.

It is proved, that after the note became payable, the testator agreed in writing with the principal, to extend the time of payment "for one year more," upon the agreement of the latter to pay interest upon this, and other notes, for that period; that the extension was made, and the interest paid at the expiration, according to the agreements; and there is no proof that either of the sureties assented to the arrangement.

The agreement of the principal to pay interest for a specified time, after the note became due, furnished a sufficient consideration for the promise to delay. Both agreements were valid, and binding upon the parties respectively, and enabled each to accomplish what he appears to have considered a desirable purpose; — a further investment for a definite period for the creditor, and an extension of credit for the same time for the debtor. The legal effect of the agreements was to disable the former from enforcing collection, and the latter from making payment of the note, until the expiration of the year stipulated; and to alter the contract, and change the responsibility of the sureties, without their consent. *Rees* v. *Berrington*, 2 Ves. 540; *Bank of the United States* v. *Hatch*, 6 Peters, 259; *Gahn* v. *Niemcewiez*, 11 Wend. 317; *Leavitt* v. *Savage*, 16 Maine, 72; *Bailey* v. *Adams*, 10 N. H. 335.

This case falls within the familiar rule of law, that where the holder of a promissory note makes a binding agreement with the principal to enlarge the time of payment beyond that fixed by the note, without the consent of the surety, the latter will be discharged. *Lime Rock Bank* v. *Mallett*, 34 Maine, 547; *Greeley* v. *Dow*, 2 Met. 176, and cases before cited.

According to the agreement of the parties, and under the provisions of the R. S., c. 115, § 11, the plaintiffs have leave to discontinue as to the sureties, on payment of costs, and to amend and take judgment against the principal for debt and costs.

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

CHESLEY *versus* WELCH *& als., Appellants.*

If a tenant continues in possession after the expiration of his lease, the burden of proof is upon him to show the acquiescence of his landlord.

A tenant, holding under a lease for a definite time, may, by a delay of the lessor to enter after its termination, acquire the rights of a tenant at will.

But if the lessor shall enter immediately on the termination of the lease, the lessee can have no rights to the emblements, though he still remains on the premises.

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

TRESPASS *quare clausum*, originally commenced before a justice of the peace. On facts agreed. Plea the general issue.

It appeared that the defendants entered upon the grass land in possession of one Morse, under whom the plaintiff claims, and took and carried away the hay thereon. Morse had possession of the farm under a lease from Paul Adams, which lease, before the taking of the hay, had expired. Previously to the alleged trespass, Adams had notified Morse in writing to quit the premises. While Morse was in pos-

session, after his lease had expired, he let a portion of the grass standing thereon to the plaintiff, to be cut on shares. Part of it was cut by plaintiff under this agreement and left by him in the field. The defendants, as the agents and by the direction of said Adams, in the presence of two witnesses, peaceably entered upon the premises for the purpose of taking and holding possession of the same, but Morse did not give his consent to such entry. The defendants, after such entry, took and carried away the hay sued for, by the direction and as the servants of Adams.

If the Court, on this statement of facts, should decide that the action was maintainable, judgment was to be rendered for the amount fixed by the justice and legal costs, otherwise the plaintiff to become nonsuit and costs for defendants.

On this agreed statement, the presiding Judge was of opinion that the action was maintainable, and ordered judgment for the plaintiff. To which opinion the defendants excepted.

A copy of the lease and also of the notice to quit were to be put in with the facts, but were not furnished to the Court.

R. A. L. Codman, for the defendants, argued that, by the statement of facts, it appears that Morse had no legal right to sell the grass; the plaintiff therefore acquired no right by his purchase. His entry and cutting were a trespass.

Title, right of possession and actual possession, were in Adams, by whose directions and authority the defendants acted, at the time of the cutting of the grass, and the severance of the grass from the freehold, gave no more right or property in the grass to the plaintiff, than he would have acquired in timber or wood, if he had felled trees. *Davis* v. *Thompson*, 13 Maine, 209; *King* v. *Fowler*, 14 Pick. 238. In *Mayo* v. *Fletcher*, 14 Pick. 525, the Court say, "a mortgagee, having never entered, cannot maintain trespass *quare clausum fregit*, against a person entering and

occupying by permission of the mortgager before condition broken and holding over after breach." In the present case the condition had been broken and entry made by mortgagee, and he could have maintained trespass against the plaintiff; consequently he or his servants cannot be liable to the present action.

J. J. Perry, for plaintiff.

1. "Lessee for a year, holding over, becomes tenant at will." *Bennett* v. *Whipple*, 12 Maine, 346.

"In the case of a tenancy at will, the crops belong to the tenant." *Sherburne* v. *Jones*, 20 Maine, 70; *Bailey* v. *Fillebrown*, 9 Mass. 12.

"Where a tenancy at will is determined by the lessor, the tenant is entitled to the emblements." *Davis* v. *Thompson*, 13 Maine, 209.

Morse, being tenant at will on the premises, had a right to the crops, and consequently a right to sell the grass growing on the same, and the plaintiff having rightfully bought the grass growing on the premises, and the same being converted into hay, there was such a severance from the freehold as to leave the hay sued for personal property in the hands of the plaintiff.

The sale of grass, from Morse to the plaintiff, carried with it the incidental right to enter upon the premises, cut the grass, and carry away the hay made from the same.

2. The entry made by the lessor cannot defeat the action.

1. Beause there is no statute provision by which a lessor can gain a possession by "entering in the presence of two witnesses," the statute remedy being by R. S., c. 128, an action of forcible entry and detainer.

2. An entry in the "presence of two witnesses," is a remedy secured solely to mortgagees, to gain possession of mortgaged premises, after condition broken.

3. To make a legal entry, by a mortgagee, in the "presence of two witnesses," it must be "peaceably" and "openly" made, and "not opposed." In this case, Morse, the tenant, did not consent to the entry, consequently, if it had been

made by a mortgagee it would be an unlawful entry. R. S., c. 125, § 3.

4. The grass, having been severed from the freehold, no longer attached to the soil, and the lessor could not in a legal entry reclaim the same as a part of the freehold.

SHEPLEY, C. J. — The lease of the farm from Paul Adams to Solomon B. Morse, and a written notice to quit from the former to the latter, were, by the agreed statement, to make a part of it. No copies of these documents have been furnished. Application has been made to the clerk of the county courts and to the present counsel of the parties for copies or dates of those papers without success; and the case, long pending, remains to be decided according to the light afforded.

It is agreed, that the lease to Morse had expired and that a written notice to quit had been given before the defendants entered for the landlord and took the hay claimed by the plaintiff through Morse.

Admitting the notice to quit to have been of no effect upon the rights of the parties, which is the most that can be alleged beneficially for the plaintiff, Morse would be left in possession of the farm after the expiration of a lease of it for a definite time, and without any evidence, that it had not expired shortly before that time.

When a tenancy is limited to a definite time, the landlord may enter immediately upon its termination. *Clapp* v. *Paine*, 18 Maine, 264; *Preble* v. *Hay*, 32 Maine, 456. He may, by delay to enter, allow the tenant to acquire the rights of a tenant at will, upon the presumption that he acquiesced in his continued possession; but the burden of proof of this is upon the plaintiff, and there is nothing in the agreed statement, as presented, authorizing such a conclusion.

Plaintiff nonsuit.

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

ROACH *versus* LEARNED.

Where the defendant claims title to property under a third person by certain acts between that third person and the plaintiff, a letter written by such third person and delivered to the plaintiff at the time of such acts, is admissible in evidence, as against the defendant, as part of the *res gestae*.

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

REPLEVIN, for a pair of steers.

The plaintiff set up title from one Russell S. Currier in April, 1849, and that he was to keep them until they were six years old and then to return them or pay fifty dollars.

The defendant introduced evidence of a sale from said Currier of his interest to one Alburn Calden, under whom he claimed title; and also evidence tending to show a sale from the plaintiff to said Calden of his interest in said steers, through one Allsworth Tainter in his capacity as constable of the town of Carthage.

The plaintiff, after this testimony in the defence, called said Tainter, who testified, that he, as constable of Carthage, in July, 1850, had an execution in favor of said Calden against the plaintiff, and had received a letter of instruction from Calden about securing it, and also a letter from Calden to the plaintiff in relation to the same matter; that in pursuance of his instructions contained in Calden's letter to him, he went to the plaintiff to get security on the execution, and gave plaintiff the letter sent by him from Calden; that plaintiff then secured the amount of the execution by a horse and heifer, but did not embrace the steers.

The letter to plaintiff was as follows:—"Mr. Roach, I have seen Mr. Currier and he says he is willing to take me as pay-master, if I pay him this month, and wants you to sign the writing which I have sent to Mr. Tainter.

"A. Calden."

The presiding Judge ruled that this letter was admissible and a verdict was returned for plaintiff.

J. S. Abbott, for plaintiff.

Tripp, for defendant.

The plaintiff claimed the right to the use of said steers until they were six years old by a parol lease from Russell S. Currier, and the defendant claimed them by purchase from Calden, who had extinguished the title of said Currier and had attempted to extinguish the right of plaintiff to the use of said steers. Whether Calden had so done or not, was the question before the jury.

1. Calden was not a party to the suit, and therefore his declarations were not admissible in evidence for the plaintiff, unless they were made while he was the owner of the right claimed by plaintiff, which the plaintiff denies. The plaintiff by his action denies that Calden was owner of plaintiff's right in the steers at any time, and the jury so found. The witness, Tainter, says, that the plaintiff did not turn out to him the steers for Calden. Thus Calden's declarations were admitted for the plaintiff, when he was not the owner of his right in the property in controversy, which is contrary to every principle of law or rule of evidence.

2. If plaintiff wanted Calden's testimony, he was a competent witness, and should have given his testimony under oath.

3. If Calden ever owned the plaintiff's right, and the defendant contends that he did, he became such owner through the agency of Tainter, the officer, who held Calden's execution, and who received the letter from him. That letter was written and delivered to the plaintiff, before he (Calden) could have become the owner of the right which the plaintiff claimed in said steers.

SHEPLEY, C. J. — The plaintiff in replevin appears to have received of Russell S. Currier, in the month of April, 1849, two steers, of the age of two years, to be kept till they were six years old, then to return them or pay fifty dollars.

The defendant introduced testimony to prove a sale of Currier's interest in them to Alburn Calden, from whom he derived that title. He also introduced testimony to prove,

that he had acquired the plaintiff's title to them by the proceedings of Allsworth Tainter, who, as a constable of the town of Carthage, had an execution in favor of Calden against the plaintiff.

To rebut this testimony the plaintiff appears to have called Tainter as a witness to prove, what had been done by agreement of the parties to that execution, for payment or security of it. He stated, that Calden forwarded a letter to him to be delivered to the plaintiff proposing a mode of security. This was produced and received as testimony. The defendant claiming to have extinguished the plaintiff's title by the proceedings to collect or secure that execution, testimony to prove what did take place between the plaintiff and Calden for that purpose, appears to have been entirely proper, and Calden's letter to the plaintiff composing a part of those transactions was admissible as part of the *res gestae.* *Exceptions overruled.*

RICE, HATHAWAY and CUTTING, J. J., concurred.

INHABITANTS OF SUMNER *& als. Petitioners, versus* COUNTY COMMISSIONERS OF OXFORD.

Irregularities in the proceedings of County Commissioners, which will not prevent one supposing himself aggrieved from obtaining the means of redress, will furnish no authority for issuing the writ of *certiorari.*

A petition for the location of a county road, is sufficiently definite, if it sets forth its *termini,* and the general course between them.

And where *alternative* places are described for the location, *this* furnishes no valid objection to proceedings thereon.

Where *actual notice* has been given to parties interested in the location of a county road, the want of the *statute notice* will not avail to quash the proceedings, unless some right has been lost or some injury suffered by reason of the omission.

The parties interested in the settlement of an agent's account for opening a County road, may be cited to appear at an *adjourned term* of the county Commissioners' Court.

And *such account* may lawfully be allowed at such *adjourned term.*

But the propriety of the allowance of any item in the account cannot on this process be examined.

If no *formal judgment* is found upon the County Commissioners' records of the amount of a distress warrant by them issued, and the sum for which it is issued is properly ascertained, it will not impair their proceedings.

Such omission may be considered as chargeable to their clerk.

The *warrant of distress* issued by County Commissioners is no part of the record to be presented in a writ of *certiorari*.

PETITION for a writ of *certiorari*.

The original petition for the location of the road, signed by Daniel Parsons & als., represented "that a public highway is much needed, commencing near Sharon Robinson's in Sumner, either at or near an angle in the county road, near Joshua Barrow's, Jr., in Hartford, or at both of said points, thence running in such a manner that the road may intersect at some suitable place; and following the valley of the east branch of twenty mile river in a southerly direction, either on the west side or on the east side, or partly on both sides of said stream, as may be most suitable and convenient for making said road, to intersect a road running from Buckfield village, easterly by Nathaniel Shaw's at some points between said Shaw's and Addison G. Cole's, thence westerly to meet the county road recently located from Buckfield village by South pond to Hebron."

This petition was entered at the May term of the Commissioners' court, in 1848, and notice was ordered to be given to all persons and corporations interested, by service of copies of the petition, &c., on the clerks of said towns of Hartford, Sumner and Buckfield, and by *posting up like copies in three public places in said towns*, &c., and by publishing the same in the Oxford Democrat, and a time was appointed to view the route and hear those interested.

On this petition a highway was located partly through the town of Sumner, and return thereof made, dated September term, 1848, describing the different courses and distances, and awarding damages. In their return the commissioners stated, that "at each angle in the aforesaid location, on the

easterly line thereof, we have set a stake marked R, or marked a tree with that letter."

Under this petition, in the Commissioner's docket, at the September term, 1848, was no entry, but the letter C, and barely the same letter under the entry at May term, 1849.

Under the docket entry for September term, 1849, of this petition, were the following entries; — "C. Recorded, book 3, pages 160 to 164. C. Proceedings closed."

The record of the Commissioners, of September term, set forth the petition, the order of notice, the location, and concluded thus; "at which term said report was accepted and ordered to be recorded. This report was then continued from term to term to the present time, when it was ordered that proceedings be closed, and that said road be established as a public highway."

Ebenezer Briggs & als. at the May term, 1849, petitioned for an increase of damages allowed them on this petition, and the report of the committee thereon was recorded with the proceedings of September term, 1850, but as accepted at the January adjourned term of 1850, being an adjournment of the September term, 1849; and the order of the Commissioners was, that said report be accepted and recorded as of the September term, 1849.

So much of the way as was located in the town of Sumner, not being opened, E. Phinney & als. entered a petition at the September term of the Commissioners' Court, 1852, being the third day of the month, for the appointment of an agent. The Court ordered that the clerk of Sumner be served with a copy of petition and order, thirty days before the 12th day of October next, and likewise that copies should be posted in three public places in said Sumner, thirty days at least before said 12th day of October, and the petition was continued to the next October term held by adjournment, from the September term, on October 12, 1852, when it appeared the order had been complied with, and an agent was appointed to open the road.

By the record, the petition of Phinney & als. was contin-

ued to the January adjourned term, 1853, from the December adjourned term, 1852, when the agent returned his warrant with his doings thereon.

Notice was then ordered to be given to the town of Sumner to appear before the Court of County Commissioners, next to be holden at, &c., on the second Tuesday of February, 1853, to show cause, if any they have, why the account of the agent should not be allowed.

On the second Tuesday of February the Court was held, the town of Sumner appeared by their agent, the account for opening of the road was allowed, and at the close of the account, after the amount was added up, was the following:— "allowed for settlement:—

"To two days attending Feb., adjourned term, proving account, $4 00

"To three days settling account for labor, materials, &c., $6 00."

The amount was not paid, and a distress warrant was issued against the inhabitants of Sumner, *in favor of the county of Oxford*, for the amount allowed at that time for opening the road, which was levied upon the goods of one of the inhabitants of Sumner and satisfied.

The regular terms of the County Commissioners for Oxford, as established by law, are to be held on the second Tuesday of May and the first Tuesday of Sept. yearly.

The petitioners for *certiorari* were the inhabitants of Sumner and Ervin Robinson, William H. H. Briggs and Thomas Bonney, who assigned the following errors:—

1. The original petition of Daniel Parsons and others contains no direct prayer or request to the County Commissioners, but is ambiguous, alternative and conditional.

2. The notice ordered and proved only required that copies of said petition and the order of Court thereon, should be posted up "in three public places in said towns of Hartford, Sumner and Buckfield," whereas by law three such copies should have been posted in *each* of said towns.

3. The said Commissioners did not cause the return of

their doings which was made at the Sept. term of said Court, 1848, to be recorded till more than two years after, to wit: till the winter of 1851, nor did their said report remain upon the files of said Court during said time; nor did they at any time cause to be entered of record, that the original petition upon which their proceedings were founded, was continued until their second next regular session to be held thereafter; nor did they ever at any time make any such order, or cause any record whatever to be made in relation to any such continuance.

4. The said County Commissioners did not continue the original petition from term to term, until a final decision was had on the petition of Briggs and others for increase of damages; but, on the contrary, closed proceedings on the original petition at the regular term of said Commissioners' Court, held in Sept. 1849, while no final decision was had on said petition of Briggs and others for increase of damages until Sept. 1850, a whole year after; nor have said Commissioners, at any time since a final decision was had on said petition for increase of damages, closed proceedings on said original petition or completed the record of their proceedings thereon.

One branch of the fifth error assigned related to facts intended by the petitioners to have been proved, but no proofs were offered; another branch of it related to the appointment of an agent, the allowance of his account, a part of which was alleged to have been done without notice to the town of Sumner, and concluded thus:—"Wherefore your petitioners further pray, that a writ of *certiorari* may issue, to cause the records of the doings of said Commissioners in appointing an agent, allowing his account, and issuing a warrant of distress in behalf of said county of Oxford, against the inhabitants of the town of Sumner as aforesaid, to be certified to, and brought before our Justices of our said Supreme Judicial Court, and that the whole proceedings aforesaid and the records thereof may be quashed."

Walton, for petitioners, in support of the errors assigned,

cited for the first, *Commonwealth* v. *Coombs*, 2 Mass. 489; for the second, R. S., c. 25, § 2; for the third, R. S., c. 25, §§ 4 and 5; for the fourth, R. S., c. 25, § 6; *Inhabitants of Cornville, petitioners*, 33 Maine, 237; *Windham, petitioners for certiorari*, 32 Maine, 452.

That no account of an agent to open the road should be allowed without due notice to the town interested, he cited R. S., c. 25, § 40.

That there was an error here, he contended was manifest from the record of the statement of the account. The two last items were added at the time it was passed upon.

It was further objected, that it did not appear of record that any judgment in favor of the agent against the town of Sumner was rendered, or any warrant of distress ordered to issue. *Waldo* v. *Moore*, 33 Maine, 511.

Another objection urged was, that the warrant of distress was illegal, being issued as if a judgment had been rendered in favor of "*the inhabitants of said county of Oxford*," when no such judgment was, or could be legally entered. The judgment, if any, should have been in favor of the agent.

And furthermore the warrant issued for too much; it included the illegal items in the account, and "*thirteen dollars costs incurred by said county.*" There cannot be either law or precedent for the recovery of costs in a case like this. *Emerson* v. *County of Washington*, 9 Maine, 98.

It was further urged, that although this application was to the discretion of the Court, it was a discretion to be exercised according to the rules of law; that if the rights of a party have been infringed to his detriment, by the erroneous doings of an inferior tribunal, he may justly claim redress; and it will be the duty of a court to afford it to him. That it was not the province of the Court to undertake to presume that it would be wiser for him to submit to the injury, or to conjecture that the public interest would be better promoted by an adjudication against him, and therefore it would not be discreet to relieve him. *Cushing* v. *Gay*, 23 Maine, 9; *Parsonsfield* v. *Lord*, 23 Maine, 511.

Hastings, County Attorney, *contra.*

The petitioners must first show a legal error and then go further and declare from that error the injury, and show distinctly that the injury has been received. *Inhabitants of Cushing* v. *Gay & al.*, 23 Maine, 9; *Parsonsfield* v. *Lord & al.*, 23 Maine, 511; *Lee* v. *Child*, 17 Mass. 351; *Strong* v. *County Commissioners*, 31 Maine, 578.

1. The first error assigned is one of form and technicality. Had the petition been as formal and as descriptive as the location itself, in what different condition would the petitioners now find themselves? The whole current of authorities runs against this objection and it is unnecessary to cite them.

2. The record does not show but that the proper notice was given. It is immaterial at this stage of the proceedings what the "notice ordered and proved" was. But if the statute notice was not given, who is injured? The town of Sumner was not, because express notice was given that town through her clerk. Were the other petitioners injured? There is no evidence that the road crossed an inch of their lands. There is no question but all persons interested actually had notice, and their appearance waived the statute notice even if it was not given. *Whately* v. *Franklin*, 1 Metc. 336; *Goodwin* v. *Inhabitants of Hallowell*, 3 Fairf. 271; *Rutland* v. *Worcester*, 20 Pick. 71; *Hancock* v. *Boston*, 1 Metc. 122; *Commonwealth* v. *Westborough*, 3 Mass. 406; *Ex parte Baring*, 8 Greenl. 137.

3. The Act of Feb'y 7, 1852, changed the law in relation to the subject matter of the alleged error. If the petitioners are right in their assumption, I reply that the continuance was *actually* had, and if the proper entry was not made, it is the misprison of the clerk and injured no one. 11 Mass. 417; *North Berwick* v. *York County Commissioners*, 25 Maine, 69; *Inhabitants of Vassalboro', Pet'rs*, 19 Maine, 343; *Ex parte Miller*, 4 Mass. 465.

4. The records do not authorize the statement of this error; but, if well grounded, have Robinson, Briggs or Bon-

ney been injured by it? How? No land of theirs appears to have been crossed by the road. Why should Sumner complain? The road is nearly all completed, and it cannot be of any *interest* to her to have it discontinued. There is nothing in this assignment which will compel the interference of the Court, so far as the establishment of the road is made as a public highway.

As to the items in the account of the agent to which exception is taken, because no notice was given, it is only necessary to call attention to the fact, that at the time at which the same was allowed, the town had notice and appeared by their agent. The other points made by the petitioners, as they do not show any ground of injury, it is unnecessary to advert to them. It is of no consequence to them, whether the warrant was in favor of the county or of the agent. The same consequences would have followed.

SHEPLEY, C. J. — The petitioners present five alleged errors.

The first is, that the petition containing no direct request is ambiguous, alternative, and conditional.

It should state the places, where the way desired is to commence and terminate, and its general course between them, that all interested may be enabled to judge how far such a way would be useful, and to what extent their interests might be affected. It is not perceived, that a petition presenting alternative places, each accurately described, for the commencement of a way, must necessarily be erroneous.

It does not appear in this case, that the description was so defective that a person would find it difficult to determine what was designed to be accomplished.

The second error alleged is, that it does not appear that the notices were ordered to be, or that they were posted in three public places, in each of the towns named.

The town of Sumner appears to have been notified by service of an attested copy upon its clerk. It does not ap-

pear that the way was laid out over any land owned by Ervin Robinson or Thomas Bonney, or that they were thereby injured. The way does appear to have been laid out to commence within four rods of the house of the only other petitioner, rendering it highly probable, that he must have had actual notice. The petition contains no allegation that either party petitioning had not actual notice, or that either has lost any right or suffered any injury by reason of the insufficiency of the notice given.

The third and fourth alleged errors may be considered in connection. They are in substance, that the proceedings of the Commissioners having been returned to their session, held in September, 1848, were not ordered to be recorded, "till more than two years after;" that the petition was not continued to their next regular session, and that it was not continued from term to term until a final decision was made upon a petition for increase of damages.

The record and docket entries do not appear to have been very accurately or perfectly made; and the counsel do not agree respecting the facts disclosed by them.

The return of the Commissioners bears date of their September term, 1848. The docket entry of that term does not so state. Nor does it state, that any order was made at that term, that their return at that term was accepted and ordered to be recorded. The letter C does appear to have been made upon the docket, under the entry of the petition, indicating that it was continued; and a like entry appears to have been made under it, at their May term, 1849, when a petition appears to have been presented by certain persons, for an increase of damages; and the report of a committee upon that subject, bearing date on September 1, 1849, appears to have been returned to an adjournment of the September term, holden in January, 1850, when as the record states, it was accepted and ordered to be recorded, as of the September term, 1849. Without such an order, the proceedings and record thereof, at the adjournment, would constitute part of those of September term.

The counsel for the petitioners insists, that this order was not made before September term, 1850, and he refers to the fifteenth page of the printed documents in proof of it. There is found on that page a formal entry of the time when the September term, 1850, was holden, and what officers were present, without any entry whatever of proceedings by the Commissioners at that term. The record states, that the report was continued from term to term, "to the present term," using the word "term," if that entry was made at the adjournment, to designate the adjourned session; and it appears to have been so used on other occasions, exhibited in the printed documents.

It does not appear by the record, when the entry was made, that the proceedings be closed and the way be established as a public highway. Upon the docket of the September term, 1849, there appears to have been an entry made under the petition, "recorded book 3, pages 160 to 164." "Proceedings closed." It is not probable that these entries were made during the session. They may be regarded as subsequently made as of that term, and not till after the proceedings on its adjournment in January, 1850, when the report of the committee on the petition for an increase of damages appears to have been made and accepted, and the whole proceedings to have been closed.

The actual course of proceedings, so far as it may be discoverable from the record and docket entries presented, appears to have been; that the return of the Commissioners of the laying out of the road was made at their session in September, 1848; that the petition was continued to their May term, and thence to their September term, in the year 1849; that no order was made that the proceedings be closed until the adjournment of the September term in the month of January, 1850, when such an order was made; that a petition for an increase of damages was presented at May term, 1849; that a committee was then agreed upon, and that a report of its proceedings was presented at an adjournment of the September term, 1849, holden in January,

1850, which was accepted and ordered to be recorded as of September term, 1849, and that all the proceedings respecting the road were then completed and closed.

Provision was made by the second section of the Act approved on February 7, 1852, that no record of any highway in other respects legally laid out shall be quashed, for the reason that the return of the Commissioners shall not have been recorded, before the final close of the proceedings.

There do not appear to have been any such irregularities in the proceedings in this case, as would prevent any corporation, or person thinking himself aggrieved, from having full opportunity to obtain redress according to the course prescribed by law.

The Court is not therefore called upon to grant the writ on account of these errors.

It is admitted, that many of the facts stated under the fifth cause of complaint have not been proved; and that the opening argument was prepared, upon the expectation that they would have been. These and some others, it will not be necessary to notice.

Another objection is made to the record of the proceedings for the appointment of an agent to make and open the road. It is said that one was appointed, before the time allowed for the town to do it had expired. Two years were allowed for this purpose, after the proceedings were closed. As already stated, the proceedings appear to have been actually closed in January, 1850. The petition for the appointment of an agent appears to have been presented at their September term, 1852, when an order was made, that an attested copy thereof, with the order of the Court thereon, should be served upon the clerk of the town, and be posted in three public places in the town, thirty days at least before the twelfth day of October then next, that the town might then appear, and show cause why the prayer should not be granted. At an adjournment of the September term, holden on October 12, 1852, the Commissioners

adjudged, that all the requirements of their order had been complied with, and that an agent should be appointed.

These proceedings appear to have been in conformity to the provisions of the statute, c. 25, § 40. It is said, that the agent made return of his proceedings, and that the town was notified to make its objections to them, when no court was by law holden. The record states, that the petition was continued to an adjourned term, holden in January, 1853, from an adjourned term held in December, 1852. It would follow, that the September term, 1852, holden by adjournment on October 12, 1852, must have been adjourned to December, 1852, and then to January, 1853, when the agent made return of his proceedings. Notice then appears to have been given to the town, to appear at a further adjournment of the same term, holden on the second Tuesday of February, 1853, when the agent's account was allowed. The statute does not require that the Commissioners should act upon such proceedings only at their terms holden without adjournment, at the times prescribed by law.

Objection is made, that no formal judgment was entered of record against the town, for the amount expended to make the road. The amount due, appearing to have been regularly ascertained and adjudged, the proceedings should not be quashed, because a judgment for recovery was not formally entered of record. This may be properly regarded as an omission of their clerk.

The warrant of distress does not constitute a part of the extended record to be presented by the writ prayed for.

This Court, on this process, cannot inquire into the propriety of the allowance of items in the agent's account.

Writ denied.

HOWARD, HATHAWAY and CUTTING, J. J., concurred.

BARTLETT *versus* BLAKE.

Upon a party alleging fraud, is imposed the burden of proving it.

The insolvency of the vendor at the time of the sale of a chattel in an unfinished state, his treatment of the property as his own in completing it after such sale, do not furnish conclusive evidence of a fraudulent sale; but those *indicia* of fraud may be explained so as to make the sale valid as against the creditors of the vendor.

The sale and delivery of a chattel in an unfinished state, but which, by agreement of the parties, is left in the control of the vendor to finish, is sufficient to vest the property, after its completion, in the vendee, as against the attaching creditor of the vendor.

Where an unfinished chattel, to be completed by the vendor, was transferred by a bill of sale absolute on its face, but containing the clause "allowing the vendee the right to take the same at will," such clause will not authorize the vendee to repudiate the contract.

ON FACTS AGREED.

TRESPASS against a deputy sheriff for taking the plaintiff's wagon.

The plaintiff claimed title to the wagon under the following bill of sale:—

"W. B. Bartlett bo't of

"J. G. Robinson, One new side-spring single wagon-wood, including the running gear and the irons for the same, and the said Robinson agrees to iron, paint and trim the wagon and put it in good complete running order in July next.—On which the said Bartlett has advanced and paid him thirty-six dollars and seventy-nine cents, and the said Bartlett agrees to make such advances from time to time as may be necessary to complete said wagon, not exceeding sixty-five dollars, with the right to take the same at will. "John G. Robinson.

"Norway, June 1, 1853."

Most of the facts in this case appear in the opinion of the Court.

At the time of the sale, Robinson had no real estate and all his personal property was mortgaged to its full value. He bought the iron to complete it on his own credit, and did not disclose to the persons he traded with in relation

to the materials and work to be done on the wagon, that any person was interested in the wagon but himself. No one was present at the time of the writing of the bill of sale, or delivery of the parts of the wagon.

The defendant claimed to hold the wagon as the property of Robinson on an execution against him.

L. Whitman, for defendant, contended, that the sale to the plaintiff was a fraud upon the creditors of Robinson, and as to them void.

1. The delivery was not sufficiently public, witnesses were at hand and should have been called; a mere exhibition of separate parts of an unfinished wagon at different times and places, under a contract that it should become plaintiff's property, when finished, cannot be, in legal contemplation, a delivery.

2. These parts of a wagon were not left in the hands of the plaintiff, nor, as his property, put into the hands of a third person.

3. The facts, that at the time Robinson had no unincumbered property, but all mortgaged to its full value, that he was in embarassed circumstances, and the mode of sale and of an unfinished article to be by himself completed, show unerringly, that the sale was only colorable, and the design was to place his property beyond the reach of his honest creditors.

4. The memorandum at the bottom of the bill of sale, shows, that it was not absolute, but that the plaintiff had the right to abandon it at any time before final acceptance of the finished work.

5. The object of the sale must have been known to plaintiff, and even if he paid a consideration, it cannot avail him.

6. The usual badges of fraud are found in this pretended sale.

Bartlett, pro se,—1. As to the delivery of the wagon, cited *Badlam* v. *Tucker,* 1 Pick. 396; *Jewett* v. *Warren,* 12 Mass. 30; *Putnam* v. *Dutee,* 8 Mass. 287; *Macomber* v. *Parker,* 13 Pick. 182.

2. That the bill of sale was an absolute one, appeared on its inspection.

3. The plaintiff had a right to employ the vendor as well as any other person to finish the wagon.

4. The facts show, that Robinson was really acting as the agent of plaintiff in all he did, and it was immaterial whether he disclosed it or not, such withholding of his character was never considered an indication of fraud.

5. No circumstances are developed in this case to throw any suspicion of fraudulent design on the part of the plaintiff, or even upon the vendor.

SHEPLEY, C. J. — The suit is trespass for a wagon. The plaintiff claims title by purchase from John G. Robinson by bill of sale bearing date on June 1, 1853. The defendant, as a deputy of the sheriff, seized and sold it as the property of Robinson, on July 30, 1853, by virtue of an execution issued on a judgment recovered in 1851, by Ebenezer C. Shackley against Robinson. The description of the property in the bill of sale is "one new side spring wagon-wood, including the running gear, and the irons for the same; and the said Robinson agrees to iron, paint and trim the wagon, and put it in good complete running order in July next." The plaintiff appears to have paid by delivering up a note and discharging an account against Robinson.

The objections made to the plaintiff's title are, that there was no sufficient delivery, and that the sale was fraudulent as against creditors.

There does not appear to have been any delivery, when the bill of sale was made.

Robinson testifies that, on June 25, he delivered part of the property to the plaintiff, who accepted it; and that about ten days afterwards he met him in the highway, when he was carrying the other part to him, and was directed by him to leave it with the first part, which had been previously left in the shop of Joshua B. Stuart to be ironed; and that he did so.

This was a sufficient delivery to vest the title in the plaintiff before the seizure on execution.

The elements of fraud principally relied upon are, the insolvency of Robinson; his treatment of the property as his own after the sale; its sale in an unfinished state, and a clause in the bill of sale allowing the plaintiff "the right to take the same at will."

The case presented does not appear to be one, in which the owner of property, being about to fail, or to become known to be embarrassed, finds it convenient to dispose of his property to prevent its attachment or seizure by his creditors. So far as the condition of Robinson is disclosed, it would rather appear, that he had been insolvent, and known to be so, before he commenced to make the wagon. When a person known to be insolvent proceeds to manufacture an article and to sell it, in an incomplete state, to a favored creditor in payment of a debt due, the indication of fraud is not so strong as it would have been if he had continued in credit, until he found it failing and himself under the necessity of making a disposition of his property to prevent its attachment or seizure.

Robinson's treatment of the property after the sale, as if it were his own, would have been a strong indication of fraud, if not explained. By the contract he was to have the wagon finished, and the plaintiff was to make advances to him for that purpose; but was not to pay the bills to those employed. Robinson's engagements to pay from his own resources the blacksmith and painter, do not appear to have been inconsistent with the contract and the sale of the unfinished materials. The right of the plaintiff to take the wagon at pleasure, might be inserted to enable him to avoid a loss in case Robinson should fail to have it finished properly, or in case any of his creditors should attempt to take it, before it was finished. It does not authorize such a construction of the contract as would allow the plaintiff, at his election, to repudiate the contract and annul the sale. The burden of

proof, to establish the alleged fraud, is upon the defendant, and it is not sufficient to raise suspicions.

Defendant defaulted.

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

SOULE *versus* BONNEY.

Upon a note, given under duress by imprisonment, no action can be maintained.

Such duress must be an unlawful restraint of the person.

It is no defence to a note, that it was given for the suppression of a prosecution, criminal merely in form, but involving no criminal offence.

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

The action was upon a note of hand, in the name of the indorsee. Whether it was indorsed when over due was a question to the jury. The defence set up was, that the note was without consideration, given under duress, and to compound a felony.

The plaintiff offered evidence tending to show his ownership, and that it was given for a balance due on joint notes of defendant, and one Gorham, to Thomas Sears, which had become barred by the statute of limitations.

The defendant contended that although given for such balance, this action could not be maintained, because he was held under arrest by a warrant until he gave the note in suit, on complaint of one Moses Dennett.

Evidence was admitted showing that the defendant gave the note while under arrest upon said complaint, and was discharged from arrest on giving the note.

Neither the complaint, warrant, or any record thereof, was produced; nor was any sufficient search shown to let in parol proof of their contents.

The presiding Judge instructed the jury, that in order to constitute duress by imprisonment, the original restraint of the person must have been unlawful, or there must have been an abuse of legal process; and that the fact, that the prosecution was abandoned, and the defendant discharged

from the arrest at the time the note was given, would not necessarily impair the note; but if the defendant was under arrest at the time on such prosecution, and by reason of that, was induced and constrained to make a settlement, and give the note to procure his discharge from the arrest, when he would not have done so but for the arrest, and if the consideration of the note or any part of it was the compromising or suppression of the prosecution, the note would be invalid. A verdict was returned for the defendant.

Clifford, for plaintiff.

Ludden, for defendant.

SHEPLEY, C. J. — The defence to the note sued appears to have been, that it was made under duress of imprisonment.

No complaint or warrant, nor the record of any was produced, and no such proof of loss was made as to permit secondary proof of their contents. It is not perceived, that the Court or jury could be informed that the restraint was unlawful; and the Court appears to have correctly instructed respecting what should constitute duress by imprisonment.

A new defence appears then to have been insisted upon, that the note could not be recovered if given for the suppression of a criminal prosecution. On this point the instructions stated, "if the consideration of the note or any part of it, was the compromising or suppression of the prosecution, the note would be void."

There could have been no legal proof that "the prosecution" was for any offence known to the law. It might have been for something which the law would not regard as an offence, such as a prosecution in a criminal form for a trespass.

The instructions would authorize the jury to find the note to be void, if made to suppress a prosecution in a criminal

form, for something not involving the commission of any criminal offence. *Exceptions sustained, verdict set aside, and new trial granted.*

RICE, HATHAWAY and CUTTING, J. J., concurred.

COUNTY OF YORK.

(*) GURNEY *versus* TUFTS.

A magistrate's warrant of commitment must show his jurisdiction to issue it.

If it show the want of such jurisdiction, it can give no protection to the officer who executes it.

By the Act of 1851, c. 211, § 11, a magistrate might sentence the owner or keeper of spirituous or intoxicating liquor to stand committed for thirty days in default of payment of the fine imposed.

But for such default, the magistrate has no authority to order the offender to be imprisoned until he pay the fine or be otherwise discharged by due course of law.

If a magistrate's warrant of commitment in a criminal prosecution fails to show that, on the complaint, the accused was arrested or arraigned, or that he pleaded or was tried, or that there was any proof of his guilt; and if it expressly negatives that he was present before the magistrate; and if it also shows that an unlawful sentence of imprisonment was imposed upon him, such a warrant will not justify an officer in arresting him.

From an arrest made upon such a warrant, the party arrested is entitled to be discharged by writ *de homine replegiando.*

DE HOMINE REPLEGIANDO.

The writ was returnable to the late District Court, and was as follows:—

"We command you, that justly and without delay, you cause to be replevied John Gurney, who, (as it is said) is taken and detained in a place called Alfred, within our said county of York, by the duress of Thomas P. Tufts, of Saco, in the county of York, and is there unlawfully imprisoned

and restrained of his liberty, by the said Thomas P. Tufts; that he, the said John Gurney, may appear at our District Court, for the Western District, next to be holden at Alfred, within and for our said county of York, upon the third Monday of October, A. D. 1851, then and there in our said Court, to demand right and justice against the said Tufts, for the duress and imprisonment aforesaid, and to prosecute his replevin as the law directs; provided that the said John Gurney shall, before his deliverance, give bond to the defendant, in such sum as you shall judge reasonable, and with two sufficient sureties, with condition to appear at said Court to prosecute his replevin against the defendant, and to have his body there, to be redelivered, if thereto ordered by the Court, and to pay all such damages and costs as may be awarded against him; and if this plaintiff is delivered by you at a day before the sitting of said Court, you are to summon the defendant to appear at said Court."

Tufts, the defendant, was a constable of the town of Saco, and he avowed the taking and detaining of the plaintiff, and justified under a warrant to him directed by the Judge of the Municipal Court of that town, which warrant he was permitted to read, though objected to by the defendant.

It recited that the plaintiff had been convicted upon the complaint on oath of C. B., C. H. and S. S., all of Saco, and voters in that town, that the plaintiff had and kept spirituous and intoxicating liquors, intended for sale, deposited in the shop in said town, occupied by him, (he not having been appointed by the selectmen to sell such articles,) whereby said liquors had been forfeited to be destroyed, &c. The warrant further recited, that upon that complaint, a search warrant had been issued and committed to said Tufts for service, and that Tufts had returned the same with an indorsement thereon, certifying that he had seized certain spirituous and intoxicating liquors, and summoned John Gurney [this plaintiff,] the owner or keeper thereof, by reading to him the warrant. The warrant further recited, that said Gurney did not appear and show cause why said

liquors should not be destroyed, and why he should not be adjudged to pay a fine and costs; and that he did not appear at all, or claim said liquors; and that by the consideration of said Court, he was sentenced to pay a fine to the use of said Saco, of twenty dollars, and costs of prosecution, taxed at four dollars and ten cents, and stand committed until the same be paid; and that said liquors were declared forfeited to be destroyed, the same having been found and seized in said shop, and that said John Gurney failed to pay said fine and costs. The warrant, therefore, commanded this defendant to convey said John Gurney to the jail, and him there deliver to the keeper thereof, and to destroy said liquors. And it also commanded the keeper of the jail, to receive said Gurney into his custody in said jail, and him there to keep until he perform said sentence, or be otherwise discharged by due course of law.

Upon that warrant, the defendant made return as follows:

"York, ss. July 14, 1851. By virtue of this precept I have conveyed the within named John Gurney to the town of Alfred, for the purpose within named, where he was taken from my possession by Israel Chadbourne, sheriff of the county of York, on a writ of replevin, for replevying the person. Thomas P. Tufts, constable of the town of Saco."

The case was then taken from the jury and submitted to the Court, upon the stipulation, that if the action was maintainable, judgment should be rendered for the plaintiff; otherwise, that a nonsuit should be entered.

Shepley and *Hayes*, for the plaintiff.

Wilkinson, for the defendant.

Appleton, J. — The writ of personal replevin is given by R. S., c. 142, to any one imprisoned, restrained of liberty or held in duress, for the purpose of testing the legality of such imprisonment, restraint of liberty or duress, and if proved to be illegal, the plaintiff is entitled to his discharge and to his costs.

The defendant justifies the arrest of the plaintiff, as a

constable, by virtue of a warrant issued by the Police Judge of Saco, against him, and the question is, whether such Judge had jurisdiction over the subject matter of the complaint set forth therein, and over the person of the plaintiff, or whether a want of jurisdiction in those respects, or either of them, is apparent on the face of the proceedings.

The warrant must, on its face, show the magistrate's authority to commit, for no presumptions are to be made in favor of his jurisdiction. However important it may be that an officer should be protected, it should never be forgotten that the citizen has his rights and that they are rights under the law and entitled to its protection. When an officer acts under the authority of a magistrate having jurisdiction, and that fact is disclosed on the face of his precept, he should not be held responsible for the previous omissions of such magistrate. He should not be required to ascertain or determine the validity of prior proceedings, or to look beyond the command of his precept. But if the magistrate issues precepts or orders arrests for acts not known to the law as offences; if he imposes illegal punishments, as if he commands a plain and obvious violation of the law, he can, when thus transcending the bounds of his authority, afford no more protection to an officer than could one not a magistrate. "If a warrant," says REEVE, C. J., in *Grunder* v. *Raymond*, 1 Conn. 45, "which is against law be granted, such as no justice of the peace or other magistrate, high or low, has power to issue, the justice who issues and the officer who executes it are liable in an action of trespass. When there is a want of jurisdiction over the person, as in the Marshalsea case, 10 Co. 70, or over the cause, as if a justice should try a man for murder; or over the process, as in the case ruled from Hobart, it is the same as though there was no court. It is *coram non judice*." It may be difficult in all cases to distinguish between those cases, where the acts of an officer are justified by his precept and those in which they are not, but the distinction none the less exists.

If precepts sufficient in point of form are issued by a

court or magistrate having jurisdiction of the subject matter, the officer will be protected. *Sandford* v. *Nichols*, 13 Mass. 285. Erroneous process is the act of the Court; and when set aside, a party may justify under it. *Blanchard* v. *Goss*, 2 N. H. 491. "Those defects in the process which are *amendable*, and which do not render the process absolutely void, although apparent on its face, do not render the officer or party liable. It is only *jurisdictional* defects, and such as cannot be amended, which render the officer liable, when they are apparent on the face of the process." Per WILLARD, J., in *Dominich* v. *Easter*, 3 Barb. 17; *Harrington* v. *People*, 6 Barb. 607. In *Houlden* v. *Smith*, 14 Ad. & El., N. S., 852, PATTERSON, J., in reference to the liability of the magistrate by whom process has been issued, where he had no jurisdiction, says, "here the facts of the case which were before the defendant, and which could not be unknown to him, showed that he had not jurisdiction; and his mistaking the law as applied to these facts, cannot give *prima facie* jurisdiction or the substance of any." The warrant may have been issued without complaint or previous process; it may be defective in form and liable to abatement; it may have been fraudulently obtained, and may be void so far as regards the complainant, or the magistrate; and they may both be liable to the party injured, yet if the warrant is legal on its face, and shows an apparent jurisdiction, the officer will be protected when acting in obedience to his precept. *State* v. *Weed*, 1 Fos. 268. But when the warrant shows that the magistrate had no jurisdiction over the person, or over the offence, the officer is not obliged to make service, and in so doing he becomes a trespasser. *Pearce* v. *Atwood*, 13 Mass. 344.

The warrant of commitment under which the defendant justifies, after reciting the substance of the complaint, proceeds as follows:—"And a search warrant was issued upon said complaint on said eleventh day of July, and on said day was returned to said Court by Thomas P. Tufts, one of the constables of said town of Saco, to whom it had been

committed for service, with a return thereon, certifying that he had seized certain spirituous and intoxicating liquors, and forthwith summoned John Gurney, the owner or keeper thereof, by reading the warrant to him in his presence and hearing, and the said John Gurney did not appear and show cause why said liquors should not be destroyed and he be adjudged and held to pay a fine and costs, and *did not appear or claim said liquors.* And said John Gurney, by the consideration of said Court, is sentenced to pay a fine to the use of said Saco of twenty dollars and costs of prosecution, taxed at four dollars and ten cents, and stand committed until the same be paid." The warrant further orders the destruction of the liquors and the commitment of Gurney to jail, and that the keeper of said jail should keep him "*until he perform said sentence, or be otherwise discharged by due course of law.*" The imprisonment of the plaintiff is required to be until he perform said sentence or be otherwise discharged by due course of law. The magistrate had clearly no authority, even if he had jurisdiction of the person, to impose any such sentence, or to commit for a failure to comply therewith. By the Act of June 2, 1851, c. 211, § 11, the magistrate is only authorized to sentence the owner or keeper of liquors to "*stand committed for thirty days in default of payment,* if in the opinion of the Court said liquors shall have been kept or deposited for the purposes of sale." In *Robinson* v. *Spearman,* 3 Barn. & Cress. 493, which was an action of trespass against the magistrate, the commitment of the plaintiff was until he should pay the sum due and legal and accustomed fees, or until he should otherwise be discharged by due course of law. The magistrate, by the statute under which he acted was empowered only to commit for three months, unless the money be sooner paid. "I am of opinion" says ABBOTT, C. J., "that the warrant in this case was illegal, not being such as the justice had authority to make. It was his duty to have pursued the words of the statute. If he had so done it would have given the party committed the option either

of paying the money, or staying three months in prison and being thereby altogether discharged from the payment. This warrant is for his imprisonment till he shall pay the money, and deprives the party of that advantage. The difference is a most material one, and it gives the party committed a right of action against the magistrate." This decision would be directly in point, were the suit against the magistrate, instead of the officer.

The plaintiff in this case was never arrested. He was never arraigned, nor has he ever pleaded to any complaint. He has never suffered a default. No proof of his guilt has been offered, nor has any trial been had. The plaintiff has been summoned to appear before the magistrate who received the complaint, and not appearing, he has been sentenced without any trial or adjudication of his guilt. His presence is expressly negatived. No authority over the person is shown. The sentence imposed is one not authorized by the statute, and if it were, it would be in contravention of the bill of rights, which give to every citizen the right "to have a speedy, public and impartial trial." So far as the authority of the magistrate is concerned, the sentence might as legally have been to perpetual imprisonment, as in the present form. All this is apparent on the face of the process, and is thus brought home to the knowledge of the officer. In *Savacool* v. *Boughton*, it was held by MARCY, J., after a full and careful examination of the authorities, "that if a mere ministerial officer execute any process, upon the face of which it appears that the Court which issued it had not jurisdiction of the subject matter, *or of the person* against whom it is directed, such process will afford him no protection for acts done under it." The same doctrines were affirmed in *Churchill* v. *Churchill*, 12 Verm. 661.

Defendant defaulted.

TENNEY, J. concurred. SHEPLEY, C. J., and HOWARD, J., concurred in the result.

(*) PHILBROOK *versus* NEW ENGLAND MUTUAL FIRE INSURANCE COMPANY.

The application to an insurance company, upon which a policy is granted, is to be taken as a part of the contract of insurance, to the same effect as if incorporated into the policy itself.

The charter of a mutual insurance company provided that a person insured therein, should be deemed a member, during the time specified in his policy, and that he should be "bound to pay his proportion of all losses and expenses happening to the company, *during his connection therewith*; — *Held*, that the collection of an assessment, ordered by the company within the life of the policy, but subsequent to the destruction of the property by fire, is not a waiver of any forfeiture of the policy previously incurred by the act of the insured himself.

If, by law, a policy is to be vacated by a subsequently acquired insurance, unassented to by the first insurers, yet if the second policy be a void one, it will not defeat the former one, even though the subsequent insurers, after a loss by fire, may have paid the amount which they insured.

In the construction of written contracts, it is competent to take into consideration the subject matter, and the obvious scope and design, and even the situation of the contracting parties.

Though a by-law of an insurance company may provide that any of its policies upon property *previously insured*, shall be void, unless such previous insurance be indorsed on the policy at the time of its being issued; still such by-law is inoperative, if, *in the policy itself*, such previous insurance be recognized and approved.

A policy was issued upon property on which a previous policy had been issued by other insurers, but both the sums insured did not exceed three fourths in value of the property; — *Held*, that such a by-law as above named would not vacate the last issued policy, which within itself gave to the insured, "leave to keep insured, upon the same property, in other companies, an additional sum, provided both sums insured should not exceed, in value, three-fourths of the property insured."

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

ASSUMPSIT upon a policy of insurance against fire. After the evidence had all been presented, the case was submitted to the Court, with power to draw inferences of fact, and to enter judgment of nonsuit or default, as the principles of law may require.

By the consideration of the Court, the evidence established the following facts: —

The defendants are a corporation established by a statute of the State of New Hampshire.

Moses Emery owned a hotel in Saco, called the Thornton House. An L part and a hall either constituted a part of the hotel, or were contiguous to it, and owned with it.

On October 8, 1849, he procured of the defendants an insurance against fire, of $2000, for three years, upon "his tavern house."

In his application, he described the "buildings" to be "three stories, with an entablature of one more story in the main house; ell and hall, three stories," and valued at $12000.

On Jan. 26, 1850, Emery conveyed the property to this plaintiff, Philbrook, and assigned to him the policy. To that assignment, the defendants in due form assented.

Afterwards, on March 4, 1850, Philbrook made application to the Lowell Traders' and Mechanics' Mutual Fire Insurance Company, for an insurance to the amount of $3200, for three years, upon "hotel and hall attached," valued at $10,000. In that application, he stipulated that the $3200 did not exceed three quarters of the actual value of the buildings, exclusive of land.

Conformably to that application, the Lowell company, on the same day, issued to him their policy of insurance.

Some provisions, contained in the respective charters and by-laws of these two companies, and bearing upon the rights of these parties, are presented in the opinion of the Court.

On January 9, 1851, the "house" was wholly destroyed by fire. On the 20th of same January, the plaintiff, by certificate of E. R. Wiggin, the nearest magistrate, gave due notice to the defendants of the loss, and of the amount of insurances therein, particularly specifying that made by the Lowell Company.

On March 5, 1851, the defendants notified the plaintiff that they rejected his claim against them on their policy.

On April 22, 1851, the Lowell company paid to the plaintiff $3200, being the amount by them insured.

On July 23, 1851, the plaintiff paid to the defendants' treasurer $19,20, taking his receipt therefor, certifying that it was an assessment ordered by the directors on April 1, 1851.

The defendants insist that they are under no liability to the plaintiff, and they rely upon the ground that, subsequent to the time of their contract of insurance, and of the assignment of it to the plaintiff, he obtained the additional insurance at the Lowell office, without having procured the assent of the defendants thereto, or notified them of it.

Eastman and *Leland*, for the plaintiff.

Clifford, for the defendants.

TENNEY, J. — The defendants do not deny, that a *prima facie* case has been made out against them, by their policy to Moses Emery and the assignment thereof to the plaintiff and the loss of the property, together with the preliminary proofs required by the Act of incorporation and by-laws, which make a part of the policy. But they do deny their liability, on the ground, that subsequent to their contract of insurance, and the assignment of the same, the plaintiff obtained at the office of the "Lowell Traders' and Mechanics' Mutual Fire Insurance Company," duly incorporated and organized, an insurance of the same property, and failed to give notice, and obtain the consent of the directors of the defendants, according to the provision contained in section 12 of their Act of incorporation, which is in the following language; — "If any other insurance shall be obtained on any property insured by this company, notice shall be given to the secretary, and the consent of the directors obtained; otherwise the policy issued by the company shall be void."

It is admitted by the plaintiff, that he did obtain a policy at the office of the Lowell company, on March 4, 1850, but insists that the policy in suit is not affected by the provision in the section of the Act of incorporation referred to, for the following reasons; first, the risks assumed by the two companies were not identical. Second, the rights of the defendants, whatever they might otherwise have been, under this section, were waived by the directors. Third, that the notice of January 20, 1851, was a sufficient notice of the subsequent policy. Fourth, the policy of the Lowell

company was void, when it issued, and could have no operation to the prejudice of the plaintiff.

1. The application of Emery, made on October 8, 1849, to the defendants, is for insurance on the "Thornton House," to the amount of $2000, valued at $13000. The second question in the application, to be answered is, "materials and condition of the buildings." This question must refer to the building or buildings before mentioned, on which insurance was sought. No building is previously referred to in the application, excepting the "Thornton House." The answer is, "three stories, with an entablature of one more story in the main house, ell and hall, three stories." It is manifest that the intention of the applicant was to obtain insurance on the main house, the ell and the hall, under the general term of the "Thornton House." The evidence introduced to exhibit the relative situation of the main house, the ell and the hall, and the manner of their connection one with the other, shows very clearly, that all may be considered as parts of the same house. In the application, in answer to the sixth question, "how are the buildings occupied?" Emery says, "rented to James P. Philbrook, late of the Franklin House, Augusta, Me. for a tavern." The policy obtained upon this application, is of his "Tavern House, $2000, situate as described in his application, reference being had to said application, for a more particular description, and as forming a part of this policy." The application is to be taken as a part of the contract of insurance, in the same manner it would be, if incorporated into the policy itself.

The plaintiff's application to the Lowell company, of March 4, 1850, is for insurance upon the hotel and hall attached, of $3200, of the value of $10,000, in Saco, on Main street." A policy of insurance of the same property was obtained on that day. Nothing tends to show that the plaintiff did not consider the ell as a part of the "Hotel," and from the imperfect description given of the ell in the evidence, we do not doubt, that it is proper so to regard it.

The hall, whether a part of the "Hotel" or not, in fact is covered by the policy in express terms. The plaintiff's receipt of money after the loss, dated April 22, 1851, of the Lowell company, is in full for his loss by fire of the "Thornton House, at Saco." The property insured by one policy, is covered by the other.

2 and 3. If the second and third answers to the defence are understood by the Court, they may be considered in connection. In order that the policy in suit may not be void, by § 12, of the Act of incorporation, by a subsequent policy it is made necessary that notice thereof be given to the secretary, and the consent of the directors obtained. The consent of the directors to the second insurance, is the object of the notice, which is not required to be in any particular form, or in writing. It is for the purpose of obtaining the consent, which becomes entirely effectual, however defective the notice may be, if it be obtained. But if the consent is not obtained in express terms, but in such a mode, that of itself it may be of doubtful import, the notice shown to have been given may serve to explain it and give it a character free from doubt.

It is contended by the plaintiff, that the required notice was given on January 20, 1851, in the certificate of E. R. Wiggin, as a magistrate, containing the statement of the plaintiff, that there was such second insurance. It is true, as the plaintiff contends, that he was not bound by the aforenamed section 12 to give the notice at any precise time; but the policy of the defendants was suspended, after the second was obtained, if the latter was valid, until the notice to, and the consent of the directors, so that it would not cover a loss happening during that time.

By § 7 of the Act of incorporation of the defendants, persons sustaining a loss of property insured, shall within thirty days thereafter, give notice of the same in writing at the office of the company. And by article 11, of the by-laws, as soon after the loss as practicable the assured shall furnish the office with a particular account of such loss or damage,

verified by oath, and with other things, state whether any, or what other insurance existed on the same property, accompanied by a certificate under the hand of some disinterested magistrate, &c.

The notice of January 20, 1851, contains many things not required, if the purpose thereof was to obtain the consent of the directors to the second insurance; such as the account of the loss; knowledge or want of knowledge of the cause of the fire; value of the property on which insurance was obtained; the tenure by which the plaintiff claimed it; the dimensions of the buildings, all verified by oath, and accompanied by the certificate of a magistrate most contiguous to the place of the fire.

On the other hand, some things are omitted apparently essential in a notice designed to obtain the consent of the directors to a second insurance; the dates of the policies were not given in this notice; and nothing is found therein from which it can be inferred, that the insurance in the Lowell company was subsequent to the other; no request for consent is expressed or intimated, and nothing from which it would be understood that it was desired. It is, therefore, difficult to come to the conclusion that this paper, with the magistrate's certificate, so appropriate as a compliance with § 7, of the Act, and of article 11, of the by-laws, and purporting upon its face to be in pursuance of the requirements therein, and so totally inappropriate for any other purpose, given eleven days after the fire, and more than ten months after the second policy was taken, can be treated as designed at all for a notice under § 12. It bears no evidence of such intention, and of itself is insufficient for that purpose. There is no evidence of any other notice, unless it may be found by inference, from the conduct of the directors, relied upon by the plaintiff as proof of a waiver of the right to hold their policy void.

On March 5, 1851, the plaintiff was informed by the letter of the secretary of the defendants, that his claim was rejected by the directors. This letter must be construed to

mean all that its terms indicate and no more, in connection with the plaintiff's notice of January 20, 1851, and is a substantial denial of that liability of the company; and being so, acts more unequivocal, than might otherwise be required, may be regarded as necessary to show that the directors intended to waive the right of the company, asserted thereby, to hold the policy invalid.

For the purpose of showing the waiver of the defendants, the plaintiff relies upon the receipt of the treasurer of the company, in the following terms:—"New England Mutual Fire Insurance Company. Received of J. P. Philbrook, nineteen dollars and twenty cents, being the amount of the assessments ordered by the directors of the New England Mutual Fire Insurance Company, April 1, 1851, on premium note 6513. "Jno. Whipple, Treasurer.

"Concord, July 23, 1851. By the hand of G. White."

Upon the back of this receipt was printed a schedule of losses, from May 16, 1850, to March 29, 1851, inclusive.

It is insisted for the plaintiff, that the defendants cannot hold their policy void, and receive the benefit of his premium note. Hence this assessment and the receipt thereof from him by the proper officer of the company, is a consent to the second policy, and is a waiver of the right to hold the one in suit vacated. Is this proposition true? No authorities, which we consider bearing directly upon it, and in its support, have been referred to; and its correctness must be determined upon an examination of the whole contract.

By section 2 of the charter of the defendants, persons, who may at any time become insured under this Act, shall be deemed and be taken to be members of this corporation, during the time specified in the policy. By § 6, every member is bound to pay his proportion of all losses and expenses happening to the company during his connection therewith; and the buildings insured, with the land whereon they stand, are held as security of any deposit note of the person so insured, and the policy itself enacts a lien upon the same, for the sum of any such deposit note, and the

costs which may accrue in collecting the same; and such lien shall continue during the existence of said policy. No provisions in the Act of incorporation exonerate a member from his obligations; or put an end to his connection with the company by a rejection of his claim for a loss, which may occur; neither does it provide, that when a policy is made void, by the holder's voluntary act, he is excused from the payment of assessments made afterwards. If it were so, it would be in the power of the party assured, to relieve himself of his obligations at pleasure, if he should choose to give up the benefit of his insurance by conduct of his own. The most satisfactory reasons may exist for a rejection of a claim by the directors. § 1, of the Act, refers to such; and is it to be supposed, that by the refusal to pay for a loss, not covered by the policy, the premium note of the person, who sustained the loss, is thereby canceled?

After the plaintiff's loss had occurred, if he had given sufficient notice thereof, with a request, that the directors would consent to the second insurance, when the policy was void by the voluntary act of the plaintiff, and they had given their consent, it would have been strongly indicative of bad faith in them to the company. This we are not at liberty to presume; and it cannot be regarded as true without convincing proof.

The directors can do no act in violation of the express provisions of the charter. Those provisions are for the protection of the company, and the members of it, and their interests cannot be wantonly abandoned. It was evidently contemplated, that when an insurance should be made by the defendants for an amount not exceeding two-thirds of the estimated value of the property insured, that it would be important to them that the assured should not obtain insurance in other companies *ad libitum*, and thereby essentially increase their risk and diminish their security. It is most manifest that the restriction upon the members of the company, as to subsequent insurances, contained in § 12, had reference to the risks made by the company, while they con-

tinued in existence. The construction, that the directors had the power to give their consent, by a direct and positive vote, after the holder of the policy had omitted to notify them thereof, and request their consent, and after the entire property covered by the policy had been destroyed, cannot be admitted. By the loss of the whole property insured the risk was terminated; and if, at that time, no consent to a second policy had been given, the policy was void; and a consent would then be gratuitous to the assured, equally as it would be, by a voluntary agreement without consideration, to pay the loss by fire of property, on which no insurance had been attempted. Consequently a consent cannot be inferred from acts of the directors, so as to be binding upon the company, however unequivocal they may be in their character. A waiver, in such a case, is quite unlike a waiver of strict compliance with the charter and by-laws in certain preliminary steps, in order to make a valid policy available. Here the foundation of the claim is an insurance followed by a loss, and the defence is upon the ground that the insurance ceased utterly before the loss, and consequently, if it be so, the claim is baseless. *Heath & al.* v. *Franklin Insurance Company*, 1 Cush. 257. The evidence in this case fails to satisfy us that the directors designed to exercise the power, not possesed by them, and gave their consent to a second insurance; or that they did any thing which gave validity to a policy which had become void by the plaintiff's acts and omissions.

4. The authorities cited for the plaintiff fully establish the proposition, that a second policy, which is void, does not vacate the first, under such provisions as those contained in § 12, of the Act of incorporation. And the fact, that the company who issued the second policy paid the amount insured, is of no consequence in the question here involved, if the payment was made upon a policy clearly void. Various considerations may have had an influence in inducing the payment of the claim. The view most favorable for the defendants is, if it is a doubtful question of construction,

whether the second policy was void or not, that the party which made the policy and was interested to hold it void, have treated it as binding upon them. But whether valid or not, it must be settled by its terms, and the charter and the by-laws, referred to therein, as making a part of the policy. It is sometimes the case that a difficulty is found in ascertaining the meaning of the parties to a written instrument. "Resort must be had in such cases, to the obvious scope and design of the parties, and to the subject matter to which it has reference, and even to the situation of the parties contracting." *Cummings* v. *Dennett*, 26 Maine, 397.

In article 13, of the by-laws of the Lowell Traders' and Mechanics' Mutual Fire Insurance Company, it is provided that all policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be indorsed on the policy at the time that it issues; and when a subsequent insurance shall be made by another company, or by any person, on property insured at this office, it shall annul the policy, and the premium be forfeited to this company, unless such double insurance subsist, with the consent of the directors indorsed upon the policy.

So far as this article has reference to a previous insurance in another company, it imports that to make the policy effectual, the approval of the directors shall appear thereon, at the time it shall issue. This was intended only as evidence of their consent. As no particular form of words are made necessary, and no requirement that it shall be stated, at what office the insurance was obtained, or the amount covered by the policy, it is not perceived that an express approval and consent in the policy is not as perfect a compliance with this part of the by-law, as that which it was supposed would be necessarily implied from the simple statement of the insurance upon the instrument.

In *Liscom* v. *Boston Mutual Fire Insurance Company*, 9 Met. 205, it was provided in its by-laws, that "all policies which may issue from this company, to cover property pre-

viously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues." And the Court say, "the great object of the provision is to guard against fraud, by preventing insurances on property greatly above its value." "The Legislature were sensible of this exposure,"—"and they therefore prescribed, among other regulations for the government of mutual fire insurance companies,"—"that they might insure upon any buildings within this State, any amount not exceeding three-fourths of the value thereof. The object of the by-law above recited, is to give efficiency to this provision of the statute, by securing a timely notice of the existence of a previous insurance, if any, and thus to prevent the assuming of risks on property beyond three-fourths of its value." The directors of the Lowell company seem to have believed such to have been the design of the thirteenth article of the by-laws referred to, when in their policy to the plaintiff, which was recorded on the books of the company, they give "leave to keep insured on same in other companies, an additional sum, provided the amount insured being not more than three-fourths of the value of said buildings."

The policy from the Lowell company was made March 4, 1850, and continued for the term of three years. The defendants' policy was dated October 8, 1849, and was for the same term of time from its date; consequently the latter had two years and more than seven months to run, when the former was made. It may be supposed important for the plaintiff, that he should have the benefit of the policy already obtained, rather than be at the expense of procuring a new one for the same amount, for the whole time. On the other hand, it would be quite immaterial to the company, whether the former policy should remain effectual, or a new one for the same sum and for the same time should be obtained. Hence when we see the general leave granted, as disclosed by the policy, it is in the highest degree probable, aside from the construction of the particular terms used, that the former insurance was disclosed; and

the leave of the directors is given, that other insurances may exist upon the property, with the restriction only, that the whole sum insured shall not exceed three-fourths of the value of the property. No question is made that the sums covered by the two policies did exceed that proportion; and the whole evidence shows that they fell far below it. If the previous insurance had been indorsed on the policy at the time of its execution, it could have been evidence no more satisfactory, of a *willingness* on the part of the directors, that it should continue, than now appears from the permission granted. Every fact therefore, which could operate to satisfy them, that an indorsement of the previous insurance would have been proper, and if requested in that form, would have been made by them, is fully shown.

The terms in the policy, by which other insurances are allowed, does not limit the plaintiff to future insurances; it is permitted that others may subsist; and certainly those made previously, then in existence, are embraced in the consent which is expressed.

But it is believed that by the application of the strictest rules of construction to the language used, the previous insurance is substantially stated on the face of the policy. Something more was evidently intended, than permission to obtain insurances afterwards in other companies; for if such was the extent of the design, it could have been left to be "*indorsed upon the policy,*" when done, according to the provision of the same article; or the consent could have been expressed in the policy in the shortest and most precise language; and the use of the terms to *keep insured,* would be immaterial, inasmuch as the leave for future policies was limited only by the gross amount of three-fourths of the value.

But as the interest of the plaintiff was to retain the benefit of his previous insurance, and to have permission at the expiration thereof, to have the right of a renewal, or procure insurance from another company, it is manifest that the intention of the parties was, that this should be secured to him. The meaning of the word *keep* in Webster's Diction-

ary, under the first head, is, "to hold;" "to retain in one's power or possession;" "not to lose or part with;" "as to keep a house or a farm." By this language, therefore, the plaintiff was entitled to hold, to retain in his possession, and not to lose or part with his insurance; which must refer to that, which he previously had, as well as to that, which he was permitted to procure.

He was allowed to keep insured in an *additional sum*, provided, &c. This secured the privilege of an insurance of a further amount upon the property; and not limited so, that the payment of a loss, by one company would be payment *pro tanto* for another. Each company, by this language, would be bound to pay the sum for which it became liable independent of the other.

According to the agreement of the parties, the plaintiff must be *Nonsuit.*

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

(*) STATE *versus* GURNEY.

The allegations of an indictment in this Court are to regard the laws of the State only.

An exception in the enacting clause of a penal statute must be negatived in the indictment.

But it is not requisite that it should notice exceptions contained in any subsequent clause.

Facts which may bring the case within the exceptions or provisos of such subsequent clause, are to be proved or pleaded by the defendant.

In an *indictment* charging that the defendant is a common seller of prohibited liquors, it is not necessary to *aver* that they were not imported from any foreign place or sold by him in the importation packages.

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

INDICTMENT under the Act of 1851, "for the suppression of drinking houses and tippling shops."

In one of its counts the indictment charged, that the defendant "was a common seller of spirituous and intoxicating

liquor, not being duly appointed therefor pursuant to the provisions of said Act."

In another count it charged, that the defendant, at Saco, was such seller, "not being duly appointed as the agent of such town of Saco to sell therein spirits, wines and other intoxicating liquors to be used for medicinal and mechanical purposes, and not having given bond therefor pursuant to the provisions of the statute."

The jury returned a verdict that the defendant was guilty; and he thereupon moved in arrest of judgment, alleging the following causes;—

1. Because the Act, upon which the indictment is founded, is in conflict with the constitution of this State.

2. Because it is in conflict with the constitution and laws of the United States.

3. Because the indictment does not allege, that the defendant was a common seller of spirituous or intoxicating liquor, which had not been imported into the United States, under the laws of the United States, and in accordance therewith, and contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe.

4. Because the indictment does not allege that the defendant was a common seller of spirituous or intoxicating liquors, not imported into the United States, in accordance with the laws of the United States, and by authority thereof, and in quantities less than said laws of the United States prescribe for such importation.

5. Because the indictment does not allege that the defendant was a common seller of spirituous and intoxicating liquor, not imported into the United States under and in accordance with the laws of the United States, and sold in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe.

6. Because the indictment does not allege that the defendant was a seller of spirituous or intoxicating liquor not im-

ported into the United States by him, under and in accordance with the laws of the United States, and remaining and sold in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe.

7. Because the indictment does not allege that the defendant was a common seller of spirituous or intoxicating liquor, not for medicinal and mechanical purposes, only.

By agreement, the Court was to enter such judgment as is authorized by law.

Shepley & Hayes, for the defendant.

All the facts alleged in the indictment may be true, and yet constitute no offence. *State* v. *Godfrey*, 24 Maine, 232.

The indictment contains no averment negativing that the liquors were imported by the defendant, and sold by him in the original packages.

Under our statute, sale of liquors in the largest quantities are prohibited equally as sales by retail. *Brown* v. *Maryland*, 12 Wheat. 419; *Thurlo* v. *Massachusetts*, *in error*, 5 How. 573.

By a statute of U. S., passed Aug. 6, 1846, the Secretary of the Treasury is authorized to make such regulations as may be necessary, &c. These regulations have the force of law.

By Circular No. 34, of "instructions to collectors and other officers of the customs," issued by the Secretary of the Treasury, Feb. 17, 1849, under the power granted by the 5th § of the Act before mentioned, it is provided, that "cellars of stores, occupied for general business purposes, may be used for the storage of wines and distilled spirits imported by the owner or lessee only." And by a provision of law referred to in this circular, such private stores "shall be kept under the joint locks of the inspector and importer."

The 8th § of this circular provides, that "all merchandize thus stored, may be examined at any time, during the

business hours of the port, by the importer, consignee or agent, who shall have liberty to take samples of his goods according to the usage of his port. He may also have any further privileges to facilitate the sale of his goods while in bond, which the collector of the port may deem advisable," &c.

Here provision is made for the sale of imported merchandize, (including spirituous liquors,) even before the duties are paid, while in bond, and privileges are given to encourage and facilitate such sales; and it is an every day occurrence for imported spirituous liquors to be sold in bond, and to be shipped while in bond from one port of entry to another, after such sales.

The importer of spirituous and intoxicating liquors, who thus avails himself of the facilities extended to him by the laws of the United States, and the regulations of the Treasury Department, and engages in the business of selling his imported liquors in bond, until he has effected three distinct sales, is a "common seller, &c.," but he is guilty of no offence against any valid State law.

It is said, that "when an offence is created by statute, and there is an exception in the enacting clause, the indictment must negative the exception. But if there be a proviso, which furnishes matter of excuse for the defendant, it need not be negatived in the indictment, but he must plead it." *State* v. *Godfrey*, 24 Maine, 234.

In the statute on which this indictment is based, there is no proviso declaring that it shall not apply to sellers of liquors by authority of the laws of the United States. The exemption of such persons from the penalties of this statute, is not created by a proviso, which is itself a part of the statute, but it exists by force of a law which the constitution of the United States declares, "shall be the supreme law of the land." Nor is this exemption created or expressly declared, by any exception contained in the enacting clause of the statute creating the offence. So that this rule of criminal pleading, to which we have referred, cannot

apply to this case, unless the 8th section of the Act of 1851, "for the suppression of drinking houses and tippling shops," be construed as elliptical, as it ought to be, in order to make it consistent with the laws of the United States.

If the statute is thus construed, and the ellipsis is supplied by reading the section, "no person shall be allowed to be a common seller of spirituous or intoxicating liquor, except as authorized by the laws of the United States," &c., then the exception would be in the enacting clause of the statute creating the offence, and must be negatived in the indictment.

Upon this point we cite *State* v. *Godfrey*, 24 Maine, 232. It has a strong analogy to this case, and we rely upon it as a full authority to show that this indictment is invalid.

If it be said that the offence is described in the language of the statute, and that this is sufficient, we reply, that no offence is described by the simple words of the statute; and the statute itself can be sustained as in harmony with the laws of the United States, only by construing it as elliptical, and supplying the ellipsis as before suggested. *Preston* v. *Drew*, 33 Maine, 563; *Hopkins* v. *Commonwealth*, 3 Met. 465. If it be said the protection given by the laws of the United States is matter, to be shown in defence, not needing to be negatived in the indictment, we find a full reply already made in the case *State* v. *Godfrey*, 24 Maine, 232, to which we again respectfully refer.

Evans, Att'y General, for the State.

APPLETON, J. — The indictment in this case follows the language of the statute, and negatives the only exception in the section upon which it is founded. The sufficiency of the indictment, so far as relates to the statutes of the State by which the enactment was made, will not be questioned.

A motion in arrest of judgment has been filed for the insufficiency of the indictment. In support of this motion it is urged, that an importer selling liquors by him imported, in their original packages, may be a common seller; that the

defendant may have been such importer; that the sales on account of which he was convicted may have been of liquors in their original packages; that such sales would be lawful by the law of the United States; that in such case all the facts alleged in the indictment would be true, and yet constitute no offence; that therefore these facts should have been negatived in the indictment, and that judgment should be arrested because they have not been so negatived.

The argument in defence rests upon the position, that sales by an importer, in the original packages, would be against the statute upon which the indictment is framed, and to such extent it would be void, as against the laws of the United States. The language of the Act of this State, c. 211, entitled "an Act for the suppression of drinking houses and tippling shops," approved June 2, 1851, is not more general in its prohibitions, than the several Acts of Massachusetts, New Hampshire and Rhode Island, which received the consideration of the Supreme Court of the United States in the license cases from those States. In reference to those Acts, TANEY, C. J., in 5 How. 576, says, "but I do not consider the law of Massachusetts or Rhode Island as interfering with the trade in ardent spirits while the article remains a part of foreign commerce, and in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorize it to be imported. These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State." According to the views of DANIEL, J., in the same case, "the license laws of Massachusetts, Rhode Island and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those States, vesting in their domestic tribunals a discretion in selecting the agents for circulation, without discriminating between the sources whence

commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it, either in appearance or in reality; they do not prohibit sales either by wholesale or retail; they assert only the power of regulating the latter, but this is entirely within the sphere of their peculiar authority." While, in the opinion of WOODBURY, J., if the object of these statutes was to limit or restrict the sale of certain articles as dangerous to health and morals, and as mere police regulations, "they would appear entirely defensible as a matter of right, though prohibiting sales." The ground of exception taken to the indictment, must according to the doctrine of the Court, in the case referred to, in any event fail.

But according to the recognized rules of pleading in criminal procedure, the indictment must be sustained. When there is an exception in the enacting clause it must be negatived in the indictment, for otherwise no violation of law will appear. The case provided for, in the clause pleaded, is not made out on the record. But when the exception or proviso is in a subsequent enacting clause, the case provided for in the enacting clause may be fully stated without negativing the subsequent exception or proviso. A *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute, to bring it forward in his defence. *Com.* v. *Hart*, 6 Law Rep. N. S., 77.

It is equally well settled, that when an exception arises from another statute, the party claiming under it must plead it. "It is enough for the prosecutor to bring the case within the general purview of the statute upon which the indictment is founded, if that statute has general prohibitory words in it. For when an indictment is brought upon a statute, which has general prohibitory words in it, it is sufficient to charge the offence generally in the words of the statute. And if a subsequent statute, or even a clause of exception in the same statute excuses persons under such and such circumstances, or gives license to persons so and so qualified, so as to excuse or except out of the general pro-

hibitory words, that must come by way of plea or evidence. *Rex* v. *Pemberton*, 2 Bur. 1036.

An indictment in the State courts regards only the law of the State against which the offence is committed. The statutes or law of the State which creates the offence, and imposes the penalty, are alone to be regarded in forming the indictment. It would be a novel doctrine to require that a defence arising from treaties with, or under the statutes of another government, were required to be negatived in an indictment for an offence against the laws of this State. A *prima facie* case is stated, and if the defendant relies upon the fact, that he was an importer, and that the sales were of spirits in their original packages, he should have offered it in evidence by way of defence. *Com.* v. *Hart*, 6 Law Rep. N. S. 77. *Motion overruled.*

Judgment on the verdict.

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

(*) STATE *versus* GURNEY.

It is competent for the Legislature to regulate the sale of an article, of which the use would be detrimental to the morals of the people.

To entitle a party to appeal in a criminal prosecution, nothing more can rightfully be required than reasonable security for the appearance of the appellant, and for the prosecution of the appeal.

On an appeal from the sentence of a magistrate, imposing a lawful penalty for a specified offence, it is not competent for the Legislature to require any *increase* of the penalty to be imposed by the appellate Court after conviction by the jury.

The requiring of any such increase, (as in the sixth section of the Act of 1851, for the suppression of drinking houses and tippling shops,) is an unconstitutional restraint upon the right of trial by jury.

If, however, a defendant, in taking an appeal, acquiesce in the requirements of that Act, he cannot afterwards avail himself of their unconstitutionality, or deny the validity of the appeal.

Such increase of the penalty being unconstitutional and void, the appellate court may, after conviction by the jury, rightfully enforce the appropriate penalty.

The penalty, which the magistrate was required to impose, is to be considered the appropriate penalty.

On motion in arrest of judgment for selling spirituous liquor *by retail*, the rights, (if any,) of an importer to sell foreign liquor, cannot be called in aid of the defendant.

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

The fourth section of statute of 1851, provides that, "if any person shall sell any spirituous or intoxicating liquor, in violation of this Act," he shall forfeit on the first conviction ten dollars and costs.

The sixth section provides that, "if any person shall claim an appeal from a judgment rendered against him, by any Judge or justice, on the trial of such action or complaint, he shall, before the appeal shall be allowed, recognize in the sum of one hundred dollars with two good and sufficient sureties, in every case so appealed, to prosecute his appeal and to pay all costs, fines and penalties that may be awarded against him upon a final disposition of such suit or complaint. And before his appeal shall be allowed, he shall also, in every case, give a bond with two other good and sufficient sureties, running to the town or city where the offence was committed, in the sum of two hundred dollars, that he will not during the pendency of such appeal violate any of the provisions of this Act."—"And in the event of a final conviction before a jury, the defendant shall pay and suffer double the amount of fines, penalties and imprisonment awarded against him by the justice or Judge, from whose judgment the appeal was made."—"And if the recognizances and bonds mentioned in this section shall not be given within twenty-four hours after the judgment, the appeal shall not be allowed."

A complaint was duly made against the defendant Gurney, for selling in violation of the fourth section of the Act. Upon that complaint, he was found guilty before the municipal Judge, and sentenced to pay a fine of ten dollars and costs. From that judgment he claimed and was allowed to appeal. Upon the trial of that appeal, the jury returned a

verdict that he was guilty. Whereupon he moved in arrest of judgment for the reasons:—

1. That "the provisions of the Act, upon which said complaint is founded, are in conflict with the constitution of the State.

2. That "no legal sentence can be imposed by the Court."

By agreement of parties the Court were "to enter such judgment as is authorized by law."

Shepley and *Hayes*, for the defendant.

The fourth and sixth sections of the Act, taken together, are in manifest conflict with the sixth and ninth sections of article one of the constitution of Maine.

1. They violate that provision of the 6th section of the 1st article of the constitution, which declares, that "in all criminal prosecutions, the accused shall have a right"—"to have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity." "He shall not be deprived of his life, liberty, property or privileges, but by judgment of his peers, or the law of the land."

This provision guarantees to the accused in all criminal prosecutions, an absolute, unqualified right to a trial by jury; a right dependent upon the performance of no terms or conditions. It is the only constitutional "trial," (except in cases of martial law or impeachment,) to which a person charged with a criminal offence can be subjected, without his consent or acquiescence.

"By necessary construction of this provision, in all criminal prosecutions, an appeal lies from the sentence of a justice of the peace, who tries without a jury, to some court having cognizance of the offence, where a trial by jury may be had." *Johnson's* case, 1 Greenl. 230.

This right of appeal, founded upon the constitution, is absolute, unqualified, unconditional; necessarily so—since it flows necessarily from the absolute, unqualified, unconditional right to a trial by jury. Any conditions or restric-

tions upon the right of appeal, must necessarily be conditions and restrictions upon the right to a trial by jury.

This right of appeal, the Legislature have no power to change, qualify, abridge or burden with conditions, restrictions or terms.

Accordingly, the Revised Statutes give to the accused in criminal prosecutions, an absolute unconditional right of appeal. R. S., c. 170, § 8; *Kendall* v. *Powers*, 4 Met. 553.

These provisions violate the 9th section of the 1st article of the constitution, which declares that "all penalties and punishments shall be proportioned to the offence, excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted."

The 4th section of the Act provides, that if any person shall sell in violation of that Act, on the first conviction, he shall forfeit and pay ten dollars and the costs of prosecution; on the second conviction, twenty dollars and the costs of prosecution; on the third and every subsequent conviction, twenty dollars and costs, and be imprisoned not less than three, nor more than six months.

The Legislature must have considered these the appropriate punishments for these offences, and as proportioned to the offences. But the 6th section declares that if the appellant is convicted by a jury, he shall forfeit and pay, for the first offence, double the amount fixed by the statute as the appropriate punishment for such an offence, and more than the amount established by the Legislature as the appropriate punishment on a second conviction.

Now if the penalties and punishments provided by the 4th section are proportioned to the offences therein created, then those required by the 6th section are surely not proportioned to those offences. If the fines of the 4th section are appropriate and reasonable, certainly those in the 6th section are "excessive." This double penalty can be only the infliction of a punishment for claiming one's right to a trial by jury.

The only requirement which can rightfully be made upon an appealing party is, "security for his appearance, to answer the charge against him."

This statute requires "*excessive bail,*" in exacting from a defendant as a condition of appeal, a bond and recognizance with four good and sufficient sureties; and these to be furnished within twenty-four hours.

This statute virtually takes from a defendant the privilege of an appeal, and defeats the right of trial by a jury. This defeat results from the unjustifiable conditions to which the right of appealing is subjected. These conditions require that he recognize with sureties, in the penalty of $100, not merely to prosecute the appeal, and present himself to abide the order of the Court, but to pay all fines, forfeitures and costs; and also require a bond with sureties in the sum of $200, not to violate "any of the provisions of the Act;" and still further require the payment of a double penalty, if convicted by the jury. See Reasonings of CURTIS, J., Law Reporter, March, 1853, pages 619–621.

The Act requires a defendant, before he can appeal, to give bond that he will not do an act, allowed to him by the laws of the United States. Those laws *authorize* an importer, in his character as importer, to sell; and *require* the revenue officers to sell imported liquors, for payment of the duties. Yet our State Act prohibits any person from selling, directly or indirectly any spirituous liquor, "except he is appointed agent of some town or city for such sale.

Under a statute, fraught with such gross infractions of the rights of a party, is it possible that any sentence can be pronounced against him?

It is gratifying to know that the absurd and anomalous provisions we have been considering, have recently been repealed by the Legislature, so that the decision in this case is not necessary to settle the construction of a statute which is to continue in practical operation, but we trust it will serve to check the tendency to hasty and unconstitutional legislation recently so prevalent.

Evans, Attorney General, submitted without argument.

WELLS, J. — The respondent was charged in a complaint, made to the Judge of the Municipal Court of Saco, with a violation of the law by selling spirituous and intoxicating liquors. Upon conviction in the Municipal Court, he appealed, was tried by the jury and found guilty. He now moves in arrest of judgment for two reasons. 1. Because the provisions of the Act, upon which said complaint is founded, are in conflict with the constitution of this State. 2. Because no legal sentence can be imposed by the Court.

By the constitution of this State, the Legislature "shall have full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this constitution, nor to that of the United States." Art. 4, part 3, § 1. Under this branch of the constitution the Legislature would have a right to regulate by law the sale of any article, the use of which would be detrimental to the morals of the people. One of the incidents of civil society is self protection, and this object cannot be effected without necessary police regulations. It is unnecessary to determine the question, whether an importer of foreign liquors could lawfully sell them, when prohibited by a statute of the State. For the defendant sold by retail in the town of Saco, and must be regarded as liable to the penalty prescribed by a statute, which the Legislature had the constitutional authority to enact.

But it is contended, that the provisions of the sixth section of the Act of 1851, upon which the complaint was founded, are unconstitutional. The respondent had a right to a trial by jury, and to obtain it, it was necessary that he should appeal. If he had, upon taking the appeal, claimed the right to do so, and refused to have complied with the objectionable provisions, he would have placed himself in a position to contest the constitutionality of them. Nothing more than reasonable security for his appearance should be required of an appellant seeking a trial by jury. By the Re-

vised Statutes, c. 170, § 8, one may appeal in a criminal case, and the justice or Judge of the Municipal Court shall grant the appeal, and order the party "to recognize in a reasonable sum, not less than twenty dollars, with sufficient sureties for his appearance, and for prosecuting his appeal, and he shall stand committed till the order is complied with." Thus he may appeal, and whether he goes into jail or enters into a recognizance, he can claim a trial by jury. If the sixth section of the Act before mentioned was unconstitutional and void, no such objection would lie to the provisions of the Revised Statutes, and the respondent might have claimed an appeal in conformity with them. They would apply to all cases where one might claim an appeal under subsequent statutes, if they were not changed. If, then, the sixth section should be considered void, that infirmity would not infect the residue of the statute, and render its other requirements inoperative. The general statute would supply any such defect, and applying to all cases of a similar character without exception, would prescribe the terms of an appeal.

But the respondent complied with the conditions imposed upon him, and his appeal was allowed. The appeal was lawful, and the case was properly entered and prosecuted in the appellate court, and although conditions were prescribed more rigorous than the constitution might justify, such requisitions would not annul the appeal. If a magistrate, before he would grant an appeal, should require the payment of an unlawful sum of money, and the appellant should pay it, the appeal would be valid, and the law would furnish a remedy for the unlawful act. The requirement of unlawful bonds must stand upon the same ground; they would be void, while an appeal in itself legal and correct would be valid.

In the case of *Greene* v. *Briggs*, 15 Law Reporter, 614, the goods were replevied and there was no appeal. The order of forfeiture was held to be "invalid for two reasons, first, because there was no sufficient complaint; and secondly, because the plaintiff was deprived of his property by a

criminal prosecution, in which he neither had, nor could have a trial by jury, without submitting to conditions which the Legislature had no constitutional power to impose." If the plaintiff had submitted to such conditions, the case would have been very different from that, which was presented to the consideration of the Court.

But it is also contended, that no legal sentence can be imposed upon the respondent. The sixth section of the Act of 1851 provides, "and in the event of a final conviction before a jury, the defendant shall pay and suffer double the amount of fines, penalties and imprisonment awarded against him by the justice or judge from whose judgment the appeal was made."

The respondent had a right secured to him by the constitution of a trial by jury, and to enjoy it, he must appeal. If he desired to be free from restraint or confinement, he must give reasonable security for his appearance at the trial. The language of the constitution is, that "excessive bail shall not be required." Every condition beyond what is necessary to secure the prosecution of the appeal must be regarded as objectionable. The Legislature has no power to impair a right given by the constitution, it belongs to the citizen untrammeled and unfettered. If the Legislature can impose penalties upon the exercise of the right, they may be so severe and heavy as practically to destroy it. The provision under consideration would have the effect, as it was doubtless intended, to check appeals. It is an additional punishment inflicted upon one, who may be found guilty, for appealing. It may be said, that if a man is guilty, he ought not to appeal. But through the imperfection of human tribunals, acting upon evidence, the guilt or innocence of the accused cannot be made absolutely certain. An innocent man may be declared guilty by a verdict of a jury. And if he is threatened with a double punishment, in case of a final conviction, he might be deterred from appealing by the uncertainty of the result. But the constitution guarantees to the respondent, whether innocent or guilty, a right of

trial by jury, without any qualifications or restrictions. In *Greene* v. *Briggs*, it was said by Judge CURTIS, "I find it equally difficult to reconcile the increase of penalties upon a conviction after an appeal with the unimpaired enjoyment of the right of trial by jury. The Act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the Legislature considered this the appropriate penalty for the offence. Certainly it cannot be said that the offence is aggravated by the accused having claimed a trial by jury. For what then is the additional penalty of eighty dollars, or the additional imprisonment of thirty days, inflicted? If the offence remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right?"

This provision of the statute must be regarded as an unnecessary restraint upon the right of appeal, and therefore in conflict with the constitution, and inoperative and void. But the fourth section of the Act provides, that the offender "shall forfeit and pay on the first conviction, ten dollars and the costs of prosecution, and shall stand committed until the same be paid," &c. This appears to be an appropriate fine, and it is not stated by what tribunal it may be imposed, and any one having jurisdiction may exercise that power. As the double penalty cannot rightfully be inflicted, the single one must remain, especially as its imposition is not confined by the statute to the action alone of a justice of the peace, or Judge of a Municipal Court. This Court has therefore authority to impose a legal sentence. *Motion overruled.*

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

INHABITANTS OF SACO *versus* WENTWORTH *& als.*

Of the meaning of the phrase, "the law of the land," as used in the constitution of Maine.

§ 6, article 1, of that instrument, guarantees to the accused, in all criminal prosecutions, "that he shall have a speedy, public and impartial trial, and except in trials by martial law, or impeachment, by a jury of the vicinity. He shall not be deprived of his life, liberty, property or privileges, but by judgment of his peers or the law of the land."

§ 8, of same article, guarantees that "no person, for the same offence, shall be twice put in jeopardy of life or limb."

An Act of the Legislature which renders it difficult for the accused to obtain the privilege of a trial by jury, beyond what public necessity requires, impairs individual rights, and is inconsistent with the constitutional guaranty.

So if an Act of the Legislature requires *conditions*, for the purpose of prosecuting a *trial by jury*, it is opposed to the spirit of the constitution, and so far as it deprives one of this means of protection it is void.

By c. 211, § 6, of the Acts of 1851, it is required that if any person claim an appeal from a judgment rendered against him, by any judge of a municipal court, or justice of the peace, on trial of such action or complaint, for unlawfully selling spirituous or intoxicating liquors, *before his appeal shall be allowed*, he shall also in every case give a *bond* with two other good and sufficient sureties, running to the town or city where the offence was committed, in the sum of two hundred dollars, that he will not during the pendency of such appeal, violate any of the provisions of this Act.

This *requirement* impairs the right secured to the accused, by article 1, § 6, of the constitution, and is, therefore inoperative, and void.

And a *bond* given under that requirement is contrary to the provisions of the constitution, and also void.

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

DEBT, on a bond given by defendants to the inhabitants of the town of Saco, for $200, conditioned that the principal obligor should not violate any of the provisions of c. 211 of Acts of 1851, during the pendency of an appeal by him made, from the sentence of the Municipal Court of said Saco, on a conviction before that Court for selling spirituous liquors contrary to said Act.

The defendants pleaded the general issue, and filed a brief statement of their defence.

Plaintiffs, against the objections of the defendants, were allowed to read a copy of the record of the complaint and warrant, upon which Wentworth, the principal defendant,

was brought before the Municipal Court and tried; and the record of the judgment of that Court, by which it appeared he was convicted of the offence of selling spirituous liquor, and sentenced to pay a fine and costs of prosecution; from which sentence he appealed, and before the appeal was allowed, he was required to recognize in the manner prescribed by the statute and also to give the bond in suit, against the protest of defendants, that it was given under duress.

While that appeal was pending, it also appeared, that the principal obligor sold spirituous liquors in said Saco, not being an agent appointed for that purpose.

The case was taken from the jury and submitted to the Court.

Shepley & Hayes, for defendants, urged many objections to the maintenance of this action, but the view taken by the Court renders it unnecessary to refer to other than the constitutional objection.

The provision of the statute, under which this bond is required, is repugnant to the 6th § of Art. 1, of the constitution of Maine.

By necessary construction of this provision, in all criminal prosecutions, an appeal lies from the sentence of a justice of the peace, who tries without a jury, to some court having cognizance of the offence where a trial by jury may be had. *Johnson's case*, 1 Greenl. 230.

This right of appeal from the sentence of a justice of the peace, thus based upon the constitution, is *absolute, unqualified, unconditional*, necessarily so, because as it flows necessarily from the right to a trial by jury, and is an essential incident of that right, it must be coëxtensive with it. Being of this character, the Legislature has no power to change, qualify, abridge or encumber it with conditions, restrictions or any terms whatever.

By c. 76, § 3, of statutes of 1821, the Legislature seemed to have burthened the right of such an appeal by a condition, but when the statutes were revised, that provision was

repealed and one adopted in harmony with the constitution. R. S., c. 170, § 8. By that law the right of appeal is unburthened with any conditions whatever. A somewhat similar statute in Massachusetts has confirmed this construction. 9 Pick. 14; *Kendall* v. *Powers*, 4 Met. 553.

Any statute which assumes to withhold an appeal from the sentence of a justice in a criminal case, until the respondent complied with certain prescribed terms, — much more, any statute which makes such right of appeal depend upon certain conditions more or less onerous, to be performed by the accused within a certain limited time, recognizances and bonds with sureties more or less, prepared and filed within certain hours, conflicts directly with the constitutional right to a trial by jury, and is void.

The statute of 1846, restricting the sale of intoxicating drinks, c. 205, § § 6 and 7, provided for the recovery of penalties by action of debt or complaint, and declared that an appeal claimed by the defendants in either process from the judgment of the justice, should not be allowed, unless the defendant should within 48 hours (Sundays excepted,) after judgment, recognize with two good and sufficient sureties, in not less than $50, to prosecute his appeal, and pay all costs, fines or forfeitures that might be recovered against him upon a final disposition of the suit or complaint.

The Maine Law, as it is called, of 1851, contains an enlarged, and in the opinion of some, improved edition of this singular commentary upon constitutional rights, supposed to be improved because supposed to be endowed with more power in suppressing those troublesome guaranties of personal rights, trials by jury.

Now if the Legislature have the power to impose such restrictions and conditions upon the right of appeal, it may virtually destroy it wholly; and the right to a trial by jury may be regarded as an obsolete idea.

It may as well provide, that the recognizance shall be in the sum of $1000, or $100,000, with a good and sufficient surety to each dollar, and that the bond shall be for an indefinite

amount with as many more and *other* good and sufficient sureties, and conditioned that the defendant will not, during the pendency of the appeal, nor ever afterwards, violate any provision of law, common, statute, Mosaic, human or Divine, and that the recognizance and bond shall be given within one hour, or the appeal shall not be allowed.

Again, the provisions of this statute are repugnant to the 9th § of Art. 6, of the constitution, which provides that "excessive bail shall not be required." Requiring four separate sureties, each good and sufficient, is requiring *excessive bail.* Blackstone's Com. vol. 4, p. 350; *Greene* v. *Briggs & al.*, Law Reporter, March, 1853.

Emery & Loring, for plaintiffs.

The Declaration of Rights, Art. I, § 6, of the constitution, secures to the accused in criminal prosecutions a speedy, public and impartial trial by a jury of the vicinity; but the mode and conditions of such trial are matters of expediency purely, and are left to the wisdom of the Legislature exclusively.

1st. The 6th § of the 1st Art. of the constitution would be void, unless the Legislature, by an Act, provided for summoning a jury, and designated the Court to try cases. This then is a matter left to the discretion of the Legislature.

2d. The Legislature must adopt measures to secure the appearance of the accused at the Court to try him, either by arrest or by bonds and recognizances, else a prosecution would be unavailing and an appeal equivalent to an acquittal. This then is a matter left exclusively to the discretion of the Legislature.

3d. The accused, though clearly guilty, and fully proved to be so before the justice, is under strong inducements to appeal to another Court for delay merely, or else upon a calculation of the chances of final impunity, from the death of a witness, or from tampering with him, or procuring his absence before trial of the appeal; calculations made in liquor cases more than others. It is the duty of the Legislature to adopt provisions to counteract the advantage

of delay, to counterbalance this estimate of chances, and in some measure to test the sincerity of the culprit's claim of a trial by jury. This then is the exclusive business of the Legislature.

4th. The amount depending may be so small as to make an appeal injurious alike to the State and party. And it is for the Legislature to fix the amount for which an appeal will lie, as they did in § 46, of the militia law of 1821, and in other cases. See *Mountfort* v. *Hall*, 1 Mass. 442.

The Court cannot interfere with these matters without usurpation of others' rights. Hence the authorities. ***Flint river Steamboat Co.*** v. ***Foster***, 5 Greenl. 194, where it is said, "an Act of the Legislature clogging the right of trial by jury with onerous conditions will not be pronounced unconstitutional, unless it totally prostrates the right or renders it wholly unavailing to the party for his protection." The same Court says, that Courts are not at liberty to set aside a statute because it is *absurd* or *unreasonable*. *Kendall* v. *Kingston*, 5 Mass. 534; *Adams* v. *Howe*, 14 Mass. 345; *State* v. *Cooper*, 5 Blackford, 258.

The provisions of the 6th § of the Maine Law, are all of them fully supported by precedent and by the analogy of Legislative acts and common usage in Massachusetts and this State from time immemorial.

The Act of 1651, c. 6, (Colony Laws,) requires as conditions of allowing an appeal from the sentence of a justice of the peace the following, viz:—

1st. The accused must tender his appeal and put in security to prosecute the same to effect, and also to satisfy all damages within 12 hours.

2d. He must put in security also for his good behavior.

3d. He must pay for recording the appeal, and for its entry in Court. (N. B. He was afterwards required to pay jury fees.)

4th. He was required to give to the clerk of the Court the grounds and reasons of his appeal 6 days before the sitting of the Court appealed to.

5th. The appellant for neglect to prosecute his appeal with effect, besides the above, forfeited 40 shillings to the county.

The law regulating appeals from the District Court § § 13 to 17, c. 97, R. S., imposed a penalty on the party losing by his appeal in the name of double costs.

3. We say the bond is supported by the analogy of other laws now in force. The statute of Forcible Entry and Detainer, c. 128, R. S., requires the defendant, if he appeals, to recognize to pay reasonable intervening rent before his appeal can be allowed. § 4. It has generally been required by statute, and has always been customary to require the person convicted of any breach of the peace, before a justice, to recognize on allowing his appeal, to keep the peace and be of good behavior. See Kingsbury's Justice, and blank recognizances *passim*.

Is the requirement of the bond unreasonable? A man is accused, proved guilty and convicted of pursuing a business injurious to the morals, the happiness and the prosperity of the people of the town. He denies his guilt notwithstanding, and wishes for an opportunity to establish his innocence before a jury; is it unreasonable to require of him as a condition of allowing him the opportunity, that he shall not pursue that business while the case is pending? But whether reasonable or not, is a question for the Legislature, and not for the Court.

4. That the bond in suit was not given under duress. See *Watkins* v. *Baird*, 6 Mass. 511; *Richardson* v. *Duncan*, 3 N. H. 508; *Buck* v. *Atkinson*, 1 Bailey, 84.

TENNEY, J. — The bond in suit was given by the defendants, as one of the conditions, to obtain an appeal from a sentence to pay a fine of ten dollars, and costs of prosecution, awarded against the principal obligor by the Judge of the Municipal Court of the town of Saco, for a violation of the statute of 1851, c. 211, § 4, as required by § 6 of the same chapter. It appears from the judgment of the Court, which passed the sentence, that when the bond was executed,

the party convicted protested, that it was given under duress, for the purpose of securing a trial by jury.

The proposition in defence principally relied upon, and the only one which we propose to examine, is, that the requirement of the statute, for such a bond, as an indispensable condition of an appeal, in order to secure a trial by jury, is unconstitutional; and that the requirement and the bond are void.

"In all criminal prosecutions the accused shall have a right to be heard by himself and his counsel, or either, at his election; to demand the nature and cause of the accusation, and have a copy thereof; to have a speedy, public and impartial trial, and except in trials by martial law or impeachment, by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself, nor be deprived of his life, liberty, property or privileges, but by the judgment of his peers or the laws of the land. No person, for the same offence, shall be twice put in jeopardy of life or limb." Constitution of Maine, Art. 1, § § 6 and 8.

"The law of the land," as used in the constitution, has long had an interpretation, which is well understood and practically adhered to. It does not mean an Act of the Legislature; if such was the true construction, this branch of the government could at any time take away life, liberty, property and privilege, without a trial by jury. The words just quoted from the constitution, are substantially the same as those found in chapter 29 of Magna Carta, from which they have been borrowed, and incorporated in the federal constitution, and most of the constitutions of the individual States. Lord Coke, in commenting on this chapter, says, "no man shall be disseized, &c. unless it be by the lawful judgment, that is, a verdict of equals, or by the law of the land; that is, (to speak once for all) by the due course and process of law." Coke, 2 Inst. 46. Blackstone says, 1 Com. 44, "and first it, (the law,) is a rule, not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform and universal." Chancelor Kent

says, Lecture 24, p. 9, vol. 2, "it may be received as a self-evident proposition, universally understood and acknowledged, throughout this country, that no person can be taken, or imprisoned, or disseized of his freehold, or liberties, or estate, or exiled, or condemned, or deprived of life, liberty or property, unless 'by the law of the land or the judgment of his peers.' The words by the law of the land, as used in Magna Carta in reference to this subject, are understood to mean due process of law; that is, by indictment, or presentment of good and lawful men." Judge Story, in 3 Com. on Constitution, § 1783, says, "the clause, by law of the land, in effect affirms the right of trial according to the process and proceedings of the common law." *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

By the process and proceedings of the common law, the accused has the right to know the charge in the whole form and substance against him, to contest it, and if not proved to the satisfaction of a jury, to demand an acquittal.

Every person prosecuted for crime, having the constitutional guaranty of a trial by jury, no law can be enacted, which shall take it away, or interpose such impediments, as unnecessarily or unreasonably to impair it. It is true, the public interests are not to be sacrificed by too great favor shown to those charged with crime. The State is entitled to a full vindication of its rights against such as are supposed to be transgressors of the criminal law. This necessarily imposes restraints upon the accused before a trial and conviction, and these may operate to his injury. He is to be treated as a suspected person, because accused, so far that his person may be present, when he shall be required to answer to the offence alleged. To secure his trial, the party prosecuted may be arrested; and although he is secure under the constitution from the obligation to give unreasonable bail, his penury and want of friends, perhaps in a strange land, or a loss of confidence in those who know him, by his previous misconduct, may lead to his imprisonment for a longer or shorter period, or to great trouble and expense in

procuring bail, which is entirely reasonable. This is one of the unfortunate incidents attending criminal prosecutions and trials for alleged offences. But this inconvenience and hardship does not necessarily take away or abridge the right of a trial by jury, under statutes which are not in conflict with the constitution.

The accused shall have a speedy trial by jury, and it is only by "the law of the land," as jurists have expounded the terms, that he can be deprived of life, liberty, property and privileges. It is the duty of the government to provide such tribunals, and give every proper opportunity for trials before them, consistent with the preservation of the public good, to all who demand them.

An Act of the Legislature, which takes away this privilege of trial by jury directly, is tyrannical and a palpable violation of the constitution; one which renders it difficult to obtain, beyond what public necessity requires, impairs individual rights and is inconsistent with this provision for their protection. If an Act requires conditions for the purpose of preventing a trial by jury, the spirit of such a provision is at war with the spirit of the constitution, and so far as it deprives one of this means of protection, it is void.

We think it would be regarded an anomaly in criminal legislation, if it should be provided, that upon an indictment of a grand jury, against one for a crime, the trial should be by the Court, unless the accused should demand a trial by jury, and should, as a prerequisite for obtaining it, be compelled to give a bond with good and sufficient sureties, in a large penal sum, conditioned to be void, if he should abstain from the commission of all offences against the laws for a given period, longer or shorter. It could not be contended, that such a condition would not be in opposition to the provision, that in prosecutions for crime, the accused should have a speedy trial by jury. Such a condition could have no reference to the public interest, that punishment should follow the conviction of the crime im-

puted. When charged with a criminal violation of law, the party so accused should be brought to trial, as soon as circumstances will render it expedient, but that he is thus charged is no good reason why he should be required to give security against the commission of future crime, more than any other person unsuspected of the design to break the laws, before he can have a trial by jury. A bond to prevent any infraction of the law, after the commencement of the prosecution, for its previous violation, and an appeal from a sentence of a justice of the peace therefor, may with equal propriety be required to extend to other and all crimes, and for an indefinite period of time.

When a demand for an appeal from a sentence awarded by a court, not attended by a jury, is made, it is one step only towards obtaining such a trial, if it is desired by the party accused; and conditions in no wise conducive to the great end of the government in punishing offenders for crimes supposed to have been committed, can be required at that time, with more propriety, than at a subsequent stage of the proceedings, when a jury is about to be empanneled. After an appeal from such a tribunal, the appellant stands as he does after an indictment by the grand jury of a court, when a jury of trials is to judge of his innocence or guilt. In both instances, he is shielded by the presumption of a freedom from guilt, till he shall be proved to have committed the offence whereof he is charged.

That such a bond as that now in suit, should be required as a condition to the privilege of a trial by jury, upon appeal, does impair the right secured by the constitution. The provision cannot be intended to bring an actual offender to trial and to punishment, but looks entirely to the future, with the design of its authors, to secure the public from danger, arising from criminal acts not yet committed, by presenting an inducement to one standing charged only, to give the supposed indemnity as the price of a trial before that tribunal, which the constitution proclaims that he shall always enjoy.

"No person, for the same offence, shall twice be put in jeopardy of life or limb." This is another great privilege secured by the common law, as well as by the constitution. "The meaning of it is, that the party shall not be tried a second time for the same offence, after he has once been convicted or acquitted of the offence charged, by a verdict of a jury, and judgment has passed thereon for or against him." 3 Story's Com. on Con. § 1781.

The bond in this case, as has been before remarked, refers exclusively to future violations of the statute referred to. If it has been broken, as it is admitted that it has been, by the principal obligor therein, he is amenable to the law in a criminal prosecution, precisely as he would be, if it had not been given. It furnishes no immunity whatever from a sentence for a crime. Upon such a sentence or other forfeiture, which may be awarded and decreed upon a sufficient complaint and trial, which may in every respect be according to the law and the constitution, he is still holden on the bond with his sureties, according to its terms. He is liable to a judgment for the penal sum therein; and it is very doubtful, whether in such a case, any rule could be applied, by which it should be determined, that execution should issue for a less sum than the judgment itself. If execution should be awarded against him under our general laws, applicable to judgments and executions, his property and his liberty are exposed, and by force of the execution, if served according to its precept, he will be deprived of one or the other. All this will result or may take place, if the provision which we are considering is valid according to the constitution, for the reason, that he was unable to have a trial by a jury according to the law of the land, till he had given the bond, and thereby laid himself liable to a punishment under it for offences which he had not committed when it was executed, but which he might afterwards commit, in addition to the fines and penalties and forfeitures, to which he might be exposed under the provisions of the Act itself.

In the trial of the action on the bond, which is really for

the offence of having violated some provision of the same statute referred to therein, after the bond was executed and while the appeal was pending, he has not the nature and the cause of the accusation set out in the full, clear, precise and technical form required by the constitution. So scrupulous have the courts of the common law always been, that the charge of crime should be so described, in the prosecution therefor, that any material defect has always operated in favor of the accused; and if any allegation, necessary to constitute the offence has been omitted, all amendments have been denied, and he has been discharged.

On the bond he is tried as in civil actions generally, without the securities which are thrown around him by the rules which prevail in their full integrity under a criminal accusation. He is exposed to a greater penalty perhaps than that which he would incur, if charged with the same offence as a crime.

We are reluctantly brought to the conclusion, that the provision in the statute of 1851, c. 211, § 6, requiring that a bond, such as is described, shall be given by a party sentenced by a justice of the peace or by a judge of a municipal or police court to pay a fine and costs, as one of the conditions before an appeal can be allowed, is in violation of the provisions of the constitution of this State, which have been referred to, and that the provision itself is inoperative and void. *Greene* v. *Briggs & al.*, Law Reporter, March, 1853. *Plaintiffs nonsuit.*

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

LORD, *Plaintiff in error, versus* STATE OF MAINE.

The requirement by statute, c. 211, § 6, of the laws of 1851, that the appellant from a justice or police court, shall, on conviction in the higher court, pay and suffer *double* the amount of *fines, penalties* and imprisonment awarded against him by the former tribunal, has no reference to the *costs* of the prosecution taxed before such justice or police court.

In a complaint for violating c. 211, § 4, of the laws of 1851, it is lawful to insert two or more offences of the same nature, in different counts.

And where a complaint under that section contained several counts for apparently distinct offences, and on *one* only was the respondent convicted before the justice, and fined ten dollars, from which judgment he appealed, and in the appellate court was convicted according to the record, of the matters set forth in the complaint, and was there fined twenty dollars; the record shows no error, even if a double penalty could not lawfully be imposed.

Whether an Act is constitutional, which imposes a greater fine upon a party who is convicted before a jury, after an appeal, than could be awarded against him on conviction before a magistrate or police judge; *quere.*

WRIT OF ERROR, to reverse a judgment of the Supreme Judicial Court, rendered against the plaintiff at the September term, 1852.

The error assigned was, in sentencing the plaintiff to pay a fine of $20 and the costs of prosecution.

Complaint was made against the plaintiff in error of a violation of c. 211, § 4, of laws of 1851, which contained four counts, charging a sale of different kinds of liquors in each count. A warrant was duly issued thereon, and he was tried before a magistrate, found guilty of one offence alleged in the complaint, and was ordered to pay a fine of ten dollars and costs of prosecution.

From this judgment, the plaintiff in error appealed to the Supreme Judicial Court, and there pleaded not guilty to the complaint, was tried, and found "guilty" and sentenced to pay a fine of twenty dollars and costs of prosecution.

This writ of error was immediately sued out, and the presiding Judge ordered, that the proceedings on said judgment be stayed until the determination of said suit.

Shepley and *Hayes*, for plaintiff in error.

The Court in this case sentenced the plaintiff in error to

pay a fine of $20 and costs of prosecution. This is erroneous unless authorized by some provision of the Act on which the complaint was founded.

The 4th section declares, that the justice having original jurisdiction shall impose as the penalty the sum of $10 and costs of prosecution. The sum of $10 is not called in the statute *a fine;* it is not a fine; but $10 and the costs of prosecution constitute the penalty for the offence.

The 6th section declares, that the appellate court shall impose double the amount of fines, penalties and imprisonment awarded against him by the justice from whose judgment the appeal was made; i. e. double the sum of $10, added to double the costs of prosecution before the justice. This is what the statute says the defendant shall pay and suffer upon conviction before a jury; double the penalty awarded by the justice, and no more. The appellate court cannot add to this the costs of prosecution subsequent to the sentence of the justice.

In this case the penalty awarded by the justice was $10 and costs of prosecution, taxed at $8,02, making $18,02. The sentence of the appellate court, *indicated* by the 6th section, would have been double this sum, or $36,04. But instead of this the Court sentenced the plaintiff in error to pay $20 and costs of prosecution, taxed at $30,01, making $50,01.

But this sentence is clearly erroneous, because the clause in the 6th section, by virtue of which it was imposed, is unconstitutional and void.

The punishment for an illegal sale of liquor is fixed by the 4th section of the Act creating the offence. Upon the first conviction it is just $10 and costs of prosecution, to be awarded by the justice, &c. There is no other punishment prescribed by the statute for such a sale on the first conviction.

The 6th section of this "Act for the suppression of," &c. virtually declares that, if a person charged with its violation before a justice, shall appeal from the sentence of such justice, and add to the offence of selling liquor the equally

heinous crime of daring to insist upon the only mode of trial to which the constitution says he shall have the right, he shall suffer the punishment prescribed by the law as the fitting and adequate penalty for the illegal sale of spirituous and intoxicating liquors, and shall also pay and suffer as much more; — for what? The statute does not expressly say for what, but it declares that such a punishment he shall pay and suffer "in the event of a final conviction before a jury;" that is, if, convicted before a justice, he quietly yields, he shall be punished for selling the liquor; but, if convicted in the constitutional mode, he shall be punished for selling the liquor and for his conviction before a jury.

This sentence, though for too large a sum, cannot be corrected. *Tully* v. *Commonwealth*, 4 Met. 359.

Evans, Attorney General, for the State.

TENNEY, J. — The only error assigned is, that the appellate court sentenced the appellant upon conviction by the jury, to pay a fine of twenty dollars and costs of prosecution.

1. It appears that the fine and costs, before the appeal was taken, was less than one half the amount of the fine and costs awarded after conviction by the jury. And it is insisted, that the appellate court, by statute of 1851, c. 211, § 6, is restricted in the sentence to a sum, which is double the aggregate amount of the fine and costs, awarded by the Judge or justice, from whose sentence the appeal was taken.

The party accused, after conviction by the jury, is not relieved from the payment of full costs of the prosecution. The amount is not limited to double the sum, which he was required before the appeal, to pay. The sum to be doubled is the fine or penalty of the justice of the peace, the Municipal or Police Court. The terms "fine" and "penalty" signify a mulct for an omission to comply with some requirement of law; or for a positive infraction of law; and do not include the costs, which accrue in the prosecution. That this was the intention of the Legislature, is manifest

from the requirement in § 6, that before an appeal shall be allowed, the appellant shall recognize to pay *all costs*, fines and penalties, that may be awarded against him, on a final disposition of the complaint. This language will not admit of the construction contended for, by the plaintiff in error.

2. A further ground for a reversal of the judgment for error, is, that § 6, so far as it requires, on conviction by the jury in the appellate court, that the accused shall pay and suffer double the amount of fines, penalties and imprisonment, awarded against him by the Judge or justice, from whose sentence the appeal was made, is unconstitutional and void. And therefore, there was no valid authority for the sentence imposed.

The complaint contains charges of several distinct violations of the statute, as contained in § 4, in as many separate counts. There is nothing in the record, indicating, that they were all for the same offence. He was found guilty by the justice, before whom he was brought and tried, of the sale of one gallon of rum only. He was sentenced to pay the fine required by the 4th § and the costs of prosecution. The appeal annulled the sentence of the justice, and he was entitled to be tried upon the complaint by a jury, and such trial he sought and obtained. In the language of the judgment, "the appeal was entered." —"Now the said Rufus M. Lord is set to the bar, and has this complaint read to him, and pleads and says he is not guilty thereof, and for trial puts himself on the country. Whereupon a jury was empanneled according to law to try the issue, who return their verdict therein, and upon their oath say, that Rufus M. Lord, the defendant, is guilty." "It is therefore considered by the Court here, that said Rufus M. Lord forfeit and pay a fine of twenty dollars, and costs of prosecution," &c.

By the verdict rendered he was convicted upon the whole complaint. It was read to him in all its different and distinct charges, and he pleaded thereto. The record does not show that they were for one, and the same offence.

They may be well understood from the variation in one from the other, to have been designed for distinct offences. It is competent to frame the complaint, so that two or more offences of the same nature, and upon which the same or a similar judgment may be given, shall be contained in different counts of the same indictment. *Kane* v. *The People,* 8 Wend. 211; 1 Chit. Crim. Law, 252, 253 and 254. The forfeiture prescribed by § 4, on the first conviction is the sum of ten dollars. The record does not show, that the sentence sought to be reversed as erroneous, was a single fine for a conviction of the first offence, made double by the authority of § 6. If the plaintiff in error was guilty of two of the counts in the complaint, as the record shows that he was, he incurred the penalty of ten dollars on each.

If the Legislature had no power under the constitution to provide for a greater fine on conviction before a jury, after an appeal, than that imposed by the tribunal from which the appeal was made, (of which we give no opinion,) it does not appear from the record before us, that a greater penalty was awarded by the appellate court, than that which was deemed by the Legislature appropriate as expressed in § 4. *Judgment affirmed.*

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

HEAD *versus* GOODWIN, *& al.*

In an action of tort, wherein the defendants are described, and the wrongful act is alleged to have been done by them, as partners, and they severally plead the general issue, the allegation regarding the partnership, is immaterial and need not be proved.

Where the defendants, in an action of trover, set up a title to the property alleged to be converted, by purchase, and they fail to establish their title, the conversion takes place at the time they received and claimed it as their own.

A *bargain* for personal property of more value than thirty dollars, without any delivery, or any thing in earnest to bind it, or part payment, or some

note or memorandum of it, in writing, signed by the party with whom the bargain is made, does not change or affect the title of the property that is the subject of it.

A grant of goods, which do not belong to the grantor at the time of the grant, is void.

And if the grantor subsequently acquire title to such goods, it requires some *new act* on his part, evidential of carrying the sale into effect, to transfer the title to such grantee.

Where A sold *one half* of a chaise to which he had no title, and afterwards purchased the chaise, and the same night delivered it to the custody of the person to whom he had sold *one half*, without any avowal that the delivery was to effectuate the former sale, this was not such a *new act* as to transfer the property.

The validity of a mortgage of personal chattels, is not impaired, from the fact that it is recorded upon a book of the town records.

A certificate of the clerk of the town, on the back of such mortgage, when it was received, is legal evidence of the fact so certified.

And when he further certifies that he has recorded it, without other date than that of its reception, *that* is to be taken as the *time* it was recorded.

The recording of a mortgage of personal property, supersedes the necessity of noting in the book of records, the time when it was received.

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

TROVER, for a chaise. The writ alleged that the defendants were partners, and as partners they converted the chaise to their own use.

The defendants severally pleaded the general issue.

The plaintiff offered testimony tending to show that on May 10, 1851, he sold the chaise to one Daniel Tibbetts and received in cash $45, and took his two notes for the balance for $60 each, on six and nine months, and took a mortgage of him on the same property to secure the notes. It appeared that Tibbetts lived in Biddeford. The mortgage was produced, and upon the back of it was a certificate of the clerk of that town, "received and entered May 13, 1851, 9½ o'clock, A. M. Recorded on the 309th page of 9th Book, Biddeford Town Records." [This evidence of recording was objected to.]

The plaintiff's witness testified, that the sale was made in Portland, and the chaise delivered there; that during the following summer he saw the chaise at the defendants'

stable in Biddeford, and that Nelson, one of defendants, told him they had purchased out Tibbetts. Both of the defendants spoke of the mortgage, and of the amount due thereon.

When the first note became due, the plaintiff called on Tibbetts, but was unable to collect it, and then demanded the chaise of defendants, exhibiting his mortgage, and they refused to surrender it.

The defendants introduced Daniel Tibbetts, who testified, that he bargained for the chaise three or four days before he went after it. He took the chaise the day the notes were given, and delivered half to Nelson, one of defendants, the same night; that nothing was said between them about a sale that evening; he had sold one half of it to Nelson on Friday before, and given him a bill of sale, (not produced,) and that he had paid in full; that the chaise was delivered to him the day the writings were made. The other half, he sold to Goodwin, the other defendant, between the 15th and 20th of same May; that he did not tell Nelson, when he sold to him, that he had mortgaged it.

The case was taken from the jury by consent, and submitted to the decision of the full Court, with authority to enter such judgment as the law may require.

E. R. Wiggin, for plaintiff.

1. Was the mortgage properly recorded?

The town clerk of Biddeford certifies on the mortgage the time when it was received and entered; the book and page where recorded. This certificate was admissible and conclusive of the fact there stated. R. S., c. 125, § § 32, 33.

When the statute requires a particular person to make a record, that record, certified by the person making it, is conclusive evidence of the fact of recording, and *prima facie* evidence of the authority of him certifying. 1 Greenl. Ev. § § 92, 483 and 484; Phil. Ev., Cowan & Hill's notes, note 805, and cases there cited; *Ames* v. *Phelps*, 18 Pick. 314.

2. Is there evidence of such a sale of one half the chaise

to Nelson, before the mortgage was recorded, as vested the property in him?

The bill of sale given by Tibbetts to Nelson, should have been produced or its loss accounted for. This not having been done, all Tibbetts' testimony as to the sale, should be stricken out. 13 N. H. 283; 2 Denio, 637; 1 Greenl. Ev. § 87; 3 Stark. Ev. 1006; 1 Phil. Ev. 218, and cases there cited; 7 Cowan's R. 334.

But if Tibbetts' testimony, as to the sale, be not stricken out, then it shows no such sale as vested the property in Nelson. The sale was made on *Friday*, but Tibbetts had no right, title or interest in the chaise till *Saturday* following, when he bought it of Jewell in Portland. *Owning nothing*, he of course *sold nothing*, and hence by virtue of that sale, Nelson acquired no property in the chaise. In *Jones* v. *Richardson*, 10 Met. 481, the Court say, "that a person cannot grant or mortgage property of which he is not possessed, and to which he has no title, is a maxim of law too plain to need illustration, and which is fully sustained by all the authorities." Nelson having acquired no property in the chaise on Friday, must hold, if at all, by virtue of a sale to him subsequent to the plaintiff's mortgage. Tibbetts says there was nothing said about a sale, after he got the chaise home, and after the mortgage was made, but that he delivered one half of it to Nelson that night. This is evidence of a delivery, and had not the rights of third parties intervened, might have vested the property in Nelson; but those rights intervening, a sale was necessary to give him any property in the chaise. A simple delivery passes no property unless it may be as bailee.

Wilkinson and *Tapley*, for defendants, furnished a written argument of great length, in which the following positions were taken and elaborately argued.

1. We say that the plaintiff having failed to prove the partnership alleged, it is fatal to his action.

2. That having alleged a conversion six months prior to

the time proved, and prior to the time when any had been committed, is equally fatal.

3. That there is no evidence of a legal and valid demand, and consequently no conversion at all proved, and must be an end to the plaintiff's case.

4. The defendants were purchasers without notice of the plaintiff's title, which is by mortgage; that there is no legal or competent evidence of a registration according to the statute, and no knowledge on the part of the defendants proved of the vesting of the mortgage.

5. That if both are not purchasers without notice, at least one of the defendants is, and being tenant in common with the plaintiff, he cannot maintain his action; and if he cannot maintain it against both, he cannot against either.

TENNEY, J. — The title of the plaintiff to the chaise in controversy, is under a mortgage, dated May 10, 1851, from Daniel Tibbetts, for the purpose of securing two notes of hand, of $60 each, of the same date, and remaining unpaid at the institution of this suit. It appears by the mortgage, and other evidence, that the plaintiff sold to the said Tibbetts the chaise on the same day that the mortgage was given. The defendants claim title by virtue of a purchase from Tibbetts, who testified, that he bargained for the chaise with the agent of the plaintiff three or four days before the time when the mortgage was given, made a bill of sale of the chaise the day before the date of the mortgage and various articles of property besides; but it appeared by his testimony, that he sold only one half of the chaise at that time to Nelson, one of the defendants, and the other half to Goodwin, the other defendant, between the 15th and the 20th of May, 1851.

The counsel for the defendants contend, that the bargain three or four days before the mortgage to the plaintiff, so vested the property in them, that the sale of one half thereof became perfect in Nelson, before it could be affected by the mortgage. But Tibbetts, having admitted his purchase

to have been made on the day of the date of the mortage, and the price of the property exceeding the sum of thirty dollars, Tibbetts not having received it at the time of this bargain, which was not bound by any thing given in earnest for that purpose, or in part payment therefor, and not having taken any note or memorandum from the plaintiff in writing and signed by him of the bargain, an earlier title of Tibbetts than that acquired on May 10, 1851, cannot be legally insisted on.

The certificate of the clerk of the town, where the mortgager resided, of his receipt of the same upon the back of the mortgage, is sufficient proof that it was left with him to be recorded at the time stated in the certificate. *Ames* v. *Phelps*, 18 Pick. 314. And there being one date only to the certificates on the back of the mortgage, the further statement thereon, that it was recorded on the town records, it must be understood as recorded at the same time. This record supersedes the necessity of the clerk's noting on the book in which the record was made, the time when the mortgage was received. *Sprowle* v. *Hardy*, 31 Maine, 73.

It is objected, that the record being made upon the *town records*, and it not appearing that it was made upon a book kept for the purpose, the requirement of the statute has not been complied with. The records of mortgages of personal property must be made by the town clerk. The books on which they are made belong to the office, and not to the individual, who may make the record. On retiring from office he has no right to the book on which such records are made; neither is he entitled to remove them as his own property; but they pass into the hands of his successor; and are open to the inspection of all, who may be interested in any thing contained therein. The statute provisions are substantially the same, as those appertaining to the register of deeds, as to the reception and recording of deeds, depositions, levies, &c. Certificates on the documents, recorded by the latter, that they are recorded upon

the records of the county named, are not defective. The statute does not provide, that the record of mortgages shall be upon a book kept exclusively for that purpose, and it is believed, that the certificate in this case is as specific and full as to meet the legal requirement. The book was used for the purpose in this instance, and nothing appears that it was not so used in others.

The mortgage was recorded on May 13, 1851, at 9½ o'clock, A. M. Tibbetts testified, that he "brought the chaise out of Portland on May 10, got out Saturday night, Nelson and I at the stable that evening, and delivered chaise to him, nothing said between us about the sale of it that evening, sold one half of it to Nelson Friday before, gave him a bill of sale, it included chaise bargained for with Jewell, and took pay for them."

The law is well settled, that a grant of goods which do not belong to the grantor at the time of the grant is void. But after the grantee has acquired a title thereto, the grant may be made effectual to pass the property, *by a new act.* And the question, what must be the character of the new act, has undergone discussions in England and this country by the courts; and there seems now to be but little controversy in relation thereto. *Lunn* v. *Thornton*, 1 Man., Gran. & Scott, 379. This was a case where the plaintiff therein "by deed poll, bargained, sold and *delivered* to the defendant all his implements of trade, and other effects whatsoever, then remaining, or which should at any time thereafter remain and be in and upon, or about his dwellinghouse at Stoney Stratford, and also all other effects elsewhere. Afterwards, under color of the assignment, the defendant seized all the goods, then upon the premises, and among them, certain goods, which were not upon the premises, or in the plaintiff's possession at the time of the execution of the deed poll, but were acquired by the plaintiff afterwards, and were upon the premises at the time of the seizure." Lord Bacon's Maxim, Reg. 14, which is in these words:— *Licet dispositio de interesse futuro sit inutilis, tamen potest fieri*

declaratio præcedens, quae sortiatur effectum, interveniente novo actu," was applied. And it was held that notwithstanding the seizure on the premises, that there was no new act done, indicating an intention in the grantor, that these goods should pass under the former bill of sale. TINDALL, C. J. delivered the opinion of the Court, after taking time for advisement, and says, "the new act, which Bacon relies upon, appears in all the instances, which he puts, to be an act done by the grantor, for the avowed object, and with the view of carrying the former grant, or disposition into effect.

In *Jones* v. *Richardson*, 10 Met. 481, the same question was presented, under a mortgage of property not owned by the mortgager at the time it was executed; and the mortgagee offered to prove that the property in question, after it was acquired by the mortgager, and before the rights of the defendant, who was an attaching creditor of the mortgager, had intervened, was taken into his possession, with the other property, for the purpose of foreclosing the mortgage. This proof was deemed irrelevant by the Court, and the Judge who delivered the opinion says,—"He did not prove or offer to prove any act done by the mortgager, after the mortgage was duly executed, by which he ratified the same, as to the subsequently acquired property." The construction put upon Lord Bacon's maxim in *Lunn* v. *Thornton*, was fully adopted, that there must be an *avowal* of the object *with the view* to carry the former grant into effect.

In the present case, the strongest import of the testimony as proof of a new act, relied upon by the defendants as sufficient, is, that on Saturday night of May 10, the chaise was delivered to Nelson, at his stable, and nothing said about the sale of it that evening. The purpose of the delivery was not disclosed, and it cannot be inferred with any degree of certainty, that it had any connection with the attempted sale the day before. It was at Nelson's stable, where it was highly probable, that people were in the habit of seeking ac-

commodation for their horses, and carriages would be delivered to the proprietor for safe keeping. There is nothing to show that such might not have been the purpose of Tibbetts, when the chaise was left with Nelson on Saturday night. The delivery spoken of was of the chaise, when it was only of one half thereof which had been the subject of the sale relied upon, a circumstance of some little weight, to be considered in reference to the question of the intention, touching the "new act." At any rate, the object of Tibbetts in the delivery was not avowed to be for the purpose of carrying the sale into effect, nor was there any declaration of such a view, which seems to be regarded as indispensable, and necessary to be made in some manner. Nothing was done, before the recording of the plaintiff's mortgage from Tibbetts, which could make the sale to Nelson effectual. The contract of sale for the other half of the chaise to the defendant Goodwin, was after the mortgage was recorded, and could not affect the plaintiff.

In November, 1851, after the first note given by Tibbetts to the plaintiff became payable, Jewell, who had acted as the agent of the plaintiff in making the contract of sale of the chaise, was unable to collect the note, and called upon the defendants at their stable, where the chaise then was, showed them the mortgage, and demanded the chaise of them. They answered, that they should not give it up, till they were obliged to do so; and they said they had bought it. In this last declaration they are confirmed by Tibbetts, who testified, that he sold the chaise to them and took his pay.

Jewell having the mortgage in his possession, and having shown it to the defendants, at the time when the property was demanded, and the plaintiff having subsequently commenced this suit, is satisfactory evidence, that the demand was made by sufficient authority. The refusal of the defendants to surrender the chaise on demand is evidence of a conversion; and they having claimed to hold the chaise, unaffected by the mortgage, and for a full price, by a purchase thereof, and not of the right of Tibbetts merely, the

conversion may be considered as made at the time the property was taken by them as their own. But whether at that or any subsequent time before this action was commenced, is quite immaterial; the question being whether it was converted, and not at what particular time, the conversion took place.

The defendants being sued as partners, and it being alleged in the declaration, that as partners, they converted the property; and the defendants having pleaded severally the general issue, it is insisted by them that the partnership is a material allegation, and must be proved. The law treats all torts, several as well as joint, and upon such a plea as is here filed, a verdict might be for the plaintiff as to one of the defendants only, and in favor of the other, and a judgment could be entered against the former. The evidence is satisfactory, that both are guilty of the conversion of the property, and they cannot be regarded as less so, in this action, and under the issue presented, by being charged as having made the conversion as partners.

Defendants defaulted.

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

THORNTON *versus* BLAISDELL *& al.*

A motion, addressed to the discretion of the presiding Judge, is not subject to exceptions.

In a suit against two defendants upon a promissory note, if one is defaulted, *he* is incompetent to testify for the other.

The privilege of a *party* of swearing to usury in his contract, is *personal* to him who alleges it.

Thus where one of two defendants in a suit upon a note is defaulted, *he* cannot be a witness to prove usury in the contract.

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

ASSUMPSIT on a promissory note purporting to be signed by the defendants. Blaisdell, one of the defendants, was defaulted at a prior term of the Court, but at the time of

the trial a motion was made to have his default taken off, which was denied. Gilpatrick, the other defendant, then pleaded the general issue, and upon the trial offered Blaisdell, the defaulted defendant, as a witness; 1st, to prove usury in the note declared on; 2d, as a witness generally.

The presiding Judge ruled that he was incompetent, and a verdict was returned for the plaintiff.

Shepley and *Hayes*, in support of the exceptions.

1. Blaisdell, having been defaulted, was a competent witness generally, for Gilpatrick, his co-defendant.

The rule which would exclude the testimony of a defaulted defendant in behalf of his co-defendants, has been greatly relaxed, until it is believed to be now settled that he is competent in all cases where he is not in some way interested, or where his testimony cannot directly make for himself. Greenl. on Ev. § § 356 and 357.

The reason for excluding such a witness, in *Gilmore* v. *Bowden & al.*, 3 Fairf. 412, "that the defaulted defendant was a party to the record," would seem to be just as forcible in an action of tort, where the rule is uniformly the other way.

The reason given by the Court in *Bull* v. *Strong & al.*, 8 Met. 8, is more satisfactory and conclusive.

Under a Massachusetts statute, the Court of that State has allowed a witness under these circumstances to testify. *Bradlee* v. *Neal*, 16 Pick. 501; *Chaffee* v. *Jones*, 19 Pick. 260.

Our own statutes, c. 115, § 11, would seem to authorize the same ruling. The decision of *Gilmore* v. *Bowden & al.*, was made before the passing of this statute.

2. Blaisdell was at least competent to testify to usury in the note declared on, between himself and the plaintiff.

The note was joint and several. Either of these debtors were entitled to the benefit of any payments made thereon above the legal rate of interest. R. S., c. 69, § § 2 and 3; c. 192 of Laws of 1846.

The avoidance of excessive interest by the provisions of

this statute is not a personal privilege, so that one of several defendants, who may know of large sums of usury paid to the plaintiff, may submit to a default and deprive his co-defendants of the benefit of his knowledge. The language of the statute is explicit,—"if the debtor, or any one of them, (no matter what his position, whether defaulted or not,) when there are two or more, shall come into Court, and shall actually swear, &c., all such excess above legal interest shall be void, and the debtor shall be discharged from the payment of it, unless," &c.

This construction is favored by the provisions of the 7th §, (now repealed.)

"The party, so reserving and taking more than legal interest, shall recover no costs, but shall pay costs to the defendant; provided the damages shall be reduced by the oath of any one of the defendants, where there are more than one, by reason of such usurious interest."

In *Knights* v. *Putnam & al.*, 3 Pick. 171, it was held that all the debtors must swear to the usury under the statute of Massachusetts, at that time, which provided that "if the debtor or debtors," &c.

But our statute expressly makes the oath of one sufficient.

In this case the Court refused to take off the default of Blaisdell, and refused to allow him to testify to usury in the note declared on, because he had been defaulted, thus depriving his co-defendant, (and perhaps with the collusion of the plaintiff,) of the benefits of the statute concerning usury. The language of the statute seems too explicit to allow such a result.

L. D. Wilkinson, contra.

1. The refusal of the presiding Judge to take off the default of one of the defendants, was, under the circumstances, a mere matter of discretion, and not the proper subject of exception. 5 Pick. 206; *Clapp* v. *Balch*, 3 Maine, 216; *Leighton* v. *Mason*, 14 Maine, 208.

2. The refusal to admit Blaisdell to prove usury in the

note between plaintiff and himself was correct, for to prove usury under our statute law, is a mere personal privilege, to be exercised by the debtor and him alone. It must be for his own benefit and not for any one else. Blaisdell had been defaulted, and that default had been acquiesced in for a long time, with counsel learned in the law managing the defence. And Blaisdell, by such default, admitted in the strongest manner that he had no defence to make; that he did not wish to take advantage of the statute of usury. It is only by pleading the general issue that a party may avail himself of such a defence under the Act. Blaisdell could not by any possibility avail himself of this Act, for he had made no such plea, and if he could not set up this plea for himself, he could not be a competent witness to prove it for the other defendant, unless otherwise a competent witness in the case generally.

It appears by the exceptions that the defendant Gilpatrick is not interested in the question of usury. He raises the point between the plaintiff and Blaisdell alone. There is no pretence that he, Gilpatrick, ever paid any usury, and he therefore has no right to make a defence upon that ground. It is only he who suffers the loss that can make any claims for usury. *Green* v. *Kemp*, 13 Mass. 515, and 9 Mass. 45; *Webb* v. *Wilshire*, 19 Maine, 406; *Little* v. *White*, 8 N. H. 276.

3. Blaisdell was not a competent witness, generally. The exceptions on this branch of the case do not contain enough to enable the Court to judge whether he should have been admitted or not. They do not state what was offered or proposed to be proved by him. This should have been stated so that the Court could know whether the evidence was material. The exceptions must show that the party has cause of complaint. *Comstock* v. *Smith*, 23 Maine, 202; *Bryant* v. *Couillard*, 32 Maine, 520; *Emery* v. *Vinall*, 26 Maine, 295.

But he was a party to the record, and that is a sufficient reason for his rejection. There are some exceptions to this

rule, but this case comes not within either of them. *Gilmore* v. *Bowden & al.*, 12 Maine, 412; *Kennedy* v. *Niles*, 14 Maine, 54; *Fox* v. *Whitney*, 16 Mass. 118.

Besides, the proposed witness was interested in the result, and was therefore rightfully excluded. We could not take judgment against him alone, and if his testimony should have defeated our claim against Gilpatrick, then it would operate as a defence to the whole action, and the jury would have been obliged to render a verdict for the defence generally. The plaintiff might have discharged him, but that was not done, and so both are parties to the record and the plaintiff was bound to obtain judgment against both or neither, and therefore it is clear that Blaisdell was interested to make a defence for Gilpatrick and thereby for himself and get his costs.

The case of *Tuttle* v. *Cooper & als.* 10 Pick. 281, strongly resembles the case at bar, and comprises a full and complete investigation and examination of the principles and authorities bearing upon the point in issue, and to which the Court is referred as a part of my argument.

HOWARD, J. — The plaintiff declared upon a joint promise of the defendants, and must maintain the promise and liability alleged, or fail in his suit. In an action *ex contractu*, against several, a judgment cannot be rendered against one, without including the others, unless they have been discharged by operation of law, or exempted by some personal matter, from the obligation of the contract. 1 Chitty's Pl. 32; *Chandler* v. *Parkes & al.* 3 Esp. R. 76; *Noke & al.* v. *Ingham, in error*, 1 Wilson, 89; *Tuttle* v. *Cooper & al.*, 10 Pick. 281, where the general rule, and the exceptions to it, are largely discussed, by SHAW, C. J., as recognized in English and American cases. But such discharge, or exemption is not assumed in defence of this case.

One of several defendants, in an action *ex contractu*, who has been defaulted, cannot be a witness for another who defends, because he is interested to defeat the suit against the latter, and thereby to prevent a judgment against him-

self. 1 Greenl. Ev. § 356; *Bull* v. *Strong*, 8 Metc. 8; *Noon* v. *Eldred*, 3 Hill, 104, n. a; *Mills* v. *Lee & al.* 4 Hill, 549. The cases of *Bradlee* v. *Neale*, 16 Pick. 501, and *Chaffee* v. *Jones*, 19 Pick. 260, were decided upon the provisions of a statute of Massachusetts, 1834, c. 189, since repealed, and do not conflict in principle, with previous and subsequent decisions by the same Court, upon the general rule of law in such cases.

After a default, therefore, Blaisdell was not a competent witness for Gilpatrick, the other defendant, at the trial, as he was directly interested to sustain the defence.

It was competent for Gilpatrick to prove usury by competent testimony of others, or to support the defence of usury by his own oath. R. S., c. 69, § § 2, 3. But Blaisdell, who had suffered a default to be entered against him, could not defend on any ground. For, by the default he admitted the cause of action, and that the amount claimed upon the contract was due, and yielded all his right to a defence; and final judgment might have been rendered, without further evidence as to his liability. As a party to the suit, and a debtor by default and admission, he could not, under the provisions of the statute, "come into Court, where the cause is pending," and swear to the usury assumed by another party who made defence. If both had been defaulted, the question of usury could not have been raised by either. The privilege of a party, of swearing to usury in his contract, is personal to him who alleges it, and defends, and cannot be invoked by another. As a party, then, Blaisdell had waived that privilege, by suffering a default, and as a witness for the other defendant, he was incompetent by reason of interest in the event of the cause.

The motion to take off the default was addressed to the discretion of the presiding Judge, and his ruling upon it cannot be reëxamined upon exceptions.

Exceptions overruled. Judgment on the verdict.

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

LOW *versus* HUTCHINSON.

For breach of an illegal contract no action can be maintained.

Thus where an attorney at law agreed with the plaintiff, that if he would permit him to commence a suit in his name and the action failed, he would pay all the costs, and such suit was commenced and the plaintiff was compelled to pay the bill of costs thereon; *it was held*, that the agreement was illegal and could not be enforced.

Whether compensation for professional services, rendered under such an agreement, can be recovered; *quere*.

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

ASSUMPSIT. The writ contained two counts, one on the contract referred to, and one for money had and received.

The defendant, as an attorney at law, undertook to collect a debt for the plaintiff, upon which judgment was obtained and execution. Upon the execution, the judgment debtor was arrested and gave a relief bond.

The defendant commenced a suit upon the bond and, before this was done, agreed with the plaintiff that if the action failed, he would pay all costs. In that suit judgment was rendered for the defendant, and the plaintiff was obliged to pay the bill of costs. The amount paid was demanded of the defendant.

Upon the evidence, as produced by the plaintiff, it was stipulated that the Court should render such judgment as the rights of the parties might require.

Emery and *Loring*, for the plaintiff.

1. The parties to the contract declared on are not in *pari delicto*, and therefore the first count in the plaintiff's writ is good. In *pari delicto potior est conditio defendentis et possidentis*. "But in order that this rule should have full effect, one of two requisites must occur; first, the contract must have been *malum in se*, involving criminality or moral turpitude, or, second, if it be merely *malum prohibitum*, it should appear that the parties are in equal fault, in *pari delicto*." Story on Contracts, § 489.

The statute, c. 158, § 16, contains no general prohibition. It imposes no penalty on the client. It was intended as a

regulation only of the conduct of attorneys and officers of the law.

In *Hill* v. *Smith*, 1 Morris, (Iowa,) 70, U. S. Dig. 1848, p. 13, § 48, the language of the Court is, "where the statute fixes a mere penalty, contracts in relation to matters which subject the *maker* to that penalty, are not invalidated."

2. If the contract declared on was equally prohibited to both parties, the maxim, *ignorantia legis neminem excusat*, would not apply to the plaintiff.

In *Holman & al.* v. *Johnson, alias Newland*, 1 Cowper, 341, Lord MANSFIELD said, "the objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant." The objection here is from one who knew at the time he made the contract that it was illegal.

"But the Court will always look into the dealings between attorney and client and guard the latter from imposition." *Star* v. *Vanderheyden*, 9 Johns. 253, 1 U. S. Dig. 339, § 369; *Downing* v. *Major*, 2 Dana, 228, U. S. Dig. 339, § 374; *Smith* v. *Thompson*, 7 B. Munroe, 305.

"The law looks with jealousy upon such contracts, (viz., between attorney and client,) on account of the influence of the attorney over his client. He must show that he has not used it to the prejudice of his client, and that his client was *as well advised* on the subject as himself." *Miles* v. *Ervin*, 1 McCord's Ch. 524, 1 U. S. Dig. 339, § 370; *Bibb* v. *Smith*, 1 Dana, 582. Has defendant shown that plaintiff was as well advised on the subject of the contract as himself?

"A distinction, however, is to be made between those cases, in which one of the parties has by an illegal act taken advantage of the other, or *imposed* upon him, and those cases in which both parties have been equally in fault." Story on Contracts, § 544. See also § 618.

3. If the contract set out in the first count in the writ is illegal and void, then Hutchinson was not employed by Low to bring the suit against *Dore et al.*, but expressly forbidden, and having done so, he did it for his own benefit, and the

money which Low was compelled to pay he paid to the use of Hutchinson, and he is entitled to recover the same on the second count in his writ for money paid, &c., he requiring no aid from the illegal contract to establish his case.

Nor will the illegal contract defeat this count.

"The test whether a demand connected with an illegal contract can be enforced at law is, that the plaintiff requires the aid of the illegal transaction to establish his case." *Scott* v. *Duffey*, 14 Penn. R. (2 Harris') 18, 11 U. S. Dig. 1851, p. 14, § 25.

The plaintiff requires no aid from the contract to support this count.

Eastman and *Leland*, for the defendant, contended that the agreement declared on was in violation of an express provision of the statute and consequently void. R. S., § 16.

And that no action can be maintained on such an agreement. *Wheeler* v. *Russell*, 17 Mass. 258; 13 Pick. 518; 22 Maine, 488.

If, from the plaintiff's own showing, or otherwise, the cause of action *appears* to arise "*ex turpi causa*," he has no right to be assisted. They also cited 21 Vt., 184, 199, 456.

HOWARD, J. — The contract, as stated by the plaintiff, rests upon an illegal consideration, and was, apparently, intended to aid in carrying into effect a transaction prohibited by law. It falls within the prohibition of the R. S., (c. 158, § 16,) and consequently, is unlawful. Its enforcement would involve a violation of law, and, therefore, it cannot be enforced.

Whether compensation for professional services rendered under an agreement, like that supposed in this case, can be recovered, is not now presented for consideration.

Plaintiff nonsuit.

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

BRADBURY *versus* ANDREWS, AND LACONIA CO., TRUSTEE.

The common law principle, that the income from the labor of the wife enures to the benefit of her husband, has not been impaired by the laws of this State.

The wife's earnings are liable to be reached by the process of foreign attachment, in a suit by a creditor of her husband.

What effect c. 85, of Acts of 1854, may have upon a disclosure, involving the income of the wife's labor, made *before*, but pending in Court at the *time* of the passage of the said Act; *queritur*.

In a cause to be heard on exceptions, a motion made and filed at the hearing, as to the amount of the judgment for costs, is irregular and cannot be determined.

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

ASSUMPSIT, originally brought before a justice of the peace.

The plaintiff's writ was dated Jan. 27, 1853, service made thereon on the defendant, and the Laconia Company summoned as his trustee on Jan. 31, 1853. The defendant was defaulted. The supposed trustee disclosed that there was due to Mary E. Andrews on the first day of February, 1853, $13,68, for her personal services in one of the mills of the company, performed from the 27th day of December, 1852, to the 29th day of January, 1853, inclusive, with the exception of Sundays, and that on said Feb. 1, they paid her that sum.

The clerk further disclosed, that the defendant was entirely unknown to him, and that he did not know that Mary was the wife of defendant, except, that her overseer informed him she was a married woman, and that in speaking of her husband she usually spoke of him "as George."

It was proved that Mary was the defendant's wife, while the above services were rendered; and on the copy of the writ delivered the trustee, was indorsed this notice :—"To the trustee.—Plaintiff claims to hold the wages of defendant's wife."

The justice charged the company as trustee, from which judgment they appealed, and the Judge presiding in the ap-

pellate Court, affirmed the decision of the justice; to which ruling exceptions were filed and allowed.

When the cause came on for argument in the District Court, the counsel for the plaintiff filed the following motion:—"In this action the plaintiff moves that judgment be rendered against the trustee for all costs arising after the appeal from the decision of the magistrate, and that execution issue against the goods and estate of said Trustee to satisfy the same."

Goodwin, for trustee.

1. The money for the personal services of Mary E. Andrews, was her property, exempt from attachment for the debts of her husband, and therefore the company ought not to be charged as trustee. Acts of 1844, c. 117; of 1847, c. 27; 1848, c. 73, and 1852, c. 227.

2. These statutes were designed to give married women the power to acquire property in the same manner as when unmarried, and to exempt all property acquired by them from attachment for their husband's debts, saving the exceptions made therein. The language employed is intended to express all the different modes of acquiring property. *Wages* due is a credit, and in the ordinary acceptation of the term, is property.

3. Though it may be true that the husband has the right to the services of his wife, that is, if he chooses, he may require her to labor for him in her proper sphere, and if she unreasonably refuses, he may be relieved by divorce from his obligation to support her; yet he cannot oblige her to labor for him as he pleases, or out of her domestic sphere, to which her duties under the marriage contract are confined. And when she is compelled by her wants, or her chidren's, to submit to the exhausting labors of a factory, neither the husband nor his creditors can rob her of her earnings. In this case she did not labor for her husband. He did not claim her wages. No contract was made with him, nor was he known to the company.

4. But the company up to the time of payment to Mary

E. Andrews, had no notice that she was the wife of the defendant, and therefore properly paid the money to her as the only one known to them as entitled to receive it, and on this ground should be discharged.

Wilkinson and *Tapley*, for plaintiff.

1. What were the rights of the husband in relation to the personal services of the wife prior to the passage of the statutes cited on the other side? They were determined only by the common law, and under that he was entitled to the services and earnings of the wife. *Commonwealth* v. *Manley*, 12 Pick. 173; *Ames* v. *Chew*, 5 Metc. 320; *Keith* v. *Woombell*, 8 Pick. 211.

2. Have the statutes cited changed the common law in this matter? They are to be construed strictly. This rule is supported by numerous authorities. The statute of 1844 was accompanied with this proviso, "that the same does not in any way come from the husband after coverture." This proviso is retained in the subsequent amendments to that law. If the services of the wife belong to the husband, their proceeds do likewise.

3. But the effect to be given to the term "purchase" used in the statute cited by the trustee, has already been considered by the Court in *How* v. *Wildes*, 34 Maine, 566, and overrules the construction contended for by the other side. Vid. also *Swift* v. *Luce*, 27 Maine, 285.

4. No notice in this case was necessary to be given. It was the duty of the company to pay to such person as was authorized by law to receive it. But if a notice was necessary, then it was given, and in writing, to the proper person. For aught appears, the overseer knew all about the marriage.

Goodwin, in reply.—

The proviso in question is not applicable to this case. It relates entirely to different transactions from that which is the subject of this investigation.

Personal labor of the wife is not money or property of the husband in any correct sense of the words.

The statute expressly gives a married woman power to sell property; does not this include the power to purchase?

The case in 34 Maine, 566, was decided before the amendment of 1852 was enacted. But even as the law then stood, it might respectfully be submitted, that that decision may admit of revision and limitation.

It is not easy to discover from that decision, what meaning the Court would give to the word "purchase" used in the statutes of 1844 and 1847. The passage of the Act, 1852, would seem to indicate the limits contemplated by the Legislature as soon as this decision was made known.

The statute may well authorize and make valid an executed contract, and not an executory one. It may protect so much of a contract as is *executed*, and yet furnish no means to compel an execution of such parts as are executory only. I know of no reason why a conveyance of land or other property, purchased by a married woman, by a contract understandingly made by both parties, may not be valid under the statutes, where the vender has consented to take the promissory note of the purchaser, although that note as an executory contract has no validity in law, or although the law furnishes no means of enforcing it.

At common law, such a conveyance would be good for the purpose of passing the estate.

The notice on the writ was clearly insufficient; it did not even mention the wife's name. Whatever knowledge the overseer had, does not appear to have been communicated in any way to the corporation.

CUTTING, J. — The supposed trustees, by their agent, disclosed that when the trustee process was served on them, they were indebted to one Mary E. Andrews, for her personal labor, in the sum of $13,68.

The facts, further disclosed and proved, show that she was, during the time she labored, the wife of the principal defendant, and that the company, through their agents, had such knowledge or the means of such knowledge, when payment was made to her.

At common law, the income from the labor of the wife, inures to the benefit of the husband, and none of the recent statutes of this State, referred to in the arguments, have changed the law in that particular; consequently the payment to the wife, after the service, was unauthorized.

Since the disclosure, and the adjudication thereon at *Nisi Prius*, the Legislature by the Act of April 15, 1854, have enlarged the statute, c. 119, § 63, so as to embrace the personal labor of the wife and minor children. But there being more than one month's labor due, it becomes unnecessary to consider the effect of that Act upon this case at the present time; at all events the company are chargeable as trustees for some amount, and the exceptions are overruled.

The plaintiff's motion is not properly before us; it constitutes no part of the exceptions.

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

ABBOTT *versus* GOODWIN.

By R. S., c. 66, § 2, all boards, plank, timber and slitwork, offered for sale, shall, previously to delivery, be surveyed by one of the sworn surveyors, and their contents noted.

By § 20 of same chapter, it is enacted that any person selling and delivering any boards, plank, timber or slitwork, before they are surveyed, shall forfeit two dollars a thousand.

Where the defendant contracted with the plaintiff for a quantity of joists, and received them without objection at his own survey, he is bound to pay the price agreed upon, although they were not surveyed by any sworn surveyor.

It seems, that where joists are delivered under such a contract, there is no such *offering for sale*, as requires them to be surveyed.

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

ASSUMPSIT, on a balance of account for hard and soft wood joists. The parties lived in the town of Shapleigh.

Evidence was introduced tending to show that the plaintiff contracted with the defendant for 3 M. feet hard wood, and 5 M. feet soft wood joists, to be delivered on the line

of the York and Cumberland rail road in the town of Sanford.

They were delivered according to the agreement. The defendant surveyed the most of the hard wood joists at the mill where they were sawed, in Sanford. The balance the defendant said it was no matter about surveying them, the plaintiff might count them. The soft wood were surveyed or taken an account of by one Bragdon, at the mill when he sawed them, in Shapleigh.

It appeared that when all but two loads had been delivered, the defendant told the plaintiff that it was all right, and that if he would come down to Springvale the next Saturday, he would pay him $15 or $20.

Evidence was also produced that there were several qualified surveyors of lumber in the town of Sanford that same year; and admissions of the plaintiff, that these joists were not surveyed by any *sworn* surveyor.

The counsel for the defendant requested the Judge to instruct the jury, that the plaintiff was not entitled to recover, because it did not appear that the joists had been duly surveyed by a sworn surveyor, in the town of Sanford; if they found that the lumber had not been surveyed, and that there were sworn surveyors in the town of Sanford at the time of the delivery.

The Judge declined to give the instructions, to which refusal the defendant excepted, a verdict being rendered for the plaintiff.

Leland, for defendant.

1. These joists are required by R. S., c. 66, § 2, previously to delivery, to be surveyed by a legally qualified surveyor, and any person selling and delivering such before thus surveyed, forfeits $2 per M. § 20, same chapter.

The penalty prescribed by the latter section, renders it prohibitory in its nature, and therefore any contract made in violation thereof is unlawful and null and void. Chitty on Contracts, under head of illegal sales as rendered void by statute, wherein he says, "a contract is void if prohibit-

ed by a statute, though the statute only inflicts a penalty, because a penalty implies a prohibition." 1 Kent's Com. 467.

2. It is an ancient doctrine, that no action can be founded upon an illegal contract. *Holman* v. *Johnson*, Cowper, 343; *Russell* v. *De Grand*, 15 Mass. 39; *Wheeler* v. *Russell*, 17 Mass. 258; *Pray* v. *Burbank*, 10 N. H. 377.

3. It is incompetent to either or both the parties by any agreement to waive such survey as is required by law. A positive statutory provision can in no case be avoided. All laws, except special enactments, are intended for the public and general good, and they are the rules to which the public are obliged to conform.

4. It clearly appears from the exceptions that each party acted "by agreement" in violating a statute provision; and we may invoke the aid of the well known principle "*in pari delicto portior est conditio defendentis.*"

The case of *Coombs* v. *Emery*, 14 Maine, 404, appears to settle this principle "that whenever there are legal surveyors of timber, &c. in any town where such articles are to be measured, the measurement must be done by them. In this connexion *vide* R. S., c. 66, § 20.

If, as the Court decide in *Buxton* v. *Hamblen*, 32 Maine, 450, "the sale of pressed hay *unbranded* is a violation of the statute, and equally so, whether to be visited by a forfeiture of the article or by a pecuniary penalty," it is difficult to see the distinction in principle between the law as applicable to the case at bar and the case there decided, excepting in this, that c. 66, § 20, R. S., does, "in express terms," prohibit the sale of boards, slitwork, &c. and subjects the seller to a forfeiture, &c., whereas the statute under which that decision was made, does not in express terms prohibit any such sale.

D. Goodenow, for plaintiff.

1. Penal statutes should be construed strictly. They should be so construed as to suppress the mischief and advance the remedy. The object of the statute is to prevent fraud in the sale of lumber. There is not the same facility

in cheating in the sale of timber, as in boards or shingles; shingles and clapboards have their dimensions, &c. prescribed by statute c. 66, § § 6, 7, 8, 9, 10 and 11.

The lumber described in § 20, of this chapter, is not forfeited.

2. The joists in this case were not offered for sale, but delivered and accepted in fulfilment of a previous contract. It was a case not within the mischief to be suppressed. There was no holding out of property for sale contrary to law. To constitute an offence it must be a wilful violation of law, and this is immoral. 2 Starkie's Ev. 87, note K.

3. Where the parties otherwise agree, a survey is not necessary. This is expressly provided for in the sale of shingles.

4. In this case it does not appear but that the defendant, who surveyed the greater part, was a sworn surveyor of the town of Shapleigh. The burthen of proof is on the defendant. *Nutter* v. *Bailey*, 32 Maine, 504.

5. To constitute an offence, the lumber should be sold and delivered in the same town; otherwise, to which shall the penalty go?

6. If defendant was not satisfied, it was his duty to have a legal survey, and he cannot take advantage of his own wrong.

7. This was dimension stuff, and there is no pretence it was not merchantable, or that there was any fraud on the part of the plaintiff. In *Low* v. *Hodsden*, 11 East, 300, there was an actual fraud. The case of *Coombs* v. *Emery*, 14 Maine, 404, is an authority for the plaintiff's recovery. In the case of *Wheeler* v. *Russell*, 17 Mass. 258, there was a real fraud practiced.

8. The plaintiff's right to recovery comes within the principle as laid down in 2 Camp. 144; 4 Yates, 86; 2 Bingham, 220. It cannot be doubted that the R. S. clearly recognize the distinction taken by the Court in *Coombs* v. *Emery*, 14 Maine, 404, between a penalty and prohibition.

For selling hay without being branded is against public

policy, and by statute such hay is forfeited. The articles enumerated in § 20, of c. 66, are not in express terms prohibited from sale, but a penalty only is inflicted.

Leland, in reply. To the objection "that the joists in this case were not offered for sale," I refer to Chitty on Con. p. 9, ed. of 1848, for the definition of a sale. There must be a request on one side and an assent on the other. The case finds there was an offer to sell, and that it was accepted.

It is said a survey is not necessary, when the parties otherwise agree, and this is expressly provided in the case of shingles. But this provision applies only to shingles. There is no provision dispensing with a survey of "timber," &c.

Then, as to the objection that it does not appear but that defendant was a sworn surveyor of the town of Shapleigh, the case finds the lumber was to be delivered in Sanford. There the contract was to be completed, and there the joists surveyed. Further, it appears by the case, that they were not surveyed by a sworn surveyor.

It is said the timber should be sold and delivered in the same town. But where was the offence committed? Not in Shapleigh, for there was no agreement that a survey should be made there. Chapter 66, § 20, provides for both "selling and delivery," not selling *or* delivery. Both the act of *selling* and *delivery*, must be proved before *any penalty attaches*. No penalty could here attach until after the delivery in Sanford. Such penalty could not be avoided by making a *sale* in one town, and *delivery* in another.

Again, if a man may not take advantage of his own wrong, the Court cannot aid either party in reaping any advantage from an illegal contract.

It is not necessary to show fraudulent acts or cheating on the part of the plaintiff. Where the doing of an act subjects one to a penalty, it implies a prohibition of the act. *Wheeler* v. *Russel*, 17 Mass. 258; *Buxton* v. *Hamblen*, 32 Maine, 450.

The case shows, that here is a plain and obvious intent

to avoid the effect and meaning of a wholesome statutory provision on the part of the plaintiff.

HATHAWAY, J. — On the 17th of December, 1850, the defendant contracted with the plaintiff to get for him a quantity of joists, and to deliver them on the line of the York and Cumberland Rail Road, in Sanford. The plaintiff performed the contract on his part, and the defendant received the joists upon an estimate satisfactory to himself, at the time, and refuses to pay for them, because, as he alleges, they were not surveyed by a *sworn surveyor*, as required by statute, c. 66, § 2, which provides that "timber, &c., offered for sale" shall be thus surveyed, previous to delivery. The case does not find that the joists were offered for sale by the plaintiff. He procured them on contract, for the defendant, and the defendant received them, and there is no honest or legal reason apparent, why he should not pay for them. *Coombs* v. *Emery*, 14 Maine, 404.

Exceptions overruled. Judgment on the verdict.

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

LORD *versus* MOORE.

It seems, that the provision in § 20, c. 133, R. S., in regard to depositions taken on *written interrogatories*, has reference to such as may be taken before a magistrate on notice, as well as to those taken under a commission.

When a deposition is taken on written interrogatories, and incompetent testimony is drawn out in response thereto, such testimony may be excluded by the Court, although no objection was interposed at the time of taking.

While it is true that declarations of the defendant in no wise relating to the issue, are not admissible in evidence, yet if such declarations are so intermingled by him with matters pertinent to the issue, that they cannot be separated without modifying the pertinent matter or rendering its meaning obscure; then the whole of his declarations become admissible.

To impeach the testimony of a witness, who has testified to a conversation with the defendant involving him in a trespass, it is incompetent to introduce his declarations that he believed the defendant innocent.

Entries in books of a private character, made by different persons, and some of them unknown, are not admissible as original evidence.

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

TRESPASS. The parties resided in Berwick in this State, and the allegation in the writ was for burning and destroying the plaintiff's shop with the goods therein, in Somersworth, N. H. The store was destroyed on September 8, 1849.

The plaintiff introduced in evidence the deposition of Isaac Pray, taken on notice to the defendant, in the State of New Hampshire. This deposition tended to show, that the defendant procured the deponent and one Charles Curtis to commit the trespass alleged. Both parties appeared at the taking of the deposition, and furnished their questions to the magistrate on strips of paper, who wrote them down, and it was thus taken on interrogatories.

On cross-examination, several questions were put for the purpose of affecting the credibility of the deponent, which were answered without objections by the plaintiff or his counsel.

When this deposition was read to the jury, the plaintiff's counsel objected to some of these cross-interrogatories and answers, on the ground that the testimony was inadmissible.

The counsel for the defendant insisted, that the objection should have been made at the time the deposition was taken, and that it was then too late; but the Court sustained the objection and excluded the testimony, and the residue of the cross-examination was read to the jury.

The plaintiff introduced the deposition of Charles Carr, in which was detailed two conversations he had with the defendant, a few days after the burning of plaintiff's store. The defendant said he was glad the plaintiff was burnt up, and wished that one Haley, (who was supposed to have been instrumental in causing defendant and others to be prosecuted for selling liquor,) had been in it. He said there was another building over there that we want blowed up, and the conversation related to the defendant's attempt to persuade the witness to blow up a certain building, and that defendant would find powder, fuse, &c. At the conclusion

of the conversation, defendant said, "we do not want to burn, but only blow up the building, to let them know we are after them. The other fire did not work just as we expected, we did not want to burn them out, but only to blow them up, because he employed Haley as a workman."

To all this conversation, excepting that relating to the burning of Lord's shop, the counsel for defendant objected, because it had no tendency to prove that the defendant burnt Lord's shop, or had any guilty knowledge of the burning thereof; and because the request to the witness to blow up a certain shop, subsequently to the burning of Lord's shop, was not competent evidence to prove the defendant burnt Lord's shop.

The Court overruled these objections and admitted the testimony.

For the purpose of affecting the credibility of Carr, the defendant introduced the deposition of George W. Brassbridge, who in detailing a conversation with the witness soon after an examination of defendant at Somersworth, in 1851, said, the witness Carr stated, "that he did not believe Mr. Moore knew any thing about the fire more than he did," (referring to the burning of plaintiff's store.)

This the Court excluded on request of the plaintiff's counsel.

The defendant offered in evidence the depositions of Knox and Works, who testified to similar declarations made to them by Carr, soon after the examination at Somersworth, which were also excluded.

It appeared by Pray's deposition, that he, on the night Lord's store was destroyed, at about sunset, had a conversation with the defendant of about five minutes, in his store cellar, when he, Pray, was requested to assist Curtis in blowing up plaintiff's store; *that* a little past 9 o'clock in the evening of that day, he saw defendant in his back yard, near the back side of his barn, and there received from him a bag of powder for the purpose of blowing up the plaintiff's store.

To rebut this testimony the defendant called Alice Lawrence, who testified, that she was at defendant's house on the afternoon and evening before the plaintiff's store was burned; *that* he retired to bed half an hour before sunset; and that she was so situated, that he could not have passed from his chamber to his back yard without her knowledge; and that he did not leave his chamber from the time he retired to bed until after midnight; *that* she was reading during the evening a book called "Afloat and Ashore," taken from Great Falls Library, only a few days before, in the name of her uncle George Moore.

To contradict the testimony of Alice Lawrence, the plaintiff called Henry Y. Hayes, who acted as assistant librarian about that time, and who testified, that the book called "Afloat and Ashore" was taken out in the name of George Moore, on Sept. 15, 1849, and was not taken in his name before. The No. of this book was 1561. He produced a book containing the entries of the books taken out and returned to said Library for a series of years including 1849.

The entries of books taken from said Library were written in figures with pencil. The entries under the name of George Moore, under the date of

Sept. 1, 1849, were 1244, 629.
Sept. 8, 1849, were 1368, 959.
Sept. 15, 1849, were 1561, 1228.

On cross-examination, the witness said he did not find this book charged to any one about that time or ever before; he could not say who made the entry of Sept. 15, but that he made those of Sept. 1st and 8th. Any director could make entries and take out books, who had a key, but the regular time was on Saturday evening. There were fifty-two stockholders, any one of whom could get a book at any time, if he could get a key. Librarian used to keep the key at that time, as there had been some difficulty. The rules of the Library allowed only two books to one person. The most of the page, on which was kept the account of Geo. Moore, was in his handwriting. He took out two books on Sept.

1st, which were returned on Sept. 8, 1849, and on that day took out two more, which were returned on Sept. 15, and he then took out No. 1561, called "Afloat and Ashore," which was not returned till Oct. 6, 1849.

The plaintiff then offered the book of entries in evidence, to which defendant objected, assigning various reasons, but it was admitted by the Court.

To some requested instructions, withheld by the Court, the defendant excepted, but the disposition of the case makes it unnecessary to present them.

A verdict was returned for the plaintiff. The defendant excepted to the rulings, exclusions and admissions of testimony.

Leland, Wells and *Bell,* in support of the exceptions.

1. Those portions of Isaac Pray's deposition which were excluded, should have been admitted in evidence. R. S., c. 133, § 20. Before this statute no objections were necessary, except such as related to matters of form. 14 Maine, 141; 7 Maine, 181; 16 Maine, 257 and 128. But we suppose the statute has altered the rule.

2. That part of Carr's deposition, in relation to the blowing up of Stackpole's shop, was irrelevant, not necessarily connected with the other material parts, and would have a strong tendency to prejudice the defendant. It was not relevant to the issue. 1 Phil. Ev., (1st ed.) 137; *State* v. *Renton,* 15 N. H., 169; *Cole* v. *Commonwealth,* 5 Grat. 696; *Kinchelon* v. *State,* 5 Humph.; *Keith* v. *Taylor,* 3 Vt., 153; *Handley* v. *Call,* 27 Maine, 35; *Wilton* v. *Edwards,* 6 Car. and Payne, 677. Besides, this was not necessarily connected with the part which is relevant to the issue, and it is not for the plaintiff to draw out and offer such testimony.

3. The depositions of Brasbridge, Knox and Works, should have been admitted. Evidence may be given of the declarations of a witness to contradict what he had said on his examination, or to show that he did not tell the whole truth. *Staples* v. *Spoker,* 8 S. & R., 317; *Lamb* v. *Stewart,* 2

Ham. 230; *Charlton* v. *Uries*, 4 Grat. 58; *DeLailly* v. *Morgan*, 2 Esp. 69.

4. The book of entries of the Great Falls Library should have been excluded. It appears to have been kept in pencil, and in a very inaccurate manner. It can hardly lay claim to be such a book of records as to commend itself to the courts of justice. Moreover it was not kept, except in part, by the witness, nor did he know in whose handwriting the most essential part of it was kept. There is no evidence in whose custody the book was found. The rule as to admitting books of entries made by third parties is examined, and the result of the authorities given, in 2 Smith's Leading Cases, 139. Also in 1 Greenl. Ev. § § 115, 116, 120, 151, 155.

But if the entries made by Hayes, under date of Sept. 1 and 8, are admissible, that under date of September 15, and prior to September 1, are not admissible. 1 Greenl. Ev. § 115, 120; *McKenney* v. *Waite*, 20 Maine, 349; *Dow* v. *Sawyer*, 29 Maine, 117; *Doe* v. *Sanford*, 3 B. & Ad. 898; *Poole* v. *Dicas*, 1 Bing. 649; *Augusta* v. *Windham*, 19 Maine, 317; 1 Stark. Ev. 315, 320.

Clifford and *Jordan*, *contra*.

1. The deposition of Pray was not taken on written interrogatories within the meaning of the statute, and the second clause of § 20, c. 133, does not apply to it; consequently the objection to the excluded testimony was seasonably taken at the trial, under the express authority of the first clause of the same section.

2. But if the whole of § 20 applies to depositions taken in the usual method, like this of Pray's, still the testimony was rightfully ruled out, because it was illegal. *Polleys* v. *Ocean Ins. Co.* 14 Maine, 141.

3. The entire conversations with Carr, were rightfully admitted, because they were continuous and connected, so that the jury could not appreciate their full force with respect to the defendant's guilty knowledge of the Lord burning, without having the whole before them. *Commonwealth* v. *Call*,

21 Pick. 509; *Rex* v. *Wylie*, 4 Bos. & Pul. 94; *Rex* v. *Ellis*, 6 B. & C. 145; *McKenney* v. *Dingley*, 4 Maine, 172.

4. The testimony of Brassbridge, Knox and Works only involved Carr's opinion as to the defendant's knowledge of the Lord burning; he had testified to certain conversations with defendant, but upon the *effect* of those conversations he had given no opinion, and could have given none, because it would not have been evidence. The conversations were facts for the jury to judge of and not the witness. He testified to no belief, and therefore could not be contradicted.

5. The book of entries of the Great Falls Library was properly admitted, for it was the defendant, and not the plaintiff, who first introduced the contents of the book to the jury. The book was not offered or read to the jury until the cross-examination was closed. Surely it was too late for any objection to the book, after the defendant had put its contents into the case. He cannot except to his own acts.

The entries under date of Sept. 1st and 8th were in the handwriting of the witness, and in pursuance of his duty as assistant librarian, and therefore were admissible, even if they had been first offered by the plaintiff. The date, Sept. 15, 1849, was of no consequence at the trial, nor is it of any importance now. It was put in by defendant and it cannot be competent for him to object to it. It is well settled, even when the memorandum itself is not evidence, and particular entries only are used by the witness to refresh his memory, that if the opposite counsel cross-examine as to other entries in the same book, he makes it his evidence. 6 Car. & P. 280; *Ward & al.* v. *Abbott*, 14 Maine, 275. All the inquiries respecting the contents of the book were made by the defendant's counsel, and the case falls within the above rule.

But the entries were made in the discharge of a duty, in its nature official, under dates of Sept. 1st and 8th. The only use the plaintiff made of it, was to show, that vol. No. 1561, was not out in the name of Geo. Moore on Sept. 8, 1849. The cases cited on the other side do not apply to this case. With the rule therein recognized we do not

combat. We are content even to take the doctrine in *Augusta* v. *Windsor*, 19 Maine, 317, and the cases cited, particularly *Warren* v. *Greenville*, 2 Stra. 1129, and *Pattershall* v. *Turford*, 3 Barn. & Ad. 890.

The book was admissible as original evidence. 2 Hill, 534; 1 Salk. 285; 1 Greenl. Ev. § 116; *Snow* v. *Thomaston Bank*, 19 Maine, 269; *Hingham* v. *Ridgeway*, 10 East, 109; *New Haven Co. Bank* v. *Mitchell*, 15 Conn. 206; *Haven* v. *Wendell*, 11 N. H. 112; *Batchelder* v. *Sanborn*, 2 Foster, 325.

The witness identified the book as the record of the Great Falls Library.

Eastman, in reply.

RICE, J. — The first exception presents the question, whether, when a deposition is taken on written interrogatories, to which no objection is made at the time of taking, and incompetent testimony is drawn out in response thereto, such testimony can properly be excluded by the Court, at the trial.

A preliminary question has been raised in the arguments as to the meaning of the words, "written interrogatories," as used in the 20th § of c. 133, R. S. The plaintiff contends that these words apply to interrogatories when filed for the purpose of taking depositions on commissions; the defendant, that they apply in all cases where the interrogatories propounded to the witness are in writing.

By reference to § 15 of the same chapter, a solution of this question will be found. It is there provided, that the witness shall first be examined by the party producing him, on "verbal or written interrogatories," showing clearly that written interrogatories may be resorted to within the meaning of the statute, as well in taking depositions before magistrates on notice, as when taken on commissions. The reason for the rule would seem to apply with equal force in both cases.

In practice, it is well known, that the substance of the

testimony of a witness is often given voluntarily, or on the verbal interrogatories of the parties. In such cases, the proceedings are comparatively informal, and an imperfect opportunity is afforded to interpose specific objections. Not so, however, when interrogatories are reduced to writing. Then the same opportunity is presented for a distinct and specific objection, as when interrogatories are filed for taking depositions on commission, and the rule applies alike in each case.

The provisions of § 20, c. 133, were copied, substantially from § 26, c. 94, R. S., Massachusetts. The Court in that State have decided, that that provision does not require objections to the competency of a witness to be made when the deposition is taken, but such objection may be made at the trial. *Whitney* v. *Heywood*, 6 Cush. 82. This Court has decided, in the case *Polleys* v. *Ocean Ins. Co.*, 14 Maine, 141, that testimony, illegal in itself, cannot be admitted because objection was not made to the interrogatories before they were answered. Such was the established rule of law in this State before the enactment of the statute cited. Does that statute change the rule? We think not. The language of the statute is general, it is true; but in terms it applies to interrogatories only. It is however contended, that if objection cannot be taken to an interrogatory, after it has been answered, the answer itself, if responsive, should be received. To this proposition it is a sufficient answer, that the statute does not thus extend the rule; and to do so by construction, would be to interpolate into the statute a most important provision. Courts will not hold that established and salutary principles and rules of law are changed by legislative enactment, when it is necessary, to accomplish that object, to extend those provisions materially, by judicial construction, but will rather seek to harmonize the legislative provisions with existing law. This we think may be done in this case without doing any violence to the language of the statute.

There is a marked distinction between proving a fact

which is pertinent to the issue to be tried, in an informal manner, or by secondary evidence, and in proving a fact wholly foreign to the issue, by primary evidence, though produced in the most formal and technical manner. In the former case, the evidence is proper in itself; the objection is only to the form of its introduction, and is therefore matter of form, rather than of substance. In the latter the objection is to the evidence itself, to the substance in whatever form it may be produced. This latter species of evidence, being from its very nature illegal, should be excluded from the consideration of the jury, in whatever stage of the proceedings its character may be discovered. The party whose testimony is thus excluded loses no rights, because his evidence being from its nature illegal and incompetent, could not be changed by any modification or change in the form of the interrogatory, if objection should be made thereto. Not so when the objection is merely to the form of the interrogatory, or to the particular manner of proving a pertinent fact. Then, on objection being made, the interrogatory may be modified or withdrawn, or the fact proved in a mode consistent with the established rules of law. It is to this class of interrogatories that the statute applies. This exception is not sustained.

Objection is made to the admission, by the presiding Judge, of certain portions of the deposition of Charles Carr, in which the witness professes to detail conversations had by him with the defendant, in which the witness was solicited by the defendant to blow up a building of one Stackpole.

Declarations of the defendant, relating to matter in no wise connected with the subject matter then before the jury, could not properly be admitted in evidence. But when the declarations of a party which refer to other matters, are by him so intermingled and connected with other declarations which are pertinent to the issue to be tried, that they cannot be separated without modifying the signification of the pertinent matter, or to render its meaning

obscure, then the whole conversation becomes competent testimony, and should be admitted. It is the fault of the party, if in detailing one transaction or in speaking upon one subject, he so commingles it with other foreign matter, as to make it necessary to introduce the whole conversation, in order to render the part which is competent as evidence intelligible. Such we think was the case in the conversation referred to, and that the whole was therefore properly admitted.

The depositions of Brassbridge, Knox and Works, were properly excluded. They did not contradict the witness sought to be impeached, and were competent for no other purpose.

The fourth objection is entitled to more serious consideration. The situation and acts of the defendant on the night on which the plaintiff's property was destroyed, are very material. Isaac Pray had stated in his deposition, that the defendant had requested him, and one Curtis, to blow up the plaintiff's store, and had agreed to furnish powder with which to accomplish that object; and that on the night on which the property was destroyed, he and Curtis saw defendant about nine o'clock, in his (defendant's) back yard, near the back side of his barn in Berwick, and that they then and there received from him a bag of powder for the purpose of blowing up plaintiff's store.

To rebut this testimony, the defendant called Alice Lawrence, who testified, that she was at the defendant's house on the afternoon before the plaintiff's store was burned, and that the defendant retired to bed that day one half an hour before sunset, and that she was so situated, that the defendant could not have passed from his chamber from the time he retired to bed, until after midnight, that she was reading during the evening a book called "Afloat and Ashore," taken from the Great Falls Library, in the name of her uncle, George Moore.

Thus it will be perceived that in this stage of the trial time became material. Was the defendant present at the

barn, and did he deliver the powder as testified by the witness Pray? Bearing directly upon this point, is the testimony of the witness Lawrence. To show that she was mistaken as to the time when she was at defendant's house reading the book referred to by her, Hayes, the assistant librarian of the Great Falls Library, was called, and he testified that a book which he then produced, contained the entries of the books taken out of that library, and that the book entitled "Afloat and Ashore," was taken out in the name of George Moore, on the 15th of September, 1849, and not before; and that he delivered said Moore other books from said library, which are charged to him under date of the first and eighth of September. The store of the plaintiff was burned on the night of the 8th of September, 1849.

On cross-examination, it appeared that this book of records was kept in pencil; that the librarian kept the key of the library; that any director could make entries in said book, and take out books, as could any stockholder, who could get the key. He further testified that nearly all the page on which he kept the account of books taken out by George Moore, was in his handwriting; but the entry of the book entitled "Afloat and Ashore," was not in his hand writing, but in that of some person unknown to him. He also testified that he knew the entries, under date of Sept. 1 and 8, were made in 1849.

In this position of the case, the book of records was offered in evidence by the plaintiff, and under the objection of the defendant, permitted to go to the jury.

The plaintiff now contends, that the contents of the book were drawn out by the defendant on cross-examination, and therefore, that he cannot be permitted to interpose any objection to the introduction of the book itself.

The witness had, in his examination in chief, stated certain facts in relation to the delivery of books to Moore, and the time when they were delivered. The cross-examination only disclosed the fact that his knowledge of the time when

the book, "Afloat and Ashore," was delivered to Moore, was obtained wholly from seeing the entry in the book of records, in the hand-writing of some person unknown to him. This could in no just sense be deemed the introduction of the book or its contents, as evidence, by the defendant. The object of the cross-examination, was to show that the statements of the witness were not legitimate evidence for the consideration of the jury; he testifying to facts of which he had no personal knowledge.

The circumstances under which entries made by third parties, in public records, or books of private individuals, have been much discussed both in this country and England, and the principles upon which such entries have been admitted as original evidence, are by no means uniform. Perhaps the rule adopted by this Court in the cases *Augusta* v. *Windsor*, 19 Maine, 317, and *Dow* v. *Sawyer*, 29 Maine, 118, is based upon as satisfactory reasons as any found in the reported cases. To make such entries in books of a private character admissible, the books in which they are made must have been fairly and regularly kept, the entries must have been made by a deceased person whose duty it was to make them, or in the regular course of business, who had personal knowledge of the subject matter entered, and whose situation was such as to exclude all presumption of his having any interest to misrepresent the fact recorded.

Applying this rule, as indeed any other found in the adjudged cases, and the result cannot be doubtful. The book was kept in pencil, and on that account the entries were liable to be obliterated, or might easily be modified; entries were made upon it by a very large number of persons, who had access to the library when they desired, and the entry which was most material, that of Sept. 15, was made by some person whose handwriting was unknown to the witness. Entries made in books thus kept, and under such circumstances, are not admissible as original evidence by any established rules of law. The only purpose for which they could have been properly used was to refresh the

recollection of the person by whom they were actually made.

Such was the peculiar posture of affairs at the time when this book was introduced, that it would be difficult to say that it had no influence upon the minds of the jury. The presumption is very strong that it would have very considerable weight with them. The book should have been excluded. *The exceptions are sustained, and a new trial granted.*

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

HATHAWAY, J., concurred in the result.

WELD *versus* CHADBOURNE.

In an action against an officer for not attaching on plaintiff's writ against his debtor *certain goods* of the debtor, not in his possession, evidence that subsequently he received another writ against the same debtor and attached the *same goods*, by special request, and they were afterwards appropriated to the payment of the latter claim, is irrelevant and inadmissible.

In such action, the declarations of the plaintiff, tending to show that he had released all claim by attachment to any personal estate of the original debtor, may be given in evidence.

An officer, unless *specially ordered* is not bound to attach the goods of a debtor, out of his possession.

The law will imply no indemnity from the creditor for such an act. But the officer is required to use *diligence* and *good faith*, and if he knows of property belonging to the debtor, but not in his possession, he is bound to attach it under general orders from the creditor to attach all his property.

If a creditor *specially* directs an officer to attach *specific property* of his debtor, not in his possession, he is required to do so, although he held in his hands older precepts against the same debtor, with general orders to attach all his property.

Whether after such property has been attached under special directions, the officer is not excused from attaching the same on the older writs in his hands, from well grounded suspicions and reasonable grounds to believe that the title might be in controversy, is a question of fact to be determined by the jury.

Of the grounds of setting aside a verdict as against evidence.

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

A motion was also filed to set aside the verdict, as being against law and the evidence in the cause.

CASE, against the defendant as sheriff, for the official neglect and misfeasance of one D. L. Littlefield, his deputy.

The writ contained three counts. The first charged neglect in omitting to attach certain personal property owned by one Samuel Thompson, jr., specifically described. The second alleged neglect in not attaching goods in said Thompson's store, upon a writ in favor of the plaintiff, before he attached them on other writs which were put into his hands subsequently to plaintiff's. The third was for a false return on plaintiff's writ.

Evidence was offered tending to prove, that in the evening of January 31, 1848, the plaintiff sued out a writ in his favor against said Thompson, and put it into the hands of Littlefield, with directions to attach the goods of Thompson in his store, and all other goods belonging to him that could be found; *that*, on the same evening, three writs were sued out against said Thompson in favor of one Allen, Hussey and Hatch, and that on January 20, prior, another writ against Thompson had been sued out in favor of one Goodwin, on which there was an attachment of real estate; *that* all these writs were put into the hands of Littlefield for service; *that* some of the goods in Thompson's store, during that evening, had been carried across the street into the store of one Samuel B. Emery, with the knowledge and by the aid of Littlefield, in pursuance of an arrangement between said Hatch and Thompson, for the purpose of paying Hatch's debt; *that* Hatch directed Littlefield to return the goods in Thompson's store on his writ, subject to the attachment of the same goods on the writs of Goodwin, Allen and Hussey, and also to return the goods which had been carried into Emery's store, as attached on his writ; and *that* Littlefield conformed to these directions of Hatch.

The goods carried into Emery's store, were also attached and returned by Littlefield upon a writ in favor of said Emery and by his directions, which writ came into his hands subsequently to the plaintiff's writ, but those goods were

not returned as attached upon the writ in favor of the plaintiff.

The real estate of said Thompson was attached on the writs of Goodwin, Allen, Hussey and Hatch, prior to the attachment of the real estate on plaintiff's writ.

The goods in Thompson's store were also returned as attached on Goodwin's, Allen's and Hussey's writ, prior to the attachment of the same on plaintiff's writ.

Judgment was obtained in all the suits at the same term of the Court in York county. Within thirty days after judgment, the plaintiff's execution was placed in the hands of Littlefield, with directions to satisfy it out of the personal property of said Thompson, as far as it might go, and the balance to be levied on real estate.

The executions in favor of Goodwin, Allen, Hussey and Hatch, were put into the hands of Samuel Lord, another deputy of defendant, who sold the goods attached in Thompson's store, upon Goodwin's execution, and after paying Goodwin's, Allen's, Hussey's and Hatch's executions, there was a balance remaining of $74,10, which he paid on plaintiff's execution.

The goods carried into Emery's store, which are the same specifically described in the first count of plaintiff's writ, were sold by said Lord on Emery's execution for $134,43, after paying all expenses, and no part of the proceeds were paid to the plaintiff, or on the executions in favor of said Goodwin, Allen or Hatch, but $55,82, of the proceeds, were appropriated to pay the execution of said *Emery* v. *Thompson.*

The plaintiff's execution was satisfied in part by a levy on real estate of Thompson; but a large balance remains due, and the said Thompson has since died insolvent.

At the term when judgment in those suits was rendered, upon the docket under the entries of Goodwin, Allen, Hussey and Hatch against Thompson was this memorandum, "executions not to be levied on real estate in any event, but to be satisfied on personal estate, if it be found."

The plaintiff offered to prove that Littlefield attached the goods removed to Emery's store on a writ in favor of Denison & Co., against Thompson, made Feb. 2, 1848, and that a portion of the proceeds of the sale of the same goods was appropriated to pay the execution recovered in that suit; but the Judge rejected the testimony.

The defendant showed by Samuel Lord, that at the term of the Court when those judgments were obtained, the plaintiff said to him, "that he had got a number of cases settled up that day; that he was to take the real estate of said Thompson, and the other creditors the personal property; said he thought he had done a pretty good day's work."

This evidence was objected to by the plaintiff, as tending to vary or alter the effect of the docket entry by parol, but the Court admitted it.

The presiding Judge gave the following instructions to the jury: — *that* if the goods were not in the possession of the debtor, Thompson, the law would not imply an indemnity to the officer, if he should attach them, and he would not be bound to attach them, unless specially ordered so to do, by the creditor or his attorney; and also *that* if such special orders were not given, but only general orders to attach the real estate, and all the personal estate in said Thompson's store, and all the personal estate belonging to said Thompson, which he could find; and if Samuel B. Emery specially directed the officer to attach the goods in his store, on a writ in his favor, it was the duty of the officer to attach them on Emery's writ, before attaching them on the writ of the plaintiff, notwithstanding Emery's writ came into the hands of Littlefield after Weld's writ, with the general orders before mentioned; and *that*, if the goods in Emery's store were not in Thompson's possession, and were not specially designated by the plaintiff or his attorney in the directions given to the officer, he was not bound to attach them on the plaintiff's writ, if he had reasonable ground to believe that the ownership would be in dispute,

and that a controversy might arise in reference to them, as whether they were the property of Hatch or Thompson; *that* he was not obliged to determine officially the title to the property, or the legal rights of the respective claimants; *that* diligence and good faith were required of the officer, and that if he knew that the goods in Emery's store belonged to Thompson, and had no good reason to doubt or disbelieve it, he was obliged to attach them under the general orders for attaching; *that*, if those goods were in the possession of the officer, only by virtue of an attachment made by him for Hatch, under his special directions to attach them, it would not necessarily follow, that they were Thompson's property; and that the officer might still have "well grounded suspicions" and reasonable grounds to believe that the title to such goods was in controversy; *that* this was a question of fact for the consideration of the jury.

The Judge also instructed the jury, that they were to determine from the evidence in the case, whether they were satisfied or not that the plaintiff had released his claim or waived it to any part of the personal estate; and then referred to the entries upon the docket, in testimony, and said it was a question for them to determine, whether Weld did or did not assent to those entries, or agree to waive any or all claim against the officer Littlefield, in reference to the order or manner of the attachments of the property.

A verdict was returned for defendant, and the plaintiff excepted to the instructions, rulings, &c.

N. D. Appleton and *D. Goodenow*, for plaintiff.

1st. Proposition, "that if the goods were not in the possession of the debtor Thompson, the law would not imply an indemnity to the officer if he should attach them, and he would not be bound to attach them, unless specially ordered so to do by the creditor or his attorney," is erroneous.

There is no such proposition in law.

Because, it has been held that the law would imply an indemnity, where goods are in the possession of the debtor, it does not follow, that the converse of the proposition is

true; and this is not true in all cases. The officer may know it is otherwise.

The officer may have much more certain knowledge of the title of the debtor to the property, than that which would arise from mere possession. See general principle in *Gower* v. *Emery*, 18 Maine, 79; *Bond* v. *Ward*, 7 Mass. 126, 127. The officer did "not use due diligence and make all reasonable inquiry and search."

2nd Instruction is erroneous.

The officer's duty attaches when he receives the first writ. He is the creditor's agent, and is bound to act faithfully for him. He is not at liberty to accept any other engagement, inconsistent with his duty to the first employer. *Payne* v. *Denne*, 4 East, 538.

3. That he was not bound to attach the goods on plaintiff's writ if he seasonably received it, is also erroneous. There is a difference between believing there would be a *dispute* or a *controversy;* and believing there is good grounds for it. When a claim is made, the officer is to exercise a *reasonable* judgment.

4. The next instruction is also erroneous;—for, 1, there should be a *reasonable controversy*, not such an one as a reckless litigious man would get up without any probable cause. 2. The officer, in such case, if he had fears, should have asked for an indemnity.

5. The effect of the entries upon the docket was a question of law, and should not have been left to the jury.

The declarations of Weld, proved by Lord, should not have been admitted to alter or vary the *legal effect* of those entries. They might have had an effect upon the jury which they would not have had upon the Court.

As to the transaction at May term, 1849.

1. It was between other parties. Littlefield was no party to it.

2. It was all Weld could then do. The mischief, as to him, had been done, by not making or returning the attachment.

3. Weld relinquished nothing. No entry under his action.

4. It was an arrangement to prevent lapping on the real estate by levies.

5. Weld said nothing which could alter the legal effect of the entries upon the docket.

Shepley and *Hayes*, for defendant.

HATHAWAY, J. — This case is presented on exceptions and a motion for a new trial.

The instructions given the jury, by the Judge who presided at the trial, are in accordance with the law, as decided in the same case, in which an opinion was delivered by the Chief Justice, in York County, April term, 1852, (not yet reported,) which is referred to as an authority.

The testimony offered concerning the subsequent attachment of the goods in Emery's store, on Dennison & Co's. writ of the second of February, was entirely irrelevant and rightly excluded.

The declarations of the plaintiff, as testified to by Samuel Lord, had a tendency to prove that an agreement had been made by the plaintiff with the other attaching creditors of Thompson, by which, in the levy of their several executions, the plaintiff gave up his claim to the personal property attached, and they surrendered to him, their claim to the real estate. The case presents no reason why the testimony of Lord should have been excluded; it was pertinent to the issue and was properly admitted.

A verdict should not be set aside as against evidence, where there is evidence on both sides, unless in extraordinary cases, where it is manifest that the jury have mistaken, or abused their trust. *Baker* v. *Briggs*, 8 Pick. 122; *Glidden* v. *Dunlap*, 28 Maine, 379.

Upon a careful consideration of all the testimony reported in the case, we do not think the Court would be justified in determining that the jury must have been mistaken, or that their minds must have been under improper influences

in forming, from the evidence reported, the conclusion, which was expressed by their verdict.

Exceptions and motion overruled.

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

STATE, *by Complaint and Warrant for search, versus Spirituous Liquors, and* CHARLES STAPLES.

A magistrate has no authority to issue a warrant to search a *dwellinghouse*, for intoxicating liquors alleged to be kept for illegal sale, on the complaint of three persons competent to be witnesses, unless it shall *first* be shown to him by the testimony of witnesses, reduced to writing and verified by oath, that they have reasonable ground for believing that such liquors are *there* kept for illegal sale.

Unless the warrant shows this preliminary proceeding, it is void.

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

COMPLAINT was made to a magistrate by three persons competent to be witnesses in civil suits, on the 12th day of Dec., 1853, that they "had reason to believe that spirituous and intoxicating liquors were, and still are kept and deposited by Charles Staples, of Biddeford, in said county, in the dwellinghouse of said Charles Staples, situated on the south-easterly side of the road leading from Biddeford village to Kennebunk, and occupied by said Staples," &c.

On this complaint the magistrate issued his warrant, authorizing the officer to search said dwellinghouse, for such liquors, and if found, that said Staples should be apprehended, &c.

The officer executing the warrant found a large quantity of intoxicating liquors in the dwellinghouse, and apprehended the said Staples, and carried him before the magistrate, where he was convicted, and the liquor and vessels ordered to be destroyed.

An appeal was taken to the Supreme Judicial Court, where was another trial and the defendant convicted.

He seasonably filed a motion in arrest of judgment for the following reasons:—

1. Because said complaint does not negative all the exceptions in the statute.

2. Because the warrant is not directed to the officer or officers, as by the statute provided.

3. Because it does not appear by said complaint or warrant, that the magistrate before issuing the warrant, took the testimony of witnesses as directed by § 11, of the Act of 1853, in addition to c. 211, of laws of 1851.

4. Because the warrant does not appear to be issued upon such testimony as directed by said § 11.

5. Because said complaint and warrant and the record of conviction are, in other respects, informal and insufficient.

This motion was overruled and defendant excepted.

Wilkinson, for respondent, argued in support of the motion.

Evans, Att'y Gen., contra.

HATHAWAY, J.—The proceedings, in this case, were under a warrant which commanded the officer to whom it was directed, to search the defendant's dwellinghouse for spirituous and intoxicating liquors, believed by the complainants to be kept and deposited therein for illegal sale.

The defendant moved in arrest of judgment for various reasons, among which the third one assigned was, "because it does not appear by said complaint or warrant that the magistrate, before issuing the warrant, took the testimony of witnesses as directed by § 11, of the Act of 1853, in addition to c. 211, of Laws of 1851." The statute of 1853, c. 48, § 11, provides that "no warrant shall issue for the search of any dwellinghouse in which, or a part of which, a shop is not kept, or other place is not kept for the sale of such liquors, unless it shall first be shown to the magistrate, before a warrant is issued for such search, by the testimony of witnesses upon oath, that there is reasonable ground for believing that such liquors are kept or deposited in such dwel-

linghouse or its appurtenances, intended for unlawful sale in such dwellinghouse or elsewhere; which testimony the magistrate shall reduce to writing, and cause to be verified by oath or affirmation of such witnesses, and upon such testimony, so produced and verified, he may, upon complaint of three persons, &c. issue his warrant." It was *only* "upon such testimony, so produced and verified," that the magistrate had any authority "upon the complaint of three persons" to issue his warrant to search the defendant's dwellinghouse.

Nothing is to be presumed in favor of the jurisdiction of a justice of the peace, as it is not general, but given and limited by particular statutes. *Bridge* v. *Ford*, 4 Mass. 641.

The jurisdiction of an inferior tribunal must appear upon the face of its proceedings. *Granite Bank* v. *Treat & al.* 18 Maine, 340; 35 Maine, 129.

The proceedings, in the case at bar, show no compliance with those requirements of the eleventh section of the Act of 1853, which were made indispensable and preliminary to issuing the warrant, and the defect is fatal.

Exceptions sustained and judgment arrested.

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

LEWIS *versus* ROSS.

If the record of a judgment of a Court of record is incomplete, through the mistake of its clerk, it may be corrected, when discovered by the Court.

No lapse of time will divest the Court of its power to make *such corrections*.

Thus where a trustee disclosed at the return term of the summons, was charged, and entitled to his cost by law, and the clerk, in making up the record, omitted to recite the allowance of his costs; it was *held*, that the record was amendable, after *scire facias* against the trustee, even without motion.

One, who has been summoned and charged as trustee on his disclosure at the first term, may retain his legal costs out of the property in his hands al-

though in the record of the judgment the allowance of his costs has been omitted.

ON FACTS AGREED.

SCIRE FACIAS, against defendant, as trustee of one James Warren.

At the return term of the writ in the original suit, the defendant made a disclosure, was charged as trustee, and judgment obtained in that suit for $117,91, damages, and $89,83, costs.

The execution issued on the judgment was committed to an officer who demanded of the defendant within thirty days after the judgment, the goods, effects and credits of Warren in his hands, wherewith to satisfy the execution.

The defendant paid over $11,75, which was indorsed on the execution, claiming to hold $11,60, for his costs in two cases, where he was summoned at the same time, this action against Warren being one of them. But there was no judgment rendered for his costs in either case.

The plaintiff claimed not only the amount retained by the trustee as his costs, but a much larger sum.

The material part of the disclosure was in these words; "about the 25th of December, 1852, I made a contract with said Warren for a lot of hay valued at $102, two cows valued at $18, a yoke of steers valued at $40, at his barn in Shapleigh. I paid him one dollar in part payment. I was to send for the hay, cows and steers, and pay for the same when delivered. I sent for and received hay I valued at $58,35, and paid him on account of the same, $35, leaving a balance due him of $23,35. I received no more hay, nor the cows or said steers. The steers were driven to my house by persons employed by me to haul said hay, but without any authority from me, and I refused to receive them or pay Warren for the same, although he demanded pay for the same, because I had understood that Dr. Lewis had some claim on said steers by a bill of sale or in some other way, and I did not consider it safe to pay said Warren for the same. The steers remained in my shed, yoked and

chained, and I ordered them to be fed and taken care of, the same as other cattle. The next morning, this trustee process was served on me; after which, said Warren came over to my house and claimed said steers as his, because he alleged that I had not paid him for the same according to agreement, and he took and drove them away. I forbid his taking them, but he persisted, and I have not seen them since, and have never received any profit or advantage therefor."

It was stipulated, that upon the facts and the disclosure, the Court are to render judgment according to the rights of the parties.

N. D. Appleton, for plaintiff.

D. Goodenow, for defendant.

HOWARD, J. — The defendant was adjudged trustee of Warren, and this suit is brought to determine the amount for which he was accountable upon his disclosure. By that it appears, that the defendant had contracted for "a lot of hay, two cows, and yoke of steers" with the principal, and "was to send for the hay, cows and steers, and pay for the same when delivered." Before the service of the trustee process upon him, he had sent for and received a portion of the hay, for which he had made payment in part. Neither the remaining portion of the hay, nor the cows or the steers, were delivered or received under the contract. For the property received and not fully paid for, it is admitted, that the defendant was held as trustee.

It is contended, that the contract was entire, and that, as the defendant had taken a part of the goods, he had the right to the possession, and the power to take immediate possession of the whole; and that he must be regarded as having the whole property intrusted to him, within the meaning of the statute, and charged accordingly. R. S., c. 119, § 4. But it appears, that the property not delivered under the contract, remained in possession of the principal, and did not pass to the defendant. It was open to attach-

ment as the property of the former, and could not be subject to attachment as the property of the latter. The sale had not been perfected under the contract. Though the steers were temporarily in the keeping of the defendant, they were taken and used, by persons employed by him to haul the hay, but without his authority, and he refused to receive them, or pay for them. They were not, then, in his possession under the contract, and were not goods or effects of the principal entrusted or deposited in his hands, within the intent of the statute. His claiming to hold them, after the trustee process was served upon him, cannot change the facts, or right to the property, at the time of the service. This is unlike the case of *Lane* v. *Nowell & trustee*, (15 Maine, 86,) cited for the plaintiff. There the goods appeared to have been delivered to the trustee, and he had engaged to account for them, and actually controlled them under the conveyance, and written contract.

The defendant was chargeable only for the unpaid balance due for the hay received, as trustee. That amount, after deducting his costs on disclosure, he paid to the officer holding the execution, on demand. We do not understand that the amount of such balance or costs are in controversy. But it is contended, that no deduction should have been made for the trustee's costs, and that the whole balance should have been paid to the officer.

The defendant having duly submitted to an examination on oath at the first term and disclosed, and having been adjudged trustee, was entitled to his costs, and authorized "to deduct from the amount in his hands, the amount of such costs." R. S., c. 119, § § 16, 17. He claimed to retain his costs as taxed in Court, and the taxation and claim form a part of his disclosure. But no specific or separate judgment for such costs appears of record, or was noted upon the docket. The judgment, charging him as trustee upon his disclosure, established his right to his costs, which are secured to him by statute. It was a substantial finding for him, though not properly docketed and recorded. The

judgment appears to have been imperfectly recited in its details, and the record is incomplete. But it would not comport with the justice of the case, that a party clearly entitled to his costs, should be deprived of them by a mere informality in the record, or misprision of the clerk. Errors of this kind are not errors in the judgment of the Court, in point of fact, and are amendable at any time.

"The forms of the Court are always best used, when they are made subservient to the justice of the case," said Lord Kenyon, in *Mara* v. *Quin*, 6 T. R. 8. In *Cradock* v. *Ratford*, 4 Mod. 371, the Court ordered the roll to be brought in and amended, after the judgment had been signed twenty years. *Hanckford* v. *Mead*, 12 Mod. 384; *Short* v. *Coffin*, 5 Burr. 2730. In *Mechanics' Bank* v. *Minthorne*, 19 Johns. 244, the Court, on motion, ordered the entry of satisfaction of the judgment, and all proceedings in the case, subsequent to the interlocutory judgment at a previous term, including the assessment of damages, to be vacated, and the record of the judgment to be canceled, and the damages to be reassessed. *Chichester* v. *Caude*, 3 Cowen, 39; *Hart* v. *Reynolds*, 3 Cowen, 42, n. a., where the Court adopted the result of the learned research of counsel, in allowing the amendment of the record of the judgment, and proceedings connected therewith, filed six years previously.

This Court has sanctioned the same doctrines, and amended its records in furtherance of justice, and according to the truth of the case. *Crofton* v. *Ilsley*, 6 Maine, 48; *Wright* v. *Wright*, 6 Maine, 415; *Limerick, Petitioners*, 18 Maine, 183; *Hall* v. *Williams*, 10 Maine, 278.

Although no motion has been presented to us to allow the amendment in this case, yet the error is apparent, and the subject is before us upon the facts and documents connected with the imperfect record, and addresses itself to our discretion. Shall the record stand as it is, stamped with an infirmity, to perpetuate a wrong? Or shall we cause an amendment to supply the deficiencies that have

occurred by accident or mistake, and when it is evident that no one can suffer by the correction?

On general principles, it is competent for a court of record, and incident to its authority, to correct mistakes in its records, which do not arise from the judicial action of the Court, but from the mistakes of its recording officer. In doing this, it may regulate its own action upon its own sense of responsibility and duty, and proceed upon suggestion, or on motion of those interested, or upon its own "certain knowledge and mere motion." It would not be an adversary proceeding, in which, of necessity, there should be parties, or in which notice would be required. *Balch* v. *Shaw*, 7 Cushing, 282.

It would seem that no lapse of time will divest the Court of its power, or absolve it from its duty, to supply deficiencies in the records of its own proceedings, where justice and the truth of a case require it, and when it is enjoined by statute. R. S., c. 100, § § 14, 15.

In civil actions, the prevailing party is entitled to costs, and they follow the judgment, as of course, either on verdict, nonsuit or default, and practically are taxed, allowed and incorporated into the judgment by the clerk, without any special order, unless upon objection or special hearing.

In *Norris* v. *Hall*, 18 Maine, 332, it did not appear that the trustee appeared at the first term, and submitted to an examination; or that any costs were taxed, claimed or allowed for him, or that he was entitled to any, by judgment of Court.

We are of opinion that the record of the judgment of this Court, in the original suit, should be corrected and completed, so that it will show expressly, that the legal costs taxed and claimed by the trustee, in his examination and disclosure under oath at the first term, were allowed. Then judgment should be entered for defendant, according to the agreement.

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

JEFFREY *versus* GRANT *& al.*

Where a written agreement is entered into respecting a particular transaction, the parties to it are regarded as intending to secure to each other their *entire* rights.

Thus, where a seaman agreed in writing with the owners and skipper of a fishing vessel, that for his services for the season, he should have his share of one half the fish, he is not entitled to any portion of the bounty earned by the vessel.

The statute of the United States allowing fishermen a share of the bounty has no operation, when the agreement between them and the owners stipulates the compensation for their services, without any reference to it.

ON FACTS AGREED.

ASSUMPSIT, to recover a share of the "fishing bounty" of schooner Araunah during the fishing season of 1852. [Defendants were the owners of the vessel.]

On May 11th of that year, plaintiff signed what is usually called "shipping papers," being an agreement between the owner, skipper and fishermen, as to the terms of the voyage, in which he agreed to ship for the season, and continued in the vessel for the greater part of it.

The owners were to equip the schooner with all necessary supplies and tackle for the fishing business, and the plaintiff was to have his share of one-half of the fish, after deducting one-sixteenth for the shoremen or curers.

The clauses usually found in the printed forms of such agreements, relating to the deduction of the expense for the general supplies commonly called *great general charge*, and of accounting with the fishermen for their share of the allowance to the owner, which he is entitled to receive of the Collector of the Port, as bounty, were stricken out.

Some evidence as to the custom, under similar agreements, of the disposition of the bounty, and also as to demand of the plaintiff's share was introduced.

The case was submitted for a decision.

Wilkinson, for defendants.

Nye, for plaintiff.

1. This action is founded on § 5 of the Act of Congress,

of July 29, 1813, which has not been repealed, as contended on the other side.

But it is said, that if not repealed, the plaintiff cannot recover, because he has waived his right to a share of the allowance, by showing that words which would have secured to him such share, were erased from the printed formula of the agreement signed by the parties. We say—

2. The *law*, independent of the agreement, bestows a share of the allowance upon the fishermen. With or without the words erased, the rights of the parties were the same. Those rights are fixed by *statute*. The defendants might not have chosen to enter into a *contract* to do what the *law* already requires. At most the erasure of words can only raise a presumption that the fishermen were not to have a share of the bounty, and surely the operation of a positive law ought not to be suspended by a bare presumption.

To the objection that plaintiff furnished none of the general supplies, it is a sufficient answer that he never agreed to do so.

3. But the owners expressly agree "to account with the fishermen for their interest in said fishing voyage."

SHEPLEY, C. J. — This suit was commenced to recover a share of the bounty paid to the owners of the schooner Araunah, for her employment during the fishing season of 1852.

The plaintiff was not employed as one of her fishermen, during the whole time required by law to entitle her to receive the bounty. Nor was that necessary to entitle him to receive some share of it. The Act of Congress, approved on July 29, 1813, c. 34, § 5, provides, that five-eighths of it shall be paid to the fishermen, who shall have been employed during the season, "or a part thereof," in proportion to the fish taken by them. This provision does not appear to have been repealed by the Act approved on March 3, 1819, which changes the amount of the bounty to be allowed, and repeals so much of the fifth and sixth sections of the former Act as

are inconsistent therewith. No inconsistency is perceived between the provisions of those Acts with respect to the distribution of the bounty.

The parties in this case made a written agreement to secure to each other their respective rights in the employment of that vessel, for the fishing season. Parol testimony cannot be received to contradict or vary it. Any fact, which will not have such effect, may be proved. The manner in which the plaintiff entered upon that service and what he took with him, has been proved. He does not appear to have furnished any share of the provisions or supplies denominated "great general charge." Nor did he, by the contract, engage to furnish any, or to pay the owners for furnishing them, or to allow them to deduct his share of them from his share of the proceeds. On the contrary he was entitled to receive his share of one half of the fish, or of their proceeds, without any such deduction. The other half being appropriated as compensation for use of the vessel. By the agreement he was not entitled to receive any share of the bounty. He claims it by virtue of the provisions of the statute. These rights may be relinquished by a contract, as well as new ones acquired.

If the agreement was not intended by the parties, and does not secure to them all their legal rights, not surrendered or abandoned, the effect of it will be to allow the plaintiff to recover from the owners of the vessel a share of the bounty, without subjecting him to the payment, of any thing for the "great general charge." It would thus operate unequally and unjustly. When parties make a written agreement respecting a particular transaction or voyage, they are regarded as intending to secure to all parties their entire rights. Such must be considered their intention by the agreement presented in this case. *Plaintiff nonsuit.*

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

BLAISDELL *versus* ROBERTS *& als.*

A counter brief statement made up by the plaintiff's counsel and read to the Court during the progress of a trial, but which was not signed by the plaintiff or his counsel, forms no part of the proceedings, and may be withdrawn.

Where the defendant pleads soil and freehold, in an action of trespass *quare clausum* by one in peaceable possession under a recorded levy, but fails to show title in *himself*, or that the acts done were *under one* having title or right, a verdict in his favor cannot be sustained.

Such defendant is a mere *wrongdoer*, and cannot controvert the plaintiff's *prima facie* title.

MOTION to set aside a verdict as against law and evidence.

TRESPASS *quare clausum.*

The defendants severally pleaded the general issue, and Roberts filed a brief statement of soil and freehold in the land in dispute. The other defendants justified as his servants.

After the pleadings of the defendants were read, the plaintiff read the following to the Court. —

"*Samuel M. Blaisdell* v. *Ezekiel Roberts & als.*

"Counter brief statement of plaintiff. —

"The plaintiff says, that the trespasses described in his writ were committed by the defendants on the close described in his said writ; and that title to the soil and freehold thereof, was not at that time in the said Ezekiel Roberts, but was in one Samuel Blaisdell, under whom the plaintiff was in possession as servant and tenant."

The substance of the evidence in the case will be found in the opinion of the Court.

The facts in relation to the counter brief statements, were stated in the report of the evidence, for the decision of the full Court, whether it is a part of the case.

It appeared by the report, that the counsel read the counter brief statement to the Court, but it was not signed. On its being read, the counsel for the defendants remarked, that it did not affirm his declaration, and the plaintiff said it

was not necessary, he presumed, in which the presiding Judge concurred.

It was then put aside, and was not handed to the jury, and the counsel did not understand that it was in the case.

The counsel for defendants had no knowledge that it was withdrawn, but regarded it and treated it as a part of the case. No motion was made for leave to withdraw it during the trial.

A verdict was returned for the defendants.

Clifford and *Jordan*, for plaintiff.

1. Possession is sufficient to maintain this action, against one who cannot show a better title. *Moore* v. *Moore*, 21 Maine, 350.

Actual possession is *prima facie* evidence of a legal seizin, uncontrollable by a stranger. *Newhall* v. *Wheeler*, 7 Mass. 189; *Graham* v. *Peat*, 1 East, 245; *Haskell* v. *Birbeck*, 3 Bur., 1563; *Cary* v. *Holt*, 2 Strange, 1238; *Lambert* v. *Stroother*, Wilde's R., 221.

2. The defendant, in this form of action, cannot avail himself of title in a third person, without showing the title, and command or permission of that person. *Merrill* v. *Burbank*, 23 Maine, 538; *Chambers* v. *Donaldson & als.*, 11 East, 74.

D. Goodenow and *Kimball*, for defendants.

RICE, J. — This is a motion for a new trial, on the ground that the verdict is against evidence and the weight of evidence.

A preliminary question is raised upon the pleadings. The defendants severally pleaded the general issue, and Ezekiel Roberts, by brief statement, pleaded soil and freehold in himself, and the other defendants, in brief statements, justify under him as his servants. To the defence thus set up it is affirmed by the defendants that the plaintiff replied by a counter brief statement, denying the title of Ezekiel Roberts, and asserting it to be in Samuel Blaisdell, under whom the plaintiff was in possession, as servant and

tenant. This counter brief statement, the defendants contend, is to be treated as an admission, made by the pleadings, on the part of the plaintiff, and discloses facts which disqualify the plaintiff from the further prosecution of the suit. The counsel for the plaintiff, however, affirms that, though this counter brief statement was read to the Court, it was not signed by him or the plaintiff, and was not put into the case, nor did it go to the jury with the other papers in the case. This paper has been before the Court. It does not bear the signature of the plaintiff nor of his counsel. We think it was not completed and made a part of the pleadings, and is not now legitimately in the case.

The plaintiff bases his right to maintain this action on actual possession and occupation of the *locus in quo*, and on title derived from Benjamin Chadbourn, who, in 1795, conveyed to Samuel Cowell a tract of land, being 80 rods wide on Salmon Falls river, and carrying that width southerly two hundred rods. In 1800, the same grantor conveyed to said Samuel Cowell another tract of land, forty rods in width, lying southerly of the westerly half of the tract first conveyed, and extending to land formerly conveyed to Elisha and Samuel Goodrich and estimated to contain twenty-five acres. This last tract, it will be observed, was but half as wide as the tract first conveyed, thus leaving a tract lying south of the first and east of the second, apparently of the same size of the second, which was not included in either deed. This last tract is understood to be the land now in dispute.

The two tracts thus conveyed to Samuel Cowell by Chadbourn, were, in 1828, conveyed by said Samuel to his son, James Cowell, and, in 1829, James Cowell conveyed the same to his brother, Edmund Cowell, 3d.

In 1830, Samuel Blaisdell, the father of the plaintiff, treating the deed of James Cowell to Edmund as fraudulent and a nullity, levied upon a portion of the property originally conveyed by Chadbourn to Samuel Cowell, and the territory now in dispute, as the property of said James Cowell.

In 1838, said Blaisdell, by legal process, obtained posses-

sion of the land described in his levy, and from that time said Samuel Blaisdell, or the plaintiff under him, appear to have been in the quiet occupation of the land until the disturbance, on the part of the defendants, for which this action was commenced.

There is evidence tending to show, that, after the year 1800, and before the levy of Blaisdell, the Cowells were frequently upon the *locus in quo*, and cut wood and timber thereon and closed up and improved several acres of the land. There was also evidence tending to show that during that period they did not claim title to the land now in dispute, and also that the defendant, Ezekiel Roberts, was accustomed to go upon the premises and to cut timber thereon.

The title set up by defendants originated by a deed from Benjamin Chadbourn to Ephraim Hanson, in 1802. This deed conveyed one hundred and fifty acres of land, lying easterly of the land which said Chadbourn had before that time conveyed to Samuel Cowell, and covered the *locus* now in dispute. In 1804, Hanson conveyed the same land to William Boardman, and Boardman by will devised the same to his two sons, William, jr. and Samuel. In 1813, Samuel Boardman, then called by the name of William French, conveyed to Elisha Prescot, and there is parol evidence tending to show, that on the same day Prescot conveyed one undivided half of his purchase to Love Roberts. The effect of these several conveyances would be, apparently, to vest in said Roberts one undivided fourth part of the original purchase by Hanson.

In 1825, Ezekiel Roberts, one of the defendants, levied an execution on land of Love Roberts, and it is affirmed that this levy covered the land in dispute, and is the foundation of the defendants' title.

The plaintiff, to invalidate this title, introduced a levy made by John Woodsum against Love Roberts and Ezekiel Roberts, in 1826, and also a deed from said Love and Ezekiel to said Woodsum, dated July 3, 1827. We think it satisfactorily appears that, by this last levy and deed, Ezekiel

Roberts was divested of whatever title he might have obtained to the premises in controversy, by his levy upon the estate of Love Roberts in 1825. This view of the evidence is strengthened by the additional fact in the case, that Ezekiel Roberts, in 1828, disclosed and was permitted to take the poor debtor's oath.

By the proof now in the case, the rights of the parties stand thus; the plaintiff was in the open, visual possession and occupation of the premises in dispute, claiming under the levy made by his father. This possession had continued in the plaintiff or his father since 1838. But he fails to connect himself with any title to the premises originating by the deed from Benjamin Chadbourn. His possession under the recorded title, (the levy,) which he has produced, is sufficient *prima facie* to authorize him to maintain trespass against a stranger. The defendants fail to show any existing legal title in them, or either of them.

By well settled rules of law, they do not present themselves in such a position as will authorize them to contest the title of the plaintiff. They appear as mere strangers and trespassers. The jury therefore erred in applying the facts proved to the law of the case, and the verdict, for this cause, must be set aside.

A plan was found in the case, but so defective as to afford little aid in investigating the principal points in controversy. If the case shall be again presented to a jury, it is desirable that such a survey and plan may be first obtained as will throw some light upon the various monuments and locations described in the different instruments of evidence which are offered in the case. *Verdict set aside and*

New trial granted.

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

STATE OF MAINE *versus* DAY.

Rules of evidence may be changed by the Legislature without violating any of the provisions of the constitution.

The law of 1853, c. 49, § 9, making proof of a *delivery* of intoxicating liquors sufficient evidence of a *sale*, when an unlawful sale is alleged, is applicable to support an indictment for being a common seller under c. 211, § 8, of stat. of 1851.

An indictment charging a person as a common seller, includes the charge of making actual sales.

Proof of *three* unlawful sales is sufficient to authorize a conviction of being a common seller.

And *such sales* may all be made in one day.

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

INDICTMENT for the common selling of spirituous and intoxicating liquors, in the town of Saco, between October 1, 1853, and April 1, 1854, under the Act of June 2d, 1851.

After the evidence for the State was introduced, the defendant requested the Judge to give the following instructions:—

1. That the provisions of the law of 1853, in addition to c. 211, that a delivery shall be sufficient evidence, without proof of payment, when a sale is alleged, does not apply to this case, and that if it does apply, the same is unconstitutional.

2. That four specific deliveries of liquor, is not sufficient to warrant a conviction as a common seller.

3. That evidence of selling four times from March 6th to March 14th, 1854, is not sufficient to warrant a conviction on this indictment.

But the Judge refused to give any of the requested instructions, and gave other instructions.

The jury returned a verdict of guilty, and the defendant excepted.

L. D. Wilkinson, for the defendant.

1. The first instruction should have been given. The language of the clause referred to, fixes itself to an act of

single sale and nothing else; and the refusal to rule as requested, was calculated to mislead the jury.

2. The second requested instruction was legally correct. The law requires evidence of selling. There may be a number of deliveries without any selling, and consequently, without any violation of law.

3. The third instruction should have been given. Any man, either of your Honors, might sell liquor a dozen times in one day, or the same number in a dozen days, for certain good and honorable purposes, as for sickness, and not be a *common* seller.

Evans, Att'y Gen., for the State.

SHEPLEY, C. J. — The indictment charges upon the defendant a violation of the provisions of the Act of June 2, 1851, c. 211, § 8, by being a common seller of spirituous liquors without license.

It has been decided, that an indictment charging a person with being a common seller and with the actual sale of such liquors, did not charge more than one offence. *State* v. *Cottle*, 15 Maine, 473; *State* v. *Stinson*, 17 Maine, 154; *State* v. *Churchill*, 25 Maine, 306. The result is, that a charge of being a common seller includes a charge of making actual sales.

By the Act approved on March 31, 1853, c. 49, § 9, it is provided, "whenever an unlawful sale is alleged and a delivery is proved, it shall not be necessary to prove a payment, but such delivery shall be sufficient evidence of sale." This provision is applicable, when proof of actual sales are required to convict one of the offence of being a common seller.

The Legislature may make changes in the rules of evidence, without a violation of any provision of the constitution. *Oriental Bank* v. *Freese*, 18 Maine, 109.

It has been decided, that three different sales would be sufficient to authorize a conviction for being a common seller. *Commonwealth* v. *Odlin*, 23 Pick. 275. And that all the

sales may be made on the same day. *Commonwealth* v. *Perley*, 2 Cush. 559.

All the requested instructions were properly refused.

Exceptions overruled.

RICE, HATHAWAY and CUTTING, J. J., concurred.

STATE *versus* LULL.

On the trial of an indictment for larceny from a store, the goods alleged to have been stolen, may be exhibited to the witness, the supposed owner, before he is required to describe the goods he has lost.

And *such witness* may use a schedule prepared by his clerk, under his direction and inspection, by which to refresh his recollection as to the prices of the goods stolen.

No exception can be taken that a *leading question* was allowed to be propounded to a witness; the *form* of the question is solely within the *discretion* of the presiding Judge.

Where evidence is produced tending to show that a *trunk* containing stolen goods is the property of the defendant, and in it are found envelopes of letters directed to him, together with a pardon purporting to come from the governor of another State; such *envelopes* and *pardon* are admissible as evidence to show his connection with the goods found therein.

But when a document is read to a jury for a specific, lawful purpose, which is also evidence of facts not admissible, it is the duty of the Court to instruct them to disregard every other consideration than the one for which it was admitted.

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

INDICTMENT.

The defendant was accused of breaking and entering a store and stealing certain goods therefrom in the night time.

Evidence was introduced, tending to show that certain goods produced in a trunk in Court were a portion of those taken from the store; that they were at some time in the possession of the defendant, and that the trunk was his.

The owner of the goods stolen was called as a witness, and the attorney for the State offered to exhibit the goods to him, and to ask him whether they were taken from the store at the time alleged in the indictment.

It was objected that he should first state what kind of goods were taken, or give some description tending to identify them.

The objection was overruled, and the goods exhibited.

A schedule of the goods, made by the clerk of the witness in his presence, and under his direction and inspection, was then placed in his hands, and it was objected that he should not read from the list of the goods thereon or use the same to refresh his recollection.

This was overruled and the witness read therefrom the prices of the goods, and testified to their correctness.

Another trunk, belonging to witness, containing goods, and also a schedule made as the former one, was also shown to the witness, and he testified, on inspection of the goods and schedule, that a portion of them was taken from his store, against the objections of defendant's counsel.

After the witness had examined the goods in both trunks, and both schedules, the schedule first named was placed in his hands, and he was asked, "do or not the goods in the red trunk, (the one first named,) compare in amount and value with the goods on the bill?"

To which the defendant's counsel objected as leading and irrelevant, but the objection was overruled.

A similar question was propounded in relation to the second trunk and schedule against the objections of defendant.

In the trunk first named, certain letters were found with the goods alleged to be stolen, the envelopes of which were directed to defendant, and post marked "Manchester, N. H.," also a paper purporting to be a pardon, under the seal of the Commonwealth of Massachusetts, and from the Governor thereof, directed to one of the same name of defendant, which envelopes and pardon were offered and received as evidence, tending to show the defendant's connection with the goods found with them in the trunk, and for that purpose only.

The Judge instructed the jury, that the letters contained

in the envelopes were not to be read by them, and that the superscription and direction of them, and the pardon were to be received by them for the purpose for which they were offered, and for no other; and that they were to determine to what extent they were evidence of the prisoner's connexion with the goods found in the trunk, and alleged to have been stolen by him.

The admission of this evidence was objected to.

The defendant was found guilty, and his counsel excepted.

Wilkinson, in support of the exceptions.

Evans, Att'y Gen., contra.

CUTTING, J. — *First.* — It is contended, that the witness, the owner of the goods alleged to have been stolen, should first have stated what kind of goods were taken, or given some description tending to identify the same, before the goods were exhibited to him. This proposition assumes, that every merchant or trader must necessarily know, and be able to state from *memory,* the amount and description of every article kept in his store, and in default thereof, to be the proper victim of plunder and robbery. We think that few merchants would subscribe to such a doctrine, or if they did so, that the principal item in their balance sheets might be that of profit and loss; whereas we can readily perceive, and daily experience proves, that a person may identify property as belonging to himself from *inspection,* which otherwise might have escaped his recollection.

Second. — Because the witness was permitted to refresh his recollection by, and to read a list of articles from a schedule made by his clerk in his presence, and under his direction and inspection. "It does not seem to be necessary, that the writing should have been so made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection." 1 Greenl. Ev. § 436. So the witness in this case read a description of the prices of the goods named in the schedule, made under his direction and

inspection, and testified to their correctness; thus both the paper and its use comes within the rule.

Third. — Objection is made to the exhibition of the goods to the witness in the presence of the jury, before any evidence was offered to prove that the goods were taken from the store, &c. We can perceive no foundation for the exception; if there be any, it may be classed with the first objection and overruled for the same cause.

Fourth. — This is similar to the second, with the additional objection, that the question is leading and irrelevant. As to the former, the Court have had that subject under consideration in other cases and have come to the conclusion that as to the admissibility of such questions, it is a matter within the discretion of the presiding Judge. As to the latter, its relevancy becomes apparent upon the supposition that the witness had identified the goods in the bill with those that had been stolen.

Fifth. — The envelopes and paper purporting to be a pardon, *under the instructions* were properly submitted to the jury, as evidence tending to show the defendant's connection with the goods which were found in his trunk. Evidence had previously been introduced tending to show that the trunk, in which the goods had been found, belonged to the defendant; the envelopes and pardon were not only cumulative testimony on that point, but also proved the defendant's knowledge of its contents. It may be argued, it is true, that the pardon might prejudice the minds of the jury, by showing that the defendant had previously been convicted of a felony, and thereby impeach his character, which is presumed to be good until implicated by testimony introduced by the government, which could not be done if the defendant relied solely upon the legal presumption. But it is not unusual for evidence to be introduced, *de bene esse*, and afterwards to be wholly discarded; or for documents to be introduced which might establish two facts, one admissible and the other not. From necessity, then, such documents may be read to the jury, under proper in-

structions by the Court for them wholly to disregard every other consideration than the one for which the paper was admitted, which appears to have been done in this case.

Exceptions overruled.

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

TRIPP *versus* INHABITANTS OF LYMAN.

In an action against a town for injury from a defective highway, proof that it was suffered on the *precise day* alleged in the writ is not required.

Towns are bound to make and keep their highways "safe and convenient" for travelers.

For an injury received by a defect occasioned by *freezing and thawing* of the road, they are liable to the party injured, if they have reasonable notice of such defect.

And in such action, evidence that a greater portion of the ways in the same town were defective from the same cause only, is inadmissible.

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

CASE.

The plaintiff alleged the loss of his horse by means of a hole in the traveled part of a highway, in Lyman, on Dec. 18, 1851.

The witness called by plaintiff would not testify that the injury was on the eighteenth, but about that time.

The defect in the road appeared to be a small hole, occasioned by the frost heaving up the earth and leaving a stone below the surface. In the fall the road was in good repair.

The defendants offered evidence, that at the time of the accident, and before and afterwards, there were holes in the roads in Lyman, similar to that where the accident happened, occasioned by the freezing and thawing of the ground only, and extending over a considerable portion of the roads in the town, which, being objected to, was excluded by the Judge.

The jury were instructed, that the day alleged was not

material, and that it was sufficient if the plaintiff proved the facts to have taken place in the month of December.

Defendants' counsel requested the instruction, that if the jury were satisfied, that the road was in good repair, and safe and convenient for travelers and their horses, teams and carriages, at the time when the ground was first frozen during that winter, and that it so remained at, and until after the time of the alleged injury to the plaintiff's horse, unless rendered otherwise by the effect of the freezing or thawing of the ground, or by freezing and thawing both, then the town is not liable.

The Judge declined to give such instructions.

A verdict was rendered for plaintiff, and defendants excepted to the exclusion of the testimony offered, to the instruction given, and the refusal to give the one requested.

J. Shepley, in support of the exceptions.

Eastman & Leland, contra.

HATHAWAY, J. — The duties and liabilities of towns, concerning highways, are prescribed by law. R. S., c. 25, § 57, makes it the duty of towns to keep their highways in repair, and amended, from time to time, that the same may be safe and convenient for travelers and their horses, teams, carts and carriages; and § 89 makes the town liable, in a special action on the case, to any person, who shall receive any bodily injury, or shall suffer any damage in his property, through *any defect* or want of repair, in any highway, which such town was bound by law to repair, if the town had reasonable notice of the defect or want of repair. In such action, the allegation of the precise time is immaterial, and need not be proved *strictly* as alleged. 1 Chitty's Pl., 258, 383; 1 Greenl. Ev., § § 56, 61; 2 Greenl. Ev., § 624. The evidence offered by the defendants, to show that, at the time of the accident, and before and afterwards, "a considerable portion of the roads in Lyman had defects, similar to that where the accident happened, occasioned by the freezing and thawing of the ground only," could have no legitimate effect

to relieve the defendants from their liability for the cause of action, for which this suit was commenced, and it was properly excluded. The statute does not render the town liable, unless they had reasonable notice of the defect, or want of repair. The case presents no exceptions to the instructions given the jury upon the subject of notice, nor to the neglect of the Judge to instruct them concerning it. The presumption is, therefore, that they were properly instructed in that matter.

The statute does not render the liability of the town dependent upon the causes which produced the defect in the road; nor does it prescribe or define what imperfections in a road would render it defective. It is the proper business of the jury to determine whether or not the road was "safe and convenient," as the statute requires. *Merrill* v. *Hampden*, 26 Maine, 234.

No error is perceived in the rulings of the Judge, and the exceptions are overruled.

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

PALMER *& als. versus* PINKHAM *& al.*

Where the *only ground* of recovery against the defendant was, that he *represented* himself to one to be a partner with another, who bought merchandise of the plaintiffs; a verdict for the defendant will not be set aside, when it did not appear from the evidence on the trial, that *such representation* was communicated to the plaintiffs before the delivery of their goods.

Parties to a suit can obtain relief from the erroneous rulings of the presiding Judge, *only* in conformity with the provisions of the statute in such cases.

Such relief is provided by a *bill of exceptions.*

The provision made by the Act of 1852, c. 246, § 8, for the disposition of "all questions of law arising on reports of evidence," has reference *only* to cases submitted on the evidence, by agreement of the parties, to the decision of the Court, without being passed upon by the jury.

Whether testimony was rightfully *admitted* or *excluded* cannot arise under this provision.

Nor does the provision in the same section as to "all motions for new trial upon evidence as reported by the presiding Justice," authorize any question respecting the *admission* or *exclusion* of testimony to be raised on such motion.

Palmer *v.* Pinkham.

ON MOTION to set aside the verdict, on report of the evidence.

ASSUMPSIT on an account annexed.

The defendants were sued as partners. Pinkham was defaulted. The other denied the partnership.

During the progress of the trial objections were made by plaintiff to certain rulings of the Judge in excluding and receiving testimony, which were noted.

The verdict was for defendant.

All the evidence was reported by the presiding Judge, in which report the objections made by the plaintiff to the rulings were noted, *but no exceptions were filed.*

The cause will be readily understood from the opinion.

Clifford and *Appleton*, with whom was *D. Goodenow*, for defendant.

Leland, for plaintiff.

The Court will perceive, upon examination of the case, that it was the intention of the counsel, both of plaintiffs and defendants, to adopt this mode of presenting the *whole case*, both law and fact, in the form of a *report*, rather than upon *exceptions and report*. It is apprehended that it is not irregular, or *violative* of any statute provision, to embody in a report, matters of law, or questions of law which may arise at a trial, and where a report shows that *objections* to testimony were *seasonably* and properly taken at "*Nisi Prius*," and also that exceptions were properly and seasonably taken, to the *exclusion* of legal testimony. I know of no reason why the same are not to be considered as properly before the Court. It is enough for our purpose that the report shows that certain questions of law were reserved, and for aught that appears in the report, it may fairly be presumed,—

1. That exceptions were in fact seasonably *filed* in the case; or —.

2. That the counsel for the *defendant assented* that the question of law raised might be presented in the report, and *thereby waived* any right they had to a strict and literal

construction of the provisions of the statute, when exceptions *solely* are presented.

But we apprehend that by a fair construction of the statute of 1852, c. 246, § 8, we are entitled to make our objections in this form. The presiding Judge did report or cause to be reported the evidence in this case, as appears by his certificate in these words: "The foregoing is substantially a report of the whole evidence in this case."

Now we submit one question to the Court on the *effect* and meaning of this certificate. If Judge HOWARD saw fit to present the "question of *law arising* upon a report of the evidence," in the mode which has been adopted in this case, does not the section of the statute referred to fully empower him so to do? And are not the counsel on both sides precluded *now* from objecting thereto? The objection, if there is any soundness in it, should have been taken at the time of making up the report.

It could not have been the intention of the *framers* of the statute of 1852, to require of parties, when a case is before the full Court upon a report which distinctly presents "the question of law," also to require of the counsel to present the same "question of law" "on exceptions," because by the same section provision is made in the event of "exceptions" simply being filed. We submit then that the intention of that act is so plain, that unless great violence is done to the apparent meaning of the Act, the objections of the defendant's counsel ought not to prevail.

SHEPLEY, C. J. — When this case was presented on a former occasion, 33 Maine, 32, the letter addressed by Mr. Appleton to the plaintiffs, communicating to them the remarks made by the defendant Sayward, to him, constituted a part of the testimony. On the last trial it was offered and excluded. There was not in the former report, and is not now presented, any satisfactory proof, that the defendants were in fact partners. The only ground upon which the plaintiffs were then, or can now be considered as entitled

to maintain the action, is, that part of the goods were sold and delivered upon a representation of the defendant Sayward, communicated to them, that he was a partner. As the case is now presented, there is no satisfactory proof, that Sayward's representation to Appleton was communicated to the plaintiffs before they sold and delivered the last bill of goods. According to the report, Mr. Appleton testified, that on the day of his conversation with Sayward, he wrote the letter shown to him to the plaintiffs. What he wrote does not appear to have been stated, and the letter was not received as testimony.

On the testimony presented for their consideration, the jury were fully authorized, if not required, to find a verdict for the defendant.

The counsel for the plaintiffs insists, that the letter of Mr. Appleton to the plaintiffs was erroneously excluded. If this be so, the Court cannot entertain the question and correct the error, unless the case is presented in such form, that it may be done according to the provisions of some statute giving relief in such cases. Full provision has been made for relief by a bill of exceptions; but none is presented.

The report of the evidence does state, that the letter was offered and excluded, and that certain testimony was objected to and admitted.

The report appears to have been made in conformity to the provisions of the Act of 1852, c. 246, § 8. It contains the testimony received, not that excluded.

It is insisted, that the question, whether testimony was correctly admitted or excluded, may be comprehended in this language of the eighth section, "all questions of law arising on reports of evidence." No question of law on the exclusion or admission of testimony can arise on such a report, which would only present questions of law arising out of the evidence reported. This language had reference to a particular course of proceeding in our practice; that of reporting testimony received in a cause, without its submission for decision to a jury, under an agreement of par-

ties, that the Court may dispose of the cause as the parties have agreed.

The language used in that Act, to provide for a case like the present, is, "all motions for new trial upon evidence reported by the presiding justice." This does not and was not intended to embrace a contested question respecting the admission or exclusion of testimony. A construction of either of these clauses, that would authorize it, would be productive of irregularity and mischief in practice.

Motion overruled.

HOWARD, HATHAWAY and CUTTING, J. J., concurred.

ANDREWS *& al. versus* THE UNION MUTUAL FIRE INS. CO.

The powers of a corporation are derived from the law and its charter.

And no *by-law* of the corporation can enlarge its corporate powers.

Where the charter of the company only authorized insurance against *fire*, a by-law referred to in the policy, recognizing *damages* by lightning as one of the risks assumed, imposes no obligation upon the company to pay for losses other than by *fire*.

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

ASSUMPSIT.

The plaintiffs, as trustees of the Methodist Episcopal Church and Society in Biddeford, procured a policy of insurance on the "Alfred" street meetinghouse, of the defendants, in the sum of two thousand dollars. The concluding part of the policy was in these words. — "And we do therefore promise, according *to the provisions of said Act and the by-laws of the corporation*, to pay or satisfy the said L. & J. Andrews, their successors or assigns, the sum of two thousand dollars, within three months next after the said property shall be burnt, destroyed or demolished by fire, and due notice thereof given, &c."

The application for insurance was made a part of the policy, and objections were made to a recovery in this

action, on account of the suppression of facts material to the risk, as alleged by the defendants, but which, on account of the decision on other grounds, it is unnecessary to set forth.

The plaintiffs introduced evidence of their title, the policy and application, and the written account of their loss and notice to the defendants within the time limited in the policy. Also evidence of sundry assessments paid, and the premium.

The first section of the Act of incorporation "authorized the defendants to insure any description of property, real or personal, against loss or damage by fire, whether the same shall happen by accident, lightning or any other means, except by the insured." And the 11th section enacted, "that said company may make insurance for any term, not exceeding six years; and any policy of insurance issued by said company, signed by the president and countersigned by the secretary, shall be deemed valid and binding on said company in all cases where the assured has a title in fee simple, unincumbered, to the building, buildings and property insured, and to the land covered by said buildings; but if the assured have a less estate therein, or if the property or premises are incumbered, policies shall be void unless the true title of the assured and the incumbrances on the same be expressed therein."

Other provisions in the Act of incorporation had reference only to losses by fire.

In the 22d article of the by-laws, attached to the plaintiff's policy, is found these words, "the company will be liable for losses on property burned or *damaged by lightning*."

During the continuance of this policy it appeared, that the meeting-house was struck by lightning, and greatly damaged thereby. By one witness it appeared, "the lightning did all the shattering; there was burning in places that charred the wood, so as to make a coal; the burning was not extensive; the burning alone would be merely nominal."

In the plaintiffs' declaration, setting forth their loss, they say, "that said meeting-house was accidentally, and by misfortune, struck by lightning and thereby greatly torn, split, and shattered in its timbers and material, and damaged to the amount of one thousand dollars."

The cause, after this evidence was out, was submitted to the full Court, to enter such judgment, by nonsuit or default, as the law and evidence might justify.

Shepley and *Hayes*, for the defendants.

J. M. Goodwin, for plaintiffs.

No question is here made as to the fact of the loss and the amount of the damage. These are clearly shown by the depositions in the case.

That damage or loss by lightning is one that is covered by this policy, I refer to *Babcock* v. *Montgomery County Mut. Ins. Co.* 6 Barb. 637, and *Kenniston* v. *Mer. County Mut. Ins. Co.* 14 N. H. 341.

Although in these actions the Court held the defendants not liable for damage done by lightning, unaccompanied with a burning, yet it is to be gathered from the decisions, that if the language employed in the policy in these cases, in respect of *injuries* from lightning, had been such as is employed in our policy, the defendants would have been held liable.

To the point that the loss need not be occasioned by actual burning or combustion directly, but by other agencies, whose motive power may be acted on by fire, or with which fire coöperates only, we cite *Hillier* v. *Alleghany County Mut. Ins. Co.* 3 Barr. 470; Angell on Fire and Life Ins. 151; *City Fire Ins. Co.* v. *Corlies*, 21 Wend. 367; *Pent* v. *Receivers, &c.* 3 Edw. (N. Y.) Chan. Rep. 341; *Waters* v. *Louisville Ins. Co.* 11 Peters, 213; *Grinn* v. *Phoenix Ins. Co.* 13 Johns. 457.

The defendants were authorized by their Act of incorporation to insure against damage by lightning. *Head* v. *Providence Ins. Co.* 2 Cranch, 127; Angell and Ames on Corp. (4th ed.) 253; *Fuller* v. *Boston Mut. Fire Ins. Co.* 4 Met. 206.

The defendants had power to establish the 22d by-law as a valid and binding one, as appears by sections 1 and 11, of the Act of incorporation.

SHEPLEY, C. J. — The plaintiffs, as trustees, procured from the company a policy of insurance on the Alfred street Methodist meeting-house in Biddeford, against loss by fire. If no loss has been proved within the risks assumed, it will not be necessary to consider the other objections made to a recovery, however fatal they may be. The contract by the policy is to pay the amount insured "within three months next after the said property shall be destroyed or demolished by fire, and due notice thereof given." There is no engagement to pay, if the property shall be destroyed or damaged in any other manner than by fire. No risk beyond that is assumed, unless the terms of the contract may be varied by a reference "to the provisions of said Act and the by-laws of the corporation."

By the first section of the Act, it is made "a body politic" "for the purpose of insuring any description of property, real or personal, against loss or damage by fire, whether the same shall happen by accident, lightning, or any other means," with certain exceptions not material in this case.

The account of losses required by the eighth section, are only "any loss or damage by fire." If the whole amount of the deposit notes should prove insufficient, a dividend can by the tenth section be made only to pay "losses occasioned by fire." The amount of premium notes are to be retained by the provisions of the fifteenth section, until the time for which insurance was made shall have expired, in case the property "insured by said company be destroyed by fire."

No power is by its charter granted to the company to insure property from loss or damage occasioned by any other element than fire. If a loss by fire happen by lightning, or any other cause not within the exception, it may be recoverable. There is no more authority given to insure against

loss or damage occasioned by lightning, than by any other element, unless that damage happen by fire.

The twenty-second by-law provides, "the company will be liable for losses on property burned or damaged by lightning." Whether this clause, when considered in connexion with the charter and other provisions of the by-laws, may be construed to mean, that it will be responsible for damage by fire happening from lightning, and thus be made to conform to the charter, it may not be important to inquire. For if it will not admit of such a construction, it cannot enlarge the power of the company and enable it to make contracts not authorized by law or its charter. The powers of a corporation are derived from the law. They cannot be enlarged by any act of the corporate body.

The loss, for recovery of which this action has been commenced, as stated in the declaration, is, "the said meeting-house was accidentally, and by misfortune, struck by lightning and thereby greatly torn, split, and shattered, in its timbers and material, and damaged to the amount of one thousand dollars."

The particular account of the property lost or damaged, presented by the plaintiffs on oath, as required by the fifteenth article of the by-laws, is in accordance with the allegations contained in the declaration. In neither is there any allegation of a loss by fire happening by lightning.

The proof of loss introduced, is of such a loss as is alleged. One witness states, "there was burning in places that charred the wood so as to make a coal; the burning was not extensive; the burning alone would be merely nominal." For such a merely nominal burning, the plaintiffs have very properly made no claim.

As their loss claimed was not covered by their policy, the action cannot be maintained. *Plaintiffs nonsuit.*

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

HAM *& als. petitioners for partition, versus* HAM.

In a petition for partition, if an issue is presented as to a piece of land, which the presiding Judge is unable to determine whether it is included in the petition or not, he may authorize such an amendment or variance of the pleadings, as will prevent the jury from finding upon an immaterial issue.

Such amendments are allowed without costs to either party.

If the parties to a suit put in issue a matter, which is incapable of being legally made so, the Court may direct the pleadings respecting it to be struck out or disregarded.

And the omission of the jury to find *such an issue* is no ground of exception.

ON EXCEPTIONS, WELLS, J., presiding.

PETITION FOR PARTITION.

Among other pleas, the respondent pleaded, "that at the time of preferring said petition, he was, and ever since has been, sole seized of the following lot of land included in said petition, containing ten acres, and describing it, &c., and that he is entitled to hold the same in fee, and prays judgment, &c.

The replication alleged that the petitioners ought not to be precluded from having partition of the premises described in the plea of respondent, &c., and tendered an issue to the country.

The boundaries and description of the land described in the petition appear in the opinion of the Court.

After all the evidence was out, the presiding Judge instructed the jury that, as to the *ten acre lot*, one question for their determination, which the parties made, was, whether it was embraced in the petition for partition; and if they did not find it so embraced in the petition, they need have nothing to do with it. It was out of the case; but they would examine the petition and compare the description of the land in it, with the land upon the face of the earth, to ascertain whether the ten acre lot was or was not embraced in the petition; and that it would be necessary, in order to preserve the rights of the parties, for them to be able to state how they found that fact, upon the bringing in of their verdict.

After the Judge had ceased to charge the jury, the counsel for the respondent requested this instruction; "*that* the petitioners were not at liberty in this stage of the proceedings to deny that the ten acre lot is embraced in the said petition; as they have taken issue upon the respondent's plea of sole seizin, and have not disclaimed as to the ten acres, but still claim it before the jury."

Whereupon the counsel for the petitioners moved for leave to amend their replication, and instead of traversing said plea of sole seizin, to set forth that they were seized as tenants in common of the premises described in the petition. Which motion was resisted by the respondent, without the payment of costs up to the time of trial.

But the Judge allowed the amendment, without allowing costs to the respondent.

The jury returned a verdict for the petitioners, and found that the ten acre lot described in the respondent's plea was not embraced in the petition. To all of which rulings, decisions and instructions, the respondent excepted.

D. Goodenow, in support of the exceptions.

J. Shepley, contra.

SHEPLEY, C. J. — In the petition for partition the land is described as "the homestead farm, which formerly belonged to George Ham, of said Shapleigh, deceased, and which was conveyed by William Ham to said Rufus Ham and Thomas Ham by deed bearing date on the eighth day of April, A. D. 1823," except about fifteen acres described; "the said farm adjoining on the south on the Lord place, now occupied by William Ham; on the westerly side on land of Jacob Ham, of Thacher Ricker, and the road; on the north side on land of William Sayward and son, or on land of one of them; and on the east on land of Libbeus Ham, of Levi Ham, of William Ham, and Gideon Ross," excepting the same fifteen acres.

The respondent, with other pleas, pleaded sole seizin in "one other lot of land, included in said petition, containing

ten acres," and particularly described. To this plea, there was originally a replication alleging, that the petitioners were seized thereof as tenants in common, and an issue to the country was joined.

The jury were instructed in substance, if they did not find the ten acre lot was embraced in the petition, "they need have nothing to do with it. It was out of the case."

That lot appears to have been included in the farm of the respondent, and not to have been separated from it by any fence. The farm of the respondent did not constitute, under that designation, any part of the description of the land described in the petition.

That lot was also embraced in the plan of the land, but it was placed there at the request of the respondent. These facts might afford no proof, that the land described in the petition included that lot. If the latter clause of that description were alone regarded, it might be included; but this could not be ascertained without proof to locate the land and the road, to which the land is described as adjoining. The description of the land in the petition does not require, that it should be bounded entirely by the lands of others named, and by the road; but only that certain portions of it should adjoin them. Whether the ten acre lot was a part of the land described in the petition, would not be determined by considering both clauses of the description. It does not appear to have constituted a part of the farm designated by the first clause, but this could not be determined without proof *aliunde*. There not appearing to be any inconsistency between the two clauses, if the jury should find, that it was not included in the land described in the petition, it would be a lot of land not only not in contest, but one, that could not be the subject of contest in those proceedings.

If parties, by their pleadings, put a matter in contest, by an issue in due form, which is incapable of being legally made so, they merely raise an immaterial issue, and when it becomes known to the Court to be such, it is its duty to

prevent it being the occasion of trouble to the jury or to a correct determination and judgment on the matters of litigation. The omission of the jury to find such an issue would be of no importance. *Ray* v. *Clemens*, 6 Leigh. 600; *Thornton* v. *Sprague*, Wright, 645.

The instructions were therefore entirely correct.

If the presiding Judge could have been certain, without the finding of a jury, that the ten acre lot was not included in the land described in the petition, he might have directed the pleadings respecting it to be struck out or disregarded. Not being able to determine that, without the assistance of a jury, he might, at any stage of the trial, authorize such an amendment or variance of the pleadings, as would prevent a finding upon an immaterial issue. 2 Saund. 319, b, note 6; *Strout* v. *Durham*, 23 Maine, 483.

It does not appear to have been in accordance with the English practice or our own, to allow costs to either party in such cases. *Exceptions overruled.*

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

COUNTY OF CUMBERLAND.

(*) DEERING *& als. versus* ADAMS.

A construction, by which a frechold estate shall be in abeyance, is to be avoided, if possible.

In the construction of a will, the intention of the testator is to govern, when not at variance from recognized rules of law.

This intention is to be ascertained by comparing all parts of the will together.

Upon such a comparison, that construction is to be given, which will best comport with the general objects, and least conflict with particular provisions of the will.

Although a will may not contain any express words of grant to executors, or any technical words of limitation to them, yet, by implication, a fee will vest in them, if upon a view of the whole will, such a fee be indispensable for effectuating the objects of the testator.

Deering *v.* Adams.

When a will creates trusts, which require for their effectual execution an estate in fee, such estate will be implied.

A will prohibited for twenty years the vesting of the real estate in the heirs at law, who were the minor grand-children of the testatrix, and gave to the executors the entire care and management of it during that period; — required that, from the income, the grand-children should be supported and educated, and the surplus income invested by the executors; — that during the twenty years the estate should remain undivided, and that immediately afterward it should vest in the grand-children; — prohibited any sale of it by the executors, but authorized them to lease it and to exchange a specified part of it for other land, and to execute deeds therefor; — required that, upon the marriage of the female grand-children, the executors should protect the portion of each one of them from the control of their respective husbands; — and provided that, if within the twenty years the grand-children should all die without issue, the estate should be appropriated for relieving the poor of the vicinity, in such manner as the executors should prescribe: — *Held that*, by construction, the executors took a fee simple in trust, defeasible at the end of the twenty years, or when the trusts created by the will should have been accomplished.

One expressly appointed executor, and also by construction of the will constituted trustee, and having given bond as *executor*, is considered to have declined the office of *trustee*, unless he have given bond in that capacity also.

In such case the statute provides that a trustee may be appointed by the Judge of Probate.

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

Writ of Entry.

Edward D. Preble, with his family, resided with his mother, Mrs. Mary Preble, in the mansion house owned by her.

He died there, leaving a widow. He also left a son and two daughters, who are yet minors. While his widow and children were still residing in the house, Mrs. Mary Preble died, possessed of a very large estate, which she disposed of by will.

After making several legacies, and specific devises, she appointed these demandants to be executors of the will. The will having been duly approved, they accepted the trust and gave bonds as executors. In the will the testatrix directed that the executors should also be guardians to her said grand-children, and that they should have the entire care and management of her estate for the benefit of said grand-

children;" that after the payment of the legacies her "whole estate, real, personal and mixed, shall remain and be kept under the care and management of the persons named as executors and guardians aforesaid, to be by them managed with care and prudence for the benefit of my said grand-children, and so to continue and remain for the period of twenty years, from the time of making this will; during all which period, the whole of said property is directed and intended to continue and be kept in that condition, undivided, under the care and management of the said executors and guardians for the purposes aforesaid, until the said period shall fully expire; and that the said persons shall have all the necessary powers therefor.

Further provisions of the will were, that so much of the income and profits of my estate, as may in the judgment of the executors and guardians named herein be necessary and proper, shall be applied to the education and support of my said grand-children, and for suitable provisions out of the same, in case of their marriage, and coming to have families before the said period shall elapse; and the remainder thereof shall be by them duly invested from time to time in some safe and judicious manner, according to their best judgment, to be added to my said estate, until my said grand-children shall become entitled to receive the proportions respectively intended for them by this will. And my further will and direction is, that said executors and guardians shall not have power to sell any part of my real estate, during the minority of my said grand-children, or the period fixed in this will; but that it may be managed in any other manner so as to become productive, and the interest, income and profits thereof only, applied as before directed; — also, that, at the expiration of said period of twenty years, the whole of my said estate and property, shall be equally divided among those of my said grand-children, who may then be living, and the lawful issue of any one or more that should then be deceased, in the same proportion that would belong to any such grand-child if living. And if

either of my said grand-children should then be deceased without leaving lawful issue living at the end of the said time fixed, then the whole thereof shall go to the surviving grand-children or grand-child, or lawful issue of any deceased grand-child, in such proportion as aforesaid; or if there be but one surviving grand-child, or issue but of one, then the whole to go to such single grand-child, or his or her issue as aforesaid. And that said estate shall not vest in them or either of them before the end of that period in any manner; — also, that, in case of the marriage of either of my grand-daughters, at any time before they may be twenty-one years of age, or after, it shall be the duty of the said executors and guardians, or whoever may be appointed in their places, and be invested with their powers, to secure or cause the portions of property that may be coming to such grand-daughters, at the expiration of said period of twenty years, or to either of them, to be so secured for their or her own use and benefit, as not to be subject to the control and disposition of their or either of their husbands; and this direction not to be altered by any request or consent of either of such grand-daughters thereunto; — also, that if all my said grand-children should die without leaving any lawful issue in being, before the said period of twenty years shall expire, the whole of my remaining estate and property shall be given and appropriated to constitute a fund for the comfort, relief and welfare of the poor and distressed within the city and neighborhood of Portland, and the interest or income thereof shall be alone applied to those objects and purposes, in such manner as the persons named and appointed as executors and guardians herein, or the major part of them living, shall prescribe and determine, so as to carry this disposition into effect in the manner they shall consider best to accord with my intentions. And to prevent any failure of my will, and to carry out my intention in that respect, in case my said executors should from death, or any other cause, fail to make and fix upon the establishment of any fund or plan for the purpose intended, by the expiration

of the period aforesaid, in that event, the care and management of the trust fund so finally to be formed therefor, shall be vested in and devolved upon the trustees of the charity fund of the First Parish in Portland, of which my deceased mother was a founder; and the income of such fund, shall in that case be applied and appropriated in such manner as the said trustees, together with the pastor of said parish, shall think fit and direct, always for the bodily and religious comfort and welfare of the poor and destitute that shall be suitable objects of such charity within the said city of Portland and vicinity, as a charitable fund for that purpose forever. And for that purpose that the estate so devised shall vest in the said First Parish, in trust only, to be disposed of therefor as aforesaid; unless my said executors shall make some other prior effectual provision to that end; and that the said trust shall always attach and adhere to said estate, in whatever hands the same may be holden, or to whomsoever the same might otherwise legally come.

A codicil authorized the executors or a majority of them to exchange or divide any lands in said Portland, owned by me, with the heirs of my late brother, James Deering of Westbrook, from time to time, and in such portions and manner as they may judge most judicious, and for the best interest of my estate; and on such exchange or division, to execute and deliver deeds of release and quitclaim, and to receive such conveyances in exchange as may be legally made in pursuance of such partition or exchange.

The codicil also authorized her executors to lease any portion or portions of my estate, on such terms, to such persons, and for such periods of time as they may think best; and to make, execute and deliver such instruments as may be legally required to accomplish the several purposes herein appointed.

The widow of Edward D. Preble intermarried with John M. Adams, who has been duly appointed guardian to the said children of Edward D. Preble. See 34 Maine, 41.

Adams, with his wife and her said children, have continued to occupy, and still do occupy the said mansion house.

This writ of entry, to recover possession of the mansion house, is brought against Adams by the said executors, in the alleged capacity of "executors and *devisees* in trust under the will of Mrs. Preble."

The case was submitted to the Court, for nonsuit or default, as the principles of law may require.

Fessenden & Deblois and *W. P. Fessenden*, for the demandants.

Adams, pro se, assisted by *Fox*.

APPLETON, J. — The power of devising is a legal incident to ownership, and its full enjoyments is one of the most sacred rights attached to the possession of property. It gives encouragement to industry. — It stimulates accumulation. — It furnishes new motives to the love of the parent and increases the strength of parental authority. — It adds new incentives to obedience to the child, and provides additional assurances against his misconduct or ingratitude. By extending the power of the present generation over the next, it enables old age to command kindness and respect, and strengthens the ties which bind it to youth.

In construing the various provisions of a will, the intention of the maker is first to be ascertained, and when not at variance with recognized rules of law, must govern. The objects which the testator had in view, if they contravene no existing law, should always be carried into effect.

In examining the will of Mrs. Preble, it is apparent, that it was her intention that the large estates, which at the expiration of twenty years were to vest in her grand-children, should, during that period, be under the control of her executors or those who by the appointment of the Judge of Probate were to succeed to their rights. The heirs at law, who were to become the ultimate objects of her bounty, were to be educated and supported out of the income and profits of the estate. The excess over what might be neces-

sary for that purpose, was from time to time to be invested for their benefit, and be added to her estate, until her grand-children should become entitled to receive the proportions respectively intended for them by the will. The executors are to have the general control and management of the estate, and may lease it for an indefinite period, and the heirs at law, in no event, are to interfere with the estate or its income before the expiration of the twenty years from the date of the will. In case of marriage before that time, suitable provisions are to be made for the support of their families by the executors.

The defendant claims that, on the demise of the testatrix, the fee instantaneously vested in the heirs at law, and that, consequently, the plaintiffs cannot maintain the present suit. By the ninth section of the will, it is provided, "that said estate shall not vest in them, or either of them, before the end of that period in any manner." The clear and express provisions of the will are, that the estate shall not vest during the twenty years limited in the will. If there be a question, where by the will the fee may be during this time, there is none as to where it shall not be. No language can more clearly and definitely express the idea, that the estate shall not be in the grand-children for the period of twenty years, than the terms "shall not vest." More plenary evidence of intention, the language does not allow. Unless, then, *vest* and *not vest* are identical in meaning, if regard be had to the provisions of the will, it is obvious where the fee is not to be till the expiration of the period limited in the will.

But during these twenty years, in which, in most explicit terms, the fee is inhibited from being in the heirs, where does the estate vest? If the title is to be asserted, if real actions are to be brought, if rights of property are to be vindicated, who is to commence the necessary suits, to assert the title, or to vindicate violated rights? If rents are unpaid, if trespasses are committed, who during this time is to enforce the payment of what is due? And in whose name

are damages to be recovered, for any injuries which the estate may have sustained?

"It is a principle of the highest antiquity, that there should always be a known and particular owner of every freehold estate, so that it should never, if possible, be in abeyance." 1 Greenl. Cruise, 52. But if the estate is by the will prohibited from vesting in the heirs, and if it vests no where by the will, it must necessarily be in abeyance. Such a construction, then, should, if possible, be given to the whole will, as may prevent the estate either from being in abeyance, or from vesting against the declared purpose of the testatrix.

While the testatrix by her will prohibits the estate from vesting in the grand-children during the period of twenty years, she most explicitly declares, that the executors "shall have the entire control and management of (her) said estate, to be holden and managed by them for the benefit of her grand-children, agreeably to the provisions and directions contained in this present will;" and that "the whole estate, real, personal and mixed, remain and be kept under the care of the persons so named as executors and guardians," and "so continue and remain for the period of twenty years from the making of this will." She further provides that "so much of the income and profits of the estate, as may in the judgment of the executors and guardians named herein, be necessary and proper, shall be applied to the education and support" of her grand-children, and any remainder "shall be duly invested from time to time in some safe and judicious manner," to be added to her estate, "until her said grand-children shall become entitled to receive the proportions respectively intended for them by this said will." The executors are further empowered "to lease any portion or portions of the estate for such periods of time as they may think best," and to exchange or divide any lands in Portland owned by her with the heirs of her late brother, James Deering," and on "such exchange or division, to execute and deliver deeds of release and quitclaim, and

to receive such conveyances in exchange, as may be legally made in pursuance of such partition or exchange." "In case of marriage of either of her grand-daughters at any time before they may be twenty-one years of age, or after," it is made the duty of the executors or guardians "to secure or cause the portions of property, that may be coming to such grand-daughters at the expiration of twenty years, or to either of them, to be so secured for their or her own use and benefit, as not to be subject to the control and disposition of their or either of their husbands; and this direction not to be altered by any request or consent of such grand-daughters thereto." In case the grand-children referred to should die without issue, before the expiration of twenty years, then the whole estate is given and appropriated to constitute a fund for the poor of Portland and vicinity, and the income or interest is to be applied to those objects and purposes, in such manner as the executors shall prescribe and determine, and in case of any failure on their part to carry this portion of the will into effect, it is provided that the care and management of the trust fund so to be formed, "shall be vested in and devolved upon the trustees of the charity fund of the first parish," and "the estate so devised shall vest in the first parish in trust only, to be disposed of as aforesaid, unless the executors shall make some other prior effectual provision to that end."

If the estate were to be deemed as having vested in the heirs, on the demise of the testatrix, then all control over it will have passed from her, and the various provisions by which it is to be secured in case of marriage, to her grand-daughters, or in the event of their death without issue within twenty years, to vest in the first parish, in trust, for the objects of the will, become ineffectual. If the fee descends to the heirs, then the executors will be unable to secure the estate to the grand-daughters, or by any act of theirs, withdraw it from the control of the husbands, so far as they may legally have any. If they all should die within twenty years, the estate would descend to their heirs, and

the contingent bequest would entirely fail. If the estates were vested in them, they would follow the general law of descents. But the will provides that it shall not vest in them, and that if they die within a limited time, the estate shall not go to their collateral heirs, but to a new object of the bounty of the testatrix — the poor and distressed within the city of Portland, and its neighborhood. If the estate vests, and the fee passes to the heirs on the death of the grandmother, some of the provisions of the will must inevitably be defeated.

The intention of the testatrix must be gathered from all parts of the will, and such a construction must be given, as may best comport with its general objects, and as will least conflict with particular provisions. It is clear that no fee is given in express terms to the executors as trustees. If it be deemed in them, it must be by implication and for the more effectual compliance with the wishes of the testatrix. When there is an express devise, there is no occasion of resorting to implication. It is only when words of devise are wanting, that this necessity ever arises. "Before an implication is raised," observes Sir W. GRANT, in *Pullen* v. *Randall*, 1 Jac. & Walk. 196, "there must be an absence of express devise, and in opposition to a devise it can never be raised." "If" says WALWORTH, Ch., in *Rathbone* v. *Dyckman*, 3 Paige, 27, "the particular devise or bequest cannot be reasonably accounted for, except upon the supposition that the testator intended to make the corresponding disposition of other parts of his property, or of previous estates therein, the Court will carry into effect the intention of the testator, by implying such corresponding disposition." A devise of such an estate will be implied, as will effectuate the purposes of the will. "The result of the authorities is," says KENYON, C. J., in *Doe* v. *Applin*, 4 T. R., 89, "that the Court is to put such a construction on the whole of the will as will best effectuate the general intention of the devisor, contrary to one of the limitations, if a general principle will defeat the general intent." It is

well settled, that when there are trusts to be executed, which require for their effectual execution an estate in fee, it will be implied. *Oates* v. *Cooke*, 3 Bur. 1686. So it has been held, that a legal estate passed to the trustee, though there was no direct devise to him nor to trustees to preserve contingent remainders. *Doe* v. *Homfray*, 33 E. C. L., 55.

Much reliance has been placed on the case of *Schauber* v. *Jackson*, 2 Wend. 14, which in some very essential particulars resembles the case at bar. There the testator, after giving his son twenty shillings for his birthright, in express terms excluded this son from having any further claims, and as being his heir at law, or by any other pretext, pretence, color or show whatsoever. The Chancelor held that "there being no good devise of the legal estate, either to the children or to the executors, it could not prevent the descent of the estate upon the heir at law, who, in such case, holds the same in trust for those entitled to the proceeds thereof under the will, until the execution of the power of sale." This view of the law is controverted with much ability by Oliver, Senator. Here the "intent," says he, "is clearly and pointedly expressed, that his heir at law, as such, should be debarred from any claim or pretence to his real estate; and for that purpose a disinheriting legacy was bequeathed to him to be paid by the executors. How then could the legal estate pass by descent to the heir, without directly violating the plain meaning and direction of the will? Was it necessary that it should so pass, in order to carry into effect any of the provisions of the will? Surely not; for vesting the legal estate by implication of law in the executors, places the entire legal control in the hands of persons to whom it was the declared intent of the testator to confide the disposal thereof, to the use and purposes directed by his will, without infringing the legal or equitable rights of any person beneficially interested therein." So, in the present case, if the fee vests in the heirs at law, the plain language and obvious meaning of the testator is disregarded. If it

were to be deemed as conferring on them a trust estate, then it would make them the depositaries of the legal estate, for the fulfilment of trusts which are confided to the executors, which trust estate, after a certain time, is to cease, and the heirs then to hold the estates discharged of all trusts. Neither of these views do we deem correct.

The argument, that the heirs may be disinherited, cannot be considered as entitled to much consideration. The time in which their rights are to become vested, is only postponed. They take when and as the testatrix intended. If those for whom she intended the estate should decease before it should vest in them, it will then vest where and as it was the design of the testatrix it should. And only upon the construction we have given to her will, can such be the result.

It follows then, that the executors take under the will a fee simple estate in trust, defeasible at the end of twenty years, or when the trusts in the will shall be complete and ended.

The plaintiffs claim to recover as trustees. While the estates are thus devised in trust, and a trust estate is created by and under the will, still it does not necessarily follow, that this suit can be maintained. R. S., c. 111, § 1, requires, that trustees before entering upon the duties of their trust, shall give a bond with certain prescribed conditions. The duties of executors and trustees are separate and distinct, and separate and distinct bonds must be given. The bonds given by executors will not protect the estate against the non-feasance or misfeasance of the trustees, though they be the same individuals. No bonds have been given by the plaintiffs as trustees. The bond required by statute not having been given, the plaintiffs cannot maintain this action. *Groton* v. *Ruggles*, 17 Maine, 137; *Williams* v. *Cushing*, 34 Maine, 372. The same statute, § 3, provides, that when a trustee neglects to furnish the required bond, the Judge of Probate shall allow a time within which it must be filed. If not filed within the time allowed, he is considered as

having declined the trust. If those appointed trustees by will, decline or resign the trust or die, in case no adequate provision is made for supplying the vacancy, it then, by § 7, becomes the duty of the Judge of Probate, "after notice to all persons interested," to appoint a new trustee to act alone or jointly with others as the case may be. It is thus apparent that the interests of all are protected by the provisions of the statute. *Plaintiffs nonsuit.*

SHEPLEY, C. J., and TENNEY, J. concurred. HOWARD, J., concurred in the result.

(*) JORDAN *versus* YOUNG.

A receipter to the officer for property attached on a writ, is incompetent as a witness for the defendant on the ground of interest.

That interest, however, may be dislodged by a deposit made with him of money sufficient for his indemnity, with authority to appropriate it for that purpose.

And this will be the result of such a deposit, though made by the attorney, of his own money, without previous authorization from the defendant.

The master of a vessel, merely as such, has no authority to order repairs in the home port.

A vessel, moored at the wharf, in a town adjoining that in which the owner resides, is at her home port.

Enrollment at the custom house is evidence, but not conclusive evidence, to show who is the owner and who is the master of the vessel.

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

ASSUMPSIT on account annexed to the writ for $14,33; the *ad damnum* being laid at $20,00. Upon that writ a schooner was attached, the property of the defendant, which was receipted for to the officer by the firm composed of Charles E. Sawyer and Levi Sawyer. The receipt was signed in the co-partnership name, and was accepted by the plaintiff, as satisfactory security.

The plaintiff having closed his testimony, the defendant called said Charles E. Sawyer and Levi Sawyer, as witnesses.

They were objected to on the ground of interest, as being receipters for the schooner.

The defendant's attorney then, of his own money and without any authorization from his client, lodged in the hands of one of the co-partners $20,00, to indemnify against their liability as receipters; whereupon they were admitted as witnesses.

The plaintiff is a ship carpenter, resident in Portland. The defendant resides in the adjoining town of Cape Elizabeth. The account in suit is for services rendered in repairing the schooner, when lying at the wharf in Portland. It was shown by the plaintiff, *that* the labor was rendered; *that* the repairs were indispensable to the sailing of the vessel; and *that* the vessel was being loaded while the repairs were being made.

What further evidence was given, on either side, the case does not show; but from the instructions requested, and the instructions given to the jury, it is inferable that the plaintiff produced a copy of the custom house enrollment, in which the name of one of the Sawyers appeared as master; and that the repairs were ordered by some person thus acting as master, also, that Capt. Sawyer testified, for the defendant, that his employment as master, ceased upon the arrival of the schooner at Portland, from her former voyage.

The plaintiff requested that the following instructions might be given by the Judge to the jury.

1. That the custom house enrollment is evidence of the ownership of a vessel, and also of the authority of the master.

2. That the owners of a vessel are in all cases liable for repairs done upon her, and that no transaction with an agent, short of actual payment, will discharge them.

3. That the owner of a vessel, in a home port, is liable for necessary repairs, if made under authority of captain, or agent, or factor in charge of the vessel.

4. That if Sawyer was acting as agent, in charge of the vessel, the owner residing at a distance, the owner is liable for necessary repairs ordered by him.

The jury were instructed to consider whether the repairs were made by order of the owner, or by the order of any authorized agent of his; *that* the owner might authorize the master, or any other person to act for him, and to direct the repairs, and if they were found to have been made by his order, or by the order of any such authorized agent, the plaintiff would be entitled to recover; *that* if they did not so find he would not be entitled to recover; *that* the master of a vessel, without any other authority than that derived from his official capacity, was not authorized to order repairs to be made upon a vessel in her home port; *that* if they found the defendant to be a resident of Cape Elizabeth and the vessel to be moored at a wharf in Portland, when the repairs were made, she must be considered to be in her home port, and the master, as such, would not be authorized to order repairs; *that* the enrollment of a vessel is evidence of ownership, and of the master's name at the time when the enrollment was made, but the enrollment does not prove that the same person continued to be master for several months' subsequent to that time; *that*, if they believed the testimony of the person stated to be master in the enrollment, that he ceased to be master when the vessel was hauled in to the wharf for the winter, and that he was not reäppointed until after the repairs were made, such testimony should be regarded as sufficient proof that, at the time of making the repairs, he was not master, although his name remained as master in the vessel's papers. The instructions requested were not given further than thus specified. The verdict was for the defendant.

To the admission of the two witnesses above named, the refusal to give the requested instructions, and also to the instructions given, the plaintiff excepted.

O'Donnell, for the plaintiff.

Munger, for the defendants.

WELLS, J. — It is contended by the plaintiff, that the interest of Levi Sawyer and Charles E. Sawyer, who were

receipters in their co-partnership name for the property attached in the suit, and who were introduced as witnesses by the defendant, was not removed by the deposit with one of them for the benefit of both of a sum of money equal to the damages demanded in the writ. It does not appear, that they were liable as receipters for any greater sum, nor is it contended that they were, but it is insisted, that the act of the attorney was unauthorized. The cases cited show, that where money is placed in the hands of a receipter by the party calling him, sufficient to cover his whole liability, he is a competent witness for such party. Although an attorney might not be under any legal obligation to deposit money in such case, there is no law that forbids him from doing it, and when it is received by the witness as a fund out of which he may discharge his liability, he can no longer have any interest in the controversy. He is supplied with money, not a mere indemnity, which may fail, to the full extent of any claim, that can be made upon him, and the act being done for the benefit of the defendant, it may well be presumed, that he would assent to it. The question does not turn upon the legal liability of the defendant to reimburse the attorney, but upon the effect of the payment of the money to the witness. And it is not perceived, why its reception does not place him in a position entirely indifferent between the parties.

It does not appear, by the facts stated in the exceptions, who ordered the repairs, which were made upon the vessel, or in whose employment she then was. The jury were instructed, "that a master of a vessel without any other authority than that derived from his official capacity, was not authorized to order repairs to be made upon a vessel in her home port, that if they found the defendant to be a resident of Cape Elizabeth, and the vessel to be moored at a wharf in Portland, when the repairs were made, she must be considereed to be in her home port, and the master as such would not be authorized to order repairs."

It might be inferred from this instruction, that the repairs

were ordered by the master, but the case does not so state. But if they were ordered by him, the instruction appears to be correct. The master of the vessel can do all things necessary for the prosecution of the voyage. But this authority does not usually extend to cases where the owner can personally interfere, as in the home port. If the vessel be at a home port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner. Abbott on Shipping, (Perkins' ed.) 178; *John* v. *Simons*, 2 Adol. & Ell. N. S. 424; *Stonehouse* v. *Gout*, Ib. 431. There is nothing in the present case to indicate an exigency so pressing as to preclude an application to the owner before the repairs were made, and the master, merely as such, could not make the owner liable for them. The owners of a vessel are not liable for repairs, unless they are made by their order, or by the direction of some one, who has a right to act for them.

The enrollment is evidence of ownership, but not conclusively so, and the owners may part with the control of the vessel by chartering her or letting her on shares, and thus not be liable on contracts made by those in whose employment she may be. *Dame* v. *Hadlock*, 4 Pick. 458; *Colson* v. *Bonzey*, 6 Greenl. 474. The master is agent of the owners only so long as he acts for them. They can discharge him at any time, and put an end to his authority. The enrollment is evidence of what it declares at the time it is made, and it may be presumed that the same facts exist until a change is shown. But as other persons than those, whose names appear upon the enrollment, may be shown to be owners, so it may be shown that the person, whose name is enrolled as master, has ceased to be such.

The Judge did not withdraw from the jury the right of deciding upon the credibility of the person stated to be master. The meaning of the instruction is, that if the jury believed the facts, to which the witness testified, the legal con-

struction of them, notwithstanding the enrollment, would show that he was not master when the repairs were made.

Exceptions overruled.

TENNEY, HOWARD and APPLETON, J. J., concurred.

(*) SMITH *versus* CAHOON *& al. and trustee.*

In a suit against joint defendants, a person holding goods, effects or credits of *either* of them may be held as trustee.

One, who had received personal property from the principal defendant, giving therefor his obligation to pay a stipulated price or return the property within a prescribed period, is chargeable as trustee, although, when served with the process, the time allowed him for making the election had not expired, and though, in fact, the election had not then been made.

In such a case, there is the same liability of the trustee, though the property was but an undivided part of an indivisible article.

An indebtment to the principal defendant as *surviving partner* will subject the debtor as trustee, though the suit is against the defendant in his *individual character*, unless it appears either that the fund is needed for the partnership debts, or that the partnership creditors have taken measures to secure its appropriation.

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

ON TRUSTEE'S DISCLOSURE.

The case being called in its order, *Fox*, for the plaintiff, suggested that it was against a firm which consisted of four persons, of whom several were dormant partners; while the trustee has testified to his belief that, when the dealings were had, concerning which he is called to disclose, the firm consisted of two persons only. The counsel contended that the ascertainment of this disputed fact is material to a right decision, and that it could be had only through the verdict of a jury. He therefore proposed that this question be sent to the jury, before any adjudication upon the disclosure.

SHEPLEY, C. J. — There is no necessity that the principal action be tried before the trustee's disclosure be adjudicated upon. If not trustee, he may be now discharged. If

adjudged trustee, no final judgment can be entered against him, unless the plaintiff recover against the principal defendant. There is, on the disclosure, a legal question to be decided. Under the new law, the principal case stands on the jury docket. The case on the disclosure is here. When the liability of the trustee is ascertained, this part of the case goes back to the county docket, for the jury trial.

From the disclosure the following facts appeared:—

There was in Portland a business co-partnership, under the name of Turner & Cahoon. George Turner and James B. Cahoon were members of the firm. Turner died. Cahoon was the executor of his will, and continued to carry on business in the same company name. On October 3, 1851, the trustee received of Cahoon, *as surviving partner* of the firm of Turner & Cahoon, a steam boiler and fixtures, valued at $700, for which he gave his obligation to pay said Cahoon, by the name of Turner & Cahoon, seven hundred dollars in one year, or reconvey to them the said engine boiler and fixtures.

On October 4, 1851, the trustee received of the *executor* of Turner's will, a conveyance of three-fourths of two steam ferry boats, with coal and slabs for the use of the same, and gave therefor an obligation in the following form:—

"In consideration of the estate of the late George Turner having sold me three-fourths of the steamer Elizabeth, three-fourths of the steamer Boston, 38 cords of slabs and 225 tons of coal, I hereby agree to pay said estate or order twelve thousand and two dollars in one year, or reconvey said boats, slabs and coal, deducting what slabs and coal may be used in running the boats. On the same day, Oct. 4, 1851, the trustee received from Cahoon, as *surviving partner* of the firm of Turner & Cahoon, a conveyance of the other quarter of said boats, slabs and coal, amounting to $3998," for which the trustee gave an obligation to pay in a year or return the property.

In this part of the disclosure, the trustee states that "the said firm, while it existed, was composed, as he ever under-

stood, and has no doubt, of George Turner and James B. Cahoon."

This action was brought, on Nov. 19, 1851, against "the goods and estate, which were of George Turner, in the hands and possession of James B. Cahoon as his executor and trustee under the last will and testament of said George Turner, and also against James B. Cahoon, George W. Turner, Joseph E. Turner and Henry M. Turner, co-partners with the said Cahoon, as executor and trustee aforesaid, under the name and style of Turner & Cahoon." It was a trustee writ, and was served on this trustee on the same Nov. 19, 1851.

Cahoon soon afterwards resigned his trust as executor of George Turner's will, and an administrator *de bonis non* was appointed. Immediately afterwards, on December 2, 1851, this trustee transferred the three-fourths of the steamboats, slabs and coal, to the said administrator, who received the same and cancelled the obligation which the trustee had given therefor. On the same December 2, 1851, the trustee, *at Cahoon's request*, transferred to the administrator the other fourth of the same property, and also the steam boiler and fixtures, and received back the obligations, (cancelled,) which he had given therefor.

On December 16, 1851, the estate of Turner was represented insolvent, and commissioners of insolvency were duly appointed.

As the estate of Turner was thus under process of insolvency, the plaintiff withdrew all claim to hold the trustee on account of the three-fourths, of which the conveyance had been made by Cahoon as *executor*.

In relation to the other quarter, the Judge ruled that the trustee was chargeable, and to that ruling the trustee excepted.

Fessenden & Deblois, for the trustee.

The trustee's disclosure fully dislodges all imputation of fraud. The estate of George Turner being under process of insolvency, the plaintiff sets up no claim arising from the

trade between his *executor* and this trustee. But the plaintiff claims to charge the trustee by reason of the arrangement made by him with Cahoon as *surviving partner*, respecting the steam boiler and the one quarter of the steamboats, slabs and coal. The trade as sworn to by the trustee, and as is evidenced by the written contract, was not an absolute purchase of the articles. It was *conditional, contingent, dependent* upon an election subsequently to be made by the trustee, whether to consider it a purchase or not. When the service upon the trustee was made, the time for electing had not expired, and the election had not been made. And when it was subsequently made, it showed that there never was a purchase.

No one can be held as trustee, except upon a promise absolutely to pay money or to deliver other property. R. S., c. 119, § 63; *Davis* v. *Ham*, 3 Mass. 33; *Frothingham* v. *Haley*, 3 Mass. 68; *Willard* v. *Sheafe*, 4 Mass. 235. In *Thorndike* v. *DeWolf*, 6 Pick. 120, it is settled, that an uncertainty arising from the contract, whether the trustee will ever be indebted, makes the liability a contingent one, upon which he cannot be charged in a trustee suit. *Wentworth* v. *Whittemore*, 1 Mass. 471; *Randlett* v. *Jordan*, 3 Greenl. 47; *Chase* v. *Bradley*, 17 Maine, 89; *Badlam* v. *Tucker*, 1 Pick. 400.

This case comes perfectly within the definition of a contingency, as protected in *Dwinel* v. *Stone*, 30 Maine, 384.

Neither did the trustee's possession of the articles subject him to this process. For, until the year for making the election had elapsed, he had a perfect right to return, a right with which the vendor could not interfere. *Giles* v. *Bradley*, 2 Johns. Cases, 253.

Should the trustee be here charged, he is deprived of a valuable right, that of returning the property. This right he was authorized to secure and did secure by the contract, and no person, in any form of process, can impair it.

The articles were undivided and indivisible. If required, by the decision in this suit, to deliver the one quarter, it

cannot be done without a delivery of the other three quarters, upon which the plaintiff admits he has no claim.

There is also another ground, which we consider fatal to the plaintiff's claim against the trustee.

The firm of Turner & Cahoon consisted only of George Turner, deceased, and Cahoon. This is sufficiently shown by the disclosure. *Ormsby* v. *Anson*, 21 Maine, 23. The suit is against another firm. With that firm the trustee had no dealings. The only person of whom, under any circumstances, he could be charged as trustee, is the surviving partner of the late firm of Turner & Cahoon, J. B. Cahoon. The defendants in this suit, as appears from the writ, are said to be Cahoon, not as surviving partner, and the three sons of Geo. Turner. These sons never were partners in the firm. Cahoon was the only partner, and yet even he is not sued as surviving partner.

The contract, however otherwise construed, was not made by the trustee with the three Turners; they had nothing to do with it. To hold the trustee, he must either owe the principal defendants, or must have in his hands or possession the property of the principal defendants.

Fox, for the plaintiff.

TENNEY, J. — The declaration in the writ is upon paper bearing the name of "Turner & Cahoon," a firm alleged to consist of the defendants, who are James B. Cahoon, George W. Turner, Joseph E. Turner and Henry M. Turner, co-partners with said James B. Cahoon, as executor and trustee under the last will and testament of George Turner.

According to the disclosure of Pickett, it appears that he made a conditional contract, on Oct. 4, 1851, with some one acting for the estate of George Turner, for three-fourths of certain property described, and on the same day another contract with James B. Cahoon, surviving partner of Turner & Cahoon, for the other fourth part of the same property, and took the property into his possession. On the

preceding day he purchased certain other property of James B. Cahoon, surviving partner of Turner & Cahoon, and took possession of that also. He was bound to pay the stipulated price of the property to the estate of George Turner, and to James B. Cahoon in one year, unless within that time he should elect to re-convey the property. Before the expiration of the year, and before he had elected to re-convey the property, service of this writ was made upon him. Within the year, and before disclosure was made, Pickett did re-convey the property, the portion belonging to the estate of George Turner to his administrator *de bonis non* with the will annexed, and the residue to James B. Cahoon, the surviving partner of the firm of Turner & Cahoon.

It is not contended that Pickett can be holden as the trustee for the part of the property, or the price thereof, which was that of George Turner's estate. *Martin* v. *Abbott*, 1 Greenl. 333. But the controversy relates to the transaction touching the property, which was purchased by the supposed trustee of James B. Cahoon, surviving partner of the firm of Turner & Cahoon.

Pickett must be presumed to know with whom he made his contracts, and when he states that he made a contract with Cahoon *as surviving partner of the firm of Turner & Cahoon*, it necessarily implies, that one of that firm had deceased, and consequently, that it was dissolved, and that such firm was not, and could not be identical with the firm consisting of the defendants, and of James B. Cahoon as executor and trustee under the last will and testament of George Turner, in the name of "Turner & Cahoon."

The first ground on which the trustee claims to be discharged is, that the "money or other thing," supposed to be due from him to the principal defendant, was not due absolutely at the time of the service of the writ upon him, but depended upon a contingency. R. S., c. 119, § 63.

At the time of the service of the writ, Pickett held in his hands the consideration of his contract with the surviving

partner of the late firm of Turner & Cahoon. By that contract he had his election to restore the property purchased, within a time not then expired, and thereby discharge his obligations to pay the stipulated price in money. He had either goods *or* credits in his hands. It was not uncertain, whether he had received absolutely the consideration of his contract, nor whether he was absolutely bound to fulfil that contract, by a return of the property received, or pay its agreed equivalent; but the manner in which he should discharge it was dependent upon his choice. This is not the contingency referred to, in the statute cited for the trustee. And in the cases relied upon in his behalf, the facts were such as to leave it uncertain, whether any goods, effects or credits were in the hands of the supposed trustee at the time he was served with the process. In this case it was otherwise. The right to decide in which of the two modes provided, he would fulfil his agreement, did not leave his liability in any degree contingent, and he cannot with propriety contend, that he was not the trustee of the late firm of Turner & Cahoon. He had the power to signify his election to return the property, in which case, he would hold the property subject to the trustee process, in the same manner that he would have done, had he been bound absolutely to return the property within the time specified in the contract.

Pickett is summoned as the trustee of a firm named in the writ, to which he was not indebted; nor had he in his hands their property. But he was liable to James B. Cahoon, one of the principal defendants, as surviving partner of the late firm of Turner & Cahoon. The plaintiffs as creditors of the principal defendants were entitled to the property in his hands, or the sum due from him therefor, so far as it belonged to James B. Cahoon in his individual capacity, provided it was not needed for the payment of the debts due from the firm of Turner & Cahoon.

It does not appear from the case, that the creditors of that firm have taken any measures to secure this fund for

such a purpose. Certain cases have been referred to, as supporting the doctrine contended for by the trustee, that it must be shown affirmatively, that there are not outstanding liabilities of that firm, sufficient to absorb all the property belonging to it, before any part can be applied to the debt of an individual member thereof. But in the case of *Whitney* v. *Monroe & trustees*, 19 Maine, 42, the Court hold otherwise. It is said in the opinion, "if they [the partnership creditors] would claim and assert any such superior right, it was easy for them to have done so, by suits against both, summoning the same trustees. The Court would then have been called upon to determine who had the better title to the fund;" and the trustee was charged with the portion which was due from the trustees to the principal defendant, as a member of the firm. On the authority of this case, the trustee was properly charged.

Exceptions overruled.

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

NOTE. — When making his disclosure, an interrogatory was propounded to the trustee, which he declined to answer.

The plaintiff thereupon applied to the Court for an order upon the trustee to answer.

PER CURIAM. — On interlocutory questions of this character, the Court has no power to act. There is no statute or rule of practice which prescribes what interrogatories shall be propounded, or what shall be answered.

In such cases, the trustee, in refusing to answer, acts at his peril.

(*) FERNALD *& als. versus* CHASE.

There can be no conversion of property by a defendant, without an actual possession of it, or the exercise of such a claim of right or of dominion over it, as assumes a right to hold the possession or to deprive the other party of it.

To make out a conversion, there must be proof of a wrongful possession, or of the exercise of a dominion, in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand.

A mere declaration of ownership, without the taking of any possession, or the exercise of any dominion, does not constitute a conversion.

Thus, a declaration by an officer that he has attached personal property, without proof that he has taken possession, or exercised any dominion or control of it, does not amount to a conversion.

Neither will such a declaration, though made by the officer when in contact with the property, accompanied by a counting of the articles, and followed by a return of an attachment on the writ, and by certifying a copy of such return to the town clerk, and by the taking of an accountable receipt for it as property attached, justify a ruling, as *matter of law*, that there has been a conversion.

ACTION OF TORT against the sheriff, founded upon the alleged unlawful act of his deputy in attaching upon a writ against a third person certain saw-logs, cut upon the forest land owned by the plaintiffs as mortgagees. The writ contained a count in trover and three counts in trespass. The general issue was pleaded and joined.

At the trial and at the argument, the defendant's counsel contended and submitted to the Court, that though under the statute the writ might be brought either in trover *or* trespass, it could not rightfully combine counts in both.

At the time when the act of the deputy was committed, the logs were frozen into the ice in township No. 8, which adjoins the town of Monson.

The case, (whether on Exceptions or on Report does not appear,) details the evidence introduced by the parties.

So far as necessary to present the legal question decided in the case, the evidence tended to show, *that* Doughty and Jackson had jointly cut and hauled the logs under a permit from the mortgager; *that* the deputy had in his hands

for service a writ in favor of Eveleth & Huston, against Doughty; *that,* in company with one of those plaintiffs, he went to the logs, walked upon them, counted them, and declared to Jackson and some others who were present, that he attached them on a writ against Doughty; *that* he neither moved or marked any of them, nor committed the care of them to any one; *that* he returned upon the writ that he had attached them; *that* he took an accountable receipt for the same; *that* he filed a certificate of the attachment in the office of the town clerk of Monson; *that* he never afterwards saw the logs or interfered with them in any manner; that they remained in that situation about ten days, when the attachment was discharged by an arrangement between the parties to that suit, and notice of it was given to Jackson; *that* Doughty, by the procurement of Huston, after the ice broke up, drove the logs down the river.

Howard J., instructed the jury, that if the deputy went on to the logs, counted them, attached them, took a receipt for them, returned them on the writ as attached, filed a copy of his return in the office of the town clerk of Monson, the attachment was valid as between the plaintiffs and the officer, and that these plaintiffs could not have afterwards lawfully taken possession of the logs, except by civil process, without making themselves legally responsible; and that those proceedings on the part of the officer constituted an interruption and interference with the exercise of the plaintiff's rights, although they did not incur expense or trouble thereby, and that that interruption and interference constituted a conversion of the logs, for which trover was maintainable.

Fox, for the plaintiffs.

Willis & Fessenden, for the defendant.

Shepley, C. J.—The action of trover is founded upon an allegation, that the property came into the possession of the defendant; and yet it is not always necessary to

prove, that the defendant has had the actual possession of it. There can be no conversion without an actual possession or the exercise of such a claim of right, or of dominion over it, as assumes, that he is entitled to the possession or to deprive the other party of it. It is upon this principle, that a demand of property, and a refusal to deliver it, does not amount to proof of a conversion, unless the person, of whom it is demanded, has the power to deliver it, or to cause it to be delivered. *Young* v. *Smith*, 1 Camp. 440.

The mere declaration of a person, that he is the owner of property, without any proof that he has taken possession of it, or has exercised any dominion over it, cannot amount to a conversion. The element is wanting of actual possession or of the exercise of dominion. So the declaration of an officer, that he has attached property, without proof that he has taken possession of it or exercised any actual control or dominion over it, will not amount to a conversion. It can be at most but a claim of special property in it, or of a lien upon it, which is less than a claim to be the owner o it.

To make out a conversion, there must be proof of a wrongful possession, or of the exercise of a dominion over it, in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand.

Such will appear to be the law, by an examination of some of the decided cases.

In the case of *Baldwin* v. *Cole*, 6 Mod. 212, it appeared, that the tools of a workman were detained to compel him to continue to work in the Queen's yard. A demand and refusal, and subsequently a tender and refusal, were proved. HOLT, C. J., said, the very refusal of goods to him, that has a right to demand them, is an actual conversion. "For what is a conversion but an assuming upon one's self the property and right of disposing of another's goods.

In the case of *McCombie* v. *Davies*, 6 East, 538, it appeared, that certain tobacco was in the King's warehouse to

be delivered to the owner upon payment of duties. It had been purchased by a broker for the plaintiff; and the broker had conveyed and pledged it to the defendant as security for money advanced. A demand had been made for it on the defendant, who refused to deliver it without payment of the amount advanced. The tobacco was entirely subject to the defendant's control upon payment of duties, and no person could obtain it without his order. This was held to be a conversion of it.

In the case of *Cuckson* v. *Winter*, 2 Man. & Ry. 313, it appeared, that the defendants had distrained the plaintiff's goods and had proceeded to sell them, but none of them were removed from his premises, and they were all finally restored to him under an arrangement for that purpose.

The decision was, that a conversion was not proved, because the goods though sold were never removed to the interruption of the plaintiff's possession, and were ultimately left in his possession.

In the case of *Mallalieu* v. *Laugher*, 3 C. & P. 551, the defendant, by a precept issued from the sheriff's court of London, caused the plaintiff's trunks to be attached on March 31, 1828, as the property of Knight & Fossett, in the hands of one Smith, their garnishee. One of the defendants, an officer, went to the warehouse of the garnishee and delivered to him a paper containing a notice of an attachment, "and having done this, he laid his hands on the trunks and said, I attach these as the property of Knight & Fossett. He afterwards put his seal upon them." The attachment was withdrawn on April 28, following. BEST, C. J., remarked, in the present case, the man does not remove the goods, he leaves them still as they were in the possession of Smith, and I do not think, that is enough to support an action of trover.

In the case of *Woodbury* v. *Long*, 8 Pick. 543, it appeared, that the goods attached had been removed to a barn at a small distance, where they remained when the action was commenced. Upon such a state of facts, the opinion says,

"the attachment was a tortious act, which in itself was a conversion according to the well settled principles of law and uniform practice."

In the case of *Baker* v. *Fuller*, 21 Pick. 318, it was held, that a keeper of goods attached by an officer by delivering them to another person, who claimed to be the owner, did an act equivalent to a conversion. He thereby disposed of the goods in defiance of the rights of those from whom he received them.

The case of *Murray* v. *Burling*, 10 John. 172, is similar in principle.

In the case of *Miller* v. *Baker*, 1 Met. 27, the action was trespass. The goods were attached; a keeper was put over them; and he testified, that he kept them thirteen days, and then delivered them to the attaching creditors. There did not appear to have been any manual taking or removal. The acts were held to be sufficient to maintain the action, on the ground of an exercise of authority over the goods, against the will, and to the exclusion of the owner. It is apparent, that the case exhibits an actual control of the goods by the aid of a keeper.

In the case of *Leonard* v. *Tidd*, 3 Met. 6, it appeared that a gun, the property of the plaintiffs, was deposited by a person in their employment with the defendants, as security for a debt. It was sold by the person who deposited it, with the defendant's consent, and they received the purchase money. This was not considered to be a conversion by them.

In the case of *Bristol* v. *Burt*, 7 John. 254, it appeared, that the defendant refused to permit the plaintiff to remove his goods from the store of one Wentworth, where they were deposited; and that he stationed armed men near that store to prevent it. This was held to be a conversion upon the position of an exercise of dominion over them in exclusion or in defiance of the plaintiff's rights.

In the case of *Reynolds* v. *Shuler*, 5 Cow. 323, the goods appear to have been distrained for rent in arrear, and to

have been sold to pay it, while they remained without removal in the plaintiff's coal house. This also was held to be a conversion on the ground of an exercise of dominion over them in exclusion or defiance of the plaintiff's rights.

In *Wentringham* v. *Lafoy*, 7 Cow. 735, the original action was trespass. The plaintiff in error, as a constable, having a *fi. fa.* against the goods of one Gallis, levied on articles of jewelry in possession of Gallis, who placed the articles on a glass case, so that the constable might examine them and ascertain their value; and he made an inventory of them, and said he would remove them, unless security was given that they should be forthcoming to answer the execution. The security was given and the articles were left. The constable was held to be liable as a trespasser, on the ground that "every unlawful interference by one person with the property or person of another is a trespass."

The action was trespass also in the case of *Phillips* v. *Hall*, 8 Wend. 610, which was pronounced to be, in all essential circumstances, like the case of *Wintringham* v. *Lafoy*.

The case of *Bailey* v. *Adams*, 14 Wend. 201, was trover for a wagon. A constable levied on it as the property of one Collier, while it was in the possession of one Drake for repair, by virtue of a justice's attachment in favor of the defendant. The constable made a minute of the levy, and left the wagon with Drake and asked him to take care of it for him. Ten or twelve days after, the constable saw the plaintiff, and informed him by direction of the defendant, that he had no claims upon the wagon. These proceedings were held not to amount to a conversion, on the ground, that the actual possession was not changed, and that the plaintiff was put to no charge in respect to it.

The case of *Connah* v. *Hale*, 23 Wend. 462, was an action of trover for rotary pumps taken by a constable under a distress warrant for rent due from one Lovell. The pumps were enclosed in boxes, one of which was opened at the time of the distress. They were left in the store occu-

pied by Lovell, who removed and left them in it, and was succeeded by one Bayer, who was directed by Connah to keep them, and he did till Connah took them away. The opinion states, that "the property was distinctly levied on, and an inventory taken and appraisal had, one of the boxes was opened; all this followed by the defendant's direction, that he meant to sell them, the plaintiff in the meantime submitting to such control." These acts were held to amount to a conversion.

The case of *Rand* v. *Sargent*, 23 Maine, 326, was trover for a pair of oxen. The defendant stated, that he must and did attach them; and one Nickerson receipted to him for them as attached. He did not in any other manner interfere with them. This was decided not to amount to a conversion, on the ground that the plaintiff's possession had not been interrupted. That it was the debtor's possession, if any one's, which had been disturbed; and the plaintiff not having procured the receiptor and not being responsible to him, had not been injured.

In this case the testimony shows, that a deputy of the defendant went on to the logs, which were then frozen into the ice, and counted them, and stated, that he attached them as the property of one Doughty, who cut them in connection with Jackson, under a permit from the mortgager of the land. He did not remove any of them. He took a receipt for them as attached, signed by Jackson and by the plaintiffs in that suit. It does not appear, that he left any person in charge of them. The logs thus remained for about ten days, when the attachment was discharged by an arrangement made between the plaintiffs in that suit and Doughty and Jackson; and the officer gave notice thereof to Jackson; it does not appear to have been given to Doughty. The officer had filed a copy of his return of an attachment of them with the town clerk of Monson.

The actual possession of the logs was not changed. Nor was there any threat to remove them, or to employ a person to guard them to procure a receiptor. There is no proof

of an exercise of dominion over them in exclusion or defiance of the plaintiff's rights, unless the passing on to them and counting them can be so considered. If this were so regarded, every person who should pass on to a lot of logs not owned or claimed by him, and count them, might be considered as liable for their conversion. The handling and sealing of trunks was not so regarded in *Mallalien* v. *Laugher*. These acts of the officer might render him liable as a trespasser. Trespasses upon personal property may often be committed without any claim to be the owner or possessor of it, and without the exercise of any dominion over it. The return of the officer of an attachment of them without any other act than the lodgment of a copy of it with the town clerk, would not amount to a conversion of them according to the cases of *Mallalien* v. *Laughee*, *Bailey* v. *Adams*, and *Rand* v. *Sargent*.

According to the cases of *Small* v. *Hutchins*, 19 Maine, 255, and *Eastman* v. *Avery*, 23 Maine, 248, a receiptor is to be regarded as the servant of the officer; and while he holds the property for the officer replevin may be maintained.

But the reception of an accountable receipt for them would not amount to a conversion, as decided in the case of *Rand* v. *Sargent;* and even if the receiptor had been placed in charge of them without the exercise of any control over them, there would have been no conversion according to the case of *Bailey* v. *Adams*.

The receiptors being the servants of the officer, their acts as such may be regarded as his acts. But they do not appear to have in any manner interfered with them as such, or in fact in any other capacity until after the attachment was discharged. The constructive possession of the plaintiffs as owners, does not appear to have been interrupted; and as soon as the officer passed from the logs, they might, for aught that appears, have exercised the same ownership, possession and control over them as before, without being molested by the officer or receiptors.

There are many cases, in which a valid attachment of

property may be made, and yet such attachment may not show, that the possession or dominion of the owner has been disturbed. *Boynton* v. *Willard*, 10 Pick. 166. The making of a valid attachment does not therefore prove, that there has been a conversion of the property by the attaching officer, when the property appears to have been owned not by the debtor, but by another person.

The facts enumerated in the instructions do not, necessarily, and so certainly prove, that there has been a conversion of the property attached, that it can as matter of law be declared, that there has been a conversion of the property.

An officer may make on a writ a return of an attachment of personal property, without coming in contact with it, and in a suit against him by the creditor, he will be estopped by it to deny that he made a valid attachment. If he should take a receipt of some person, to be accountable to him for such property, without any interference with it by him or the receiptor, it is quite apparent, that he would not have so conducted, as to be liable for its value to the owner by a conversion of it. If the law should make such an attachment valid, with respect to the owner and third parties, upon a notice thereof, filed by the officer with the town clerk of the town in which the property was found, it would not be the less certain, that the officer had not intermeddled with the property by coming into contact with it, or by any act of dominion over it.

If the stepping upon the logs, counting them, and passing from them, be not a conversion of them, it is difficult to perceive how all the other acts of the officer combined with them, being insufficient of themselves for such purpose, could constitute a conversion.

In this case, there does not appear to have been any valid attachment, with respect to the owners or third persons, by the aid of the statute and filing of a notice with the clerk of the town of Monson, for the property was not in that town. *Verdict set aside and new trial granted.*

TENNEY and WELLS, J. J., concurred.

(*) SMITH, sheriff, *versus* BERRY *& als.*

A sheriff is not liable upon a contract made by his deputy in his private and unofficial capacity, though such contract may have arisen out of some official act performed by the deputy.

For the expenses of defending a suit brought against the sheriff upon such a contract, he has no remedy upon the deputy or his sureties, their bond containing no indemnity against such suits.

To suits brought against the sheriff for official acts of his deputy, it is proper that the sheriff should take care that no judgment be wrongfully obtained against him. For the expenses of so doing, if judiciously incurred in good faith, he has remedy on the deputy's bond.

For such expenses, incurred before the suit upon the deputy's bond, the sheriff may recover, though in fact not paid by him till after bringing the suit.

Judgment in a suit, wherein a set-off account had been filed, is conclusive upon that account, unless some of its items had been previously withdrawn.

But if, in adjusting the amount of the judgment, the parties have, in writing, stated what are the elements which make up the amount, any item of the set-off claim which was excluded from such adjustment, may become the basis of a new suit.

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

DEBT by the sheriff against the surviving sureties on a bond given by William H. Morse, deceased, a deputy under the plaintiff. The bond is substantially in the usual form of bonds given by deputies for the performance of their official duties. Its particular stipulations are sufficiently recited in the opinion of the Court.

The following are the particulars for which the plaintiff claims to recover upon the bond.

1. Cash paid to counsel, $8,00, term fee in action James H. Price against the sheriff, in which Price became "nonsuit."

2. Cash, $27,00, paid for fees of counsel employed by the sheriff in case Day against sheriff and his sureties. That suit was brought for alleged default of the deputy. Other counsel were employed in the case, some by a co-defendant, and some by other attaching creditors.

The action was commenced for Nov. Term, 1848. It was settled by the sureties of the deputy, and was entered

"neither party," Nov. term, 1849. The sheriff proved that he had paid the $27,00, of which $15,00 were for notifying the sureties of Morse and the attaching creditors. The administrator on the estate of the deputy testified that he appeared in that suit, and held himself in readiness to attend to the defence of it, and of all other suits in which the sureties of the deputy were concerned.

3. The sum of $55,00, cost and counsel fees in case *Kendrick* v. *the sheriff*, 31 Maine, 162. That report shows that Kendrick's claim was upon a mere personal promise of the deputy, and not a claim upon which the sheriff could have been accountable.

4. Balance due to the sheriff for his per centage on fees earned by Morse, as his deputy.

It appeared that, for serving a writ against the firm of Kimball & Coburn, and for attaching and keeping property thereon, the sum of $200 had been allowed to the deputy by the Court, and included in the execution issued against them, and that that execution had been collected by the sheriff. For that sum, $200, the administrator of the deputy had brought suit against the sheriff, who therein filed an account in set-off for $300 for the per centage due to him on fees earned by the deputy, and for counsel fees in defending suits. In that suit, the administrator recovered a judgment, upon an adjustment made by the parties, for $100 damage and $75,00 cost.

There was a conflict of testimony as to the items and amount allowed upon the set-off in that suit, the papers which contained the particulars having been lost.

It appeared that, for some of the counsel fees which the sheriff claims to recover, he did not in fact make the payments till after commencing this suit.

The Judge instructed the jury, that if the plaintiff had become responsible for these items previous to the date of the writ, and there was a breach of the condition of the bond before the commencement of the action, the plaintiff was entitled to recover these items for which he was thus

responsible, if the same had been since paid by him, and were reasonable charges, and had not been included in the settlement with the deputy's administrator.

The defendants requested the Judge to instruct the jury that it was the duty of the sheriff to notify the sureties or parties interested, that suit had been commenced against him, and that he cannot recover the fees of counsel for giving such notice, if he chose to employ counsel to do it; and that if suitable counsel was employed and appeared to defend the action by the bondsmen or other parties interested, the sheriff cannot recover for the expense of additional counsel employed by himself. The Judge declined to give that instruction, but instructed the jury that, when the sheriff was sued, it was his duty to defend the case in good faith when a defence was proper, and that he might employ suitable counsel; — that he had duties to himself and to the sureties and others interested; — that though others might employ counsel, he also might do the same, if the employment was in good faith; — and that he might recover the reasonable expense of the same, if entitled to recover in the suit.

The defendants also requested the Judge to instruct the jury that the suit of *Kendrick* v. *Smith*, being for the sheriff's own neglect to pay the keeper fees, when he had himself collected the extras in which said fees were recovered, the $55,00, charged for defending that suit, are not recoverable against the bondsmen of the deputy. The Judge declined so to do, but left it to the jury to decide from the evidence, as matter of fact, whether that action was solely for the doings or neglects of the sheriff, or whether it was for the doings or neglects of the deputy, and to determine the amount, if any, which the plaintiff was entitled to recover on this claim, upon the principles stated.

The defendants further requested the Judge to instruct the jury that, if the claims here prosecuted were filed in set-off in the action of the deputy's administrator against the sheriff, and that judgment was afterwards entered in that

suit in favor of the deputy's estate, the accounts in set-off not having been withdrawn, the plaintiff is thereby precluded from maintaining this action for the same causes.

The instruction given was, that if the claims were excluded from the adjustment upon which the judgment was rendered against the sheriff in favor of the deputy's administrator, the sheriff would not now be precluded by that judgment; otherwise he would be.

The verdict was for the plaintiff for $90,00.

To these instructions and to the refusals to instruct, the defendants excepted.

Fox, for the plaintiff.

Barrows, for the defendants.

TENNEY, J. — The bond in suit is believed to contain conditions substantially similar to those referred to, and made the subject of consideration in decisions of the Courts in Massachusetts, and in this State, touching the relations between a sheriff and his deputy; and secures to the plaintiff indemnity from all suits, costs, damages and expenses by reason of the *doings, wrong doings* or *neglects* of the deputy, in the execution of each and every of the conditions specified in the bond, and not otherwise. The conditions specified in the bond, are, that the deputy shall well and truly perform all the duties of said office of deputy sheriff, in all and every respect according to law, and shall faithfully execute all writs and precepts, of whatsoever nature, which shall be committed to him, and which he ought by law to execute; and shall keep a true and exact account, with the items thereof, for all fees for travel and service, and other emoluments which shall accrue, or be due to him, by virtue of his said office of deputy sheriff, (with certain exceptions,) and shall exhibit the same to the sheriff, whenever he shall be thereto requested, and shall, within twenty days next after the first day of December, annually, return under oath a true copy of said account, &c., and shall pay over,

&c., twelve per cent. of such fees and emoluments as he shall have received, or be entitled to receive, &c.

In a suit against the sheriff, on account of an act which the deputy performed in his official character of deputy sheriff, and which he could not have done otherwise; or of any neglect to do an act which he was required by law to do, by virtue of the office and the obligations which it imposed, the sheriff would be liable in the same manner as he would be, if the same acts had been done or omitted by himself, or as the deputy would be liable in an action against him for the like doings or neglects. And the sheriff would have a claim to be indemnified for the acts and omissions of his deputy, of such description, upon the bond taken of the deputy and his sureties. This right of indemnity does not depend upon the success of a suit against the sheriff, for the doings, wrong doings or neglects of the deputy, or the right to maintain an action therefor; provided he is called upon to defend a suit, instituted on account of his deputy's official doings or omissions. There may be numerous instances, where the sheriff may be called upon in a suit for an alleged default of his deputy; and such action may fail as having no valid foundation in law or fact, and he may have a perfect claim upon the deputy and his sureties, for his expenses in the defence of the action, because those expenses accrued by reason of the doings, wrong doings or neglects of the deputy in the execution of some of the conditions of the bond.

On the other hand, an action against the sheriff, for an act or neglect of his deputy, not embraced in some of the conditions of the bond, or any costs, damage or expense which may arise therefrom, cannot be maintained, though the suit was commenced under the belief, that he is liable for the supposed defaults of his deputy, and he may be subjected to the costs and expense necessarily in the defence, which may prove successful, on the ground that he is not responsible for the acts or omissions of the deputy alleged.

The sheriff cannot be holden for the breach of a contract made by his deputy in his private and not official capacity, although the contract may arise on account of some duty done by the deputy in his office; consequently he has no claim upon his deputy's bond, for the expense to which he may be subjected in the defence of the groundless suit; for the deputy alone is liable for the failure to fulfil his private obligation. If a deputy sheriff take property as that of the defendant, on *mesne process*, or of the debtor on execution, and the sheriff is called upon in a suit by a stranger, who claims to be the owner of the property, the expense of the sheriff in a proper defence of that suit, whether the suit be well grounded or not, successful or otherwise, is secured by the deputy's bond. But the contracts which the deputy may make with his servants or agents, for the safe keeping and restoration of that property, are not official acts, and for a breach of those contracts, the sheriff is in no respect holden. *Kendrick* v. *Smith*, 31 Maine, 162. And when he is relieved from liability for the acts or neglects of his deputy, because they are neither the doings, the wrong doings or neglects, in the performance of the conditions of the bond for which he is responsible, he has no claim on the deputy for any costs, damage or expense arising from his defence of the suit.

The actions in favor of Price and of Day, against the plaintiff, were for acts of the deputy as alleged, of an official character; and it was not improper, that the sheriff should take care that judgment was not rendered against him therein for want of attention to their defence; and the costs, damages and expense which he was bound to pay in giving this attention, so far as they were judicious, were a charge against his deputy, and would be covered by his bond. As he would be called on directly, if a judgment had been rendered against him, in either of the actions, it was his privilege to judge of the propriety of the measures, which he adopted in the defence, and so long as he conducted in good faith, without any intention to oppress his

deputy, or to make unnecessary expense in the employment of counsel in addition to those engaged by the deputy himself, the latter would be bound to save him harmless from the costs and expense which were reasonable. The instructions to the jury in this part of the charge were consistent with these principles, and in those given and in omitting those requested, there was no legal error.

The defendants objected to the allowance of any item of the plaintiff's expense, that had not accrued and been paid, before the commencement of this suit. By the instruction of the Judge, the right to recover for such items was dependent upon a breach of the bond, and a responsibility of the plaintiff to pay, before the date of the writ, and the actual payment of those items, and satisfactory evidence to the jury, that the payments were reasonable, and the failure of the deputy or any other person to reimburse the money so paid, before the trial. When the responsibility of the deputy to make payments to the sheriff before the institution of the suit is established, a sum paid afterwards, and before the trial, for which the deputy may be liable, may be included in the amount for which execution should issue, upon a judgment for the breach of the bond. *Gardiner* v. *Niles*, 16 Maine, 280. The instructions in this respect were correct.

The Court were requested to instruct the jury that, if they find the claims here prosecuted were filed in set-off, in the action in favor of the deputy's administrator against the plaintiff, and judgment was afterwards entered in that suit, and the account in set-off was not withdrawn, the plaintiff is precluded from maintaining this action for the same causes. This request was not granted, but the jury were instructed that, if the claims were excluded from the settlement, between the administrator and the agent of the plaintiff, the plaintiff would not be precluded by the settlement and the judgment founded thereon; otherwise, he would be precluded by that judgment.

If the jury had found the facts, as the request of the

defendants supposed, the instruction requested was proper. But upon that question there was evidence of a contradictory character. The testimony on one side was, that a judgment was rendered in the action referred to, in which an account was filed in set-off, embracing the same claims to some extent, which are demanded in this suit. A judgment in that action, without a withdrawal of any item in set-off, would be conclusive upon that account. *Eaton* v. *Cole*, 1 Fairf. 137. But if an adjustment took place between the parties, and a writing was executed by them showing the mode of adjustment, and items charged in the account in set-off were expressly excluded, and judgment was rendered accordingly, it was a withdrawal of such items. Evidence tending to show these facts was adduced, and it was upon the truth of these facts, that the jury were directed to find that the plaintiff would not be precluded by the settlement and judgment thereon from recovery for the items in this action, so excluded. In this there was no error.

It appears from the report of the case of *Kendrick* v. *Smith*, 31 Maine, 162, which was read to the jury without objection, that the suit was brought against the plaintiff, for the alleged neglects of his deputy, Morse; and also for the plaintiff's own neglects. He was exonerated from liability on account of the former, for the reason, that those neglects were the breaches of the deputy's promises, which were personal, and which involved no official responsibility. The bond secured no indemnity for these neglects, and the plaintiff is without a remedy therefore upon the bond. So far as that suit was for a recovery of damages received for his own neglects after the death of Morse, the defendants cannot on any principle be liable. The right of the plaintiff to recover on account of the expenses incurred in the defence of the action in favor of Kendrick against him, was dependent upon the nature of the claim in that suit, and the condition of the bond. The construction of the latter was a matter of law, and had been given in the decision of the questions raised in the suit referred to. The same case

fully disclosed the grounds of action therein, and it was adjudged that the plaintiff was not liable, for the reason, that the neglects complained of, were not those embraced in the conditions of the bond. The instruction requested by the defendants, that the charge for defending that suit was not recoverable against the bondsmen of the deputy, should have been given; and the submission to the jury, to decide as matter of fact, whether that action was solely for the doings or neglects of the sheriff, or whether it was for the doings or neglects of the deputy, and to determine the amount, if any, which the plaintiff was entitled to recover on this claim, was incorrect. For this cause the

Exceptions are sustained,
and a new trial granted.

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

(*) VARNEY *versus* GROWS.

By the statute of limitations a plaintiff may consider himself to have been under a disability to sue, while he was "without the limits of the United States;" the statute therefore makes an exception in his favor.

That disability ceases, however, upon his return to *any part* of the United States, however distant from the State of his domicile.

ON FACTS AGREED.

TRESPASS, for an assault and battery committed on the high seas, Dec. 11, 1849, the writ being dated Sept. 25, 1852.

The defendant relied upon the statute of limitations, and pleaded that the cause of action, if any, did not accrue within two years next before the commencement of the suit.

It is agreed that the plaintiff's cause of action, if any he have, arose during the progress of a voyage from Bath to San Francisco, in the State of California, which voyage terminated by their arrival at San Francisco, in May, 1850.

The plaintiff and defendant remained together in Califor-

nia until the spring of 1851, when the plaintiff returned home to Brunswick in this county. The defendant did not return home until June, 1852, but during all the time, and for years previously he had a wife and family in Brunswick, where he also owned real estate and personal property, which facts were well known to the plaintiff.

If on this statement of facts the action is barred by the statute of limitations, the plaintiff is to become nonsuit, if not, then the action is to stand for trial.

Shepley and *Dana*, in support of the action.

Barrows, for defendant.

SHEPLEY, C. J. — The suit is for a trespass alleged to have been committed upon the person of the plaintiff on December 11, 1849, on the high seas. The parties arrived in California in the month of May, 1850, where they remained until the spring following, when the plaintiff returned to his home in this State. The defendant did not return till June, 1852. The statute of limitations, c. 146, § 3, is presented as a bar to the suit.

The provision is, that all actions of this description shall be commenced within two years next after the cause of action shall accrue. The tenth section provides, if any person entitled to bring such action shall, when the cause of action accrues, be without the limits of the United States, he may bring the action within the times limited, after the disability shall be removed. The word "disability" appears to have been used with reference to the preceding condition of the party as an infant *feme covert*, or as insane, imprisoned or without the limits of the United States; and when the party is no longer in either of those conditions the disability is removed. It is however insisted, that the phrase without the limits of the United States should be considered as equivalent to the phrase "beyond seas," used in the statute of 21 Jac. 1, and in the statutes of several States of the Union. The recognized construction of those words

required a return of the person within the country or state making the enactment before his disability would be removed.

In the Act of 1786, c. 52, after the words "beyond sea," the words "without any of the United States," were inserted, and the same language was used in the statute of 1821, c. 52, § 9. The legal effect of the insertion of these last words had been considered in the case of *Whitney* v. *Goddard*, 20 Pick. 304. The opinion in that case was published during the year before the revision of the statute of this State was reported to the legislature, at its session, in January, 1840. In that revision, as if the design was to remove all doubt, the words beyond sea were omitted, and the exception appears to have been designed to include only those without the limits of the United States; and the disability would therefore be removed upon a return within those limits.

The cause of action cannot be considered as not accruing on account of the absence of the defendant from this State by the provisions of the twenty-eighth section of the statute. *Crehore* v. *Mason*, 23 Maine, 413.

According to the agreement of the parties the entry will be *Plaintiff nonsuit.*

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

(*) FARWELL *versus* STURDIVANT.

A court of equity, having jurisdiction for any purpose, must have jurisdiction as to the means of effectuating that purpose, and will hold it till complete relief be afforded.

Such a court, having jurisdiction of a suit for the redemption of mortgaged land, upon payment of the mortgage debt, may, *in such suit*, require that any over payment, made to the mortgagee upon such debt, shall be refunded, *without resort to an action at law.*

A written notice upon a mortgagee, for an exhibit of the amount due, is not *necessarily* to be delivered by the mortgager personally. A service of it by an officer will be sufficient.

The prescribing, in such a notice, of an unreasonable time or place, in which the exhibit is to be furnished, will not exonerate the mortgagee from the duty of furnishing it at a reasonable place, within a reasonable time.

On a bill in equity to redeem land, mortgaged to secure a sum with its semi-annual interest, the interest computed for the first half year, together with the principal, will constitute a new principal, upon which, in the same mode, the interest is to be computed and compounded for each succeeding half year.

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

BILL IN EQUITY to redeem real estate mortgaged.

The plaintiff had drawn up and signed a paper, directed to the defendant, which, as to its form, was a sufficient demand upon the defendant to exhibit to the plaintiff the amount due upon the mortgage.

The paper also stated, that if more convenient to the defendant, he might leave the exhibit with Willis & Fessenden, attorneys.

This notice, according to the officer's return, was served upon the defendant by delivering it to him in hand. The defendant objected to the sufficiency of that demand.

The cause having come up for a hearing upon bill, answer and proof, was referred to a master to ascertain what amount, if any, was due on the mortgage.

The master's report shows, that the debt secured by the mortgage was a note dated Aug. 27, 1838, for $250, payable in two years, with interest *semi annually*. Upon that note, a payment of $190 was made on April 21, 1845; and on Feb. 4, 1848, the parties were together, and the defendant caused the *interest* on the note to be computed from its date to that time. That computation, made "by calculating the interest every six months and compounding it," showed the interest to have amounted to $188,24, for which amount the plaintiff gave his note which the defendant afterwards collected.

In that computation the payment of the $190 was wholly unnoticed. The plaintiff also paid $50 upon the note on Jan. 8, 1851, and $50 more on Jan. 13, 1852.

The report showed, that the sums paid to defendant had

overpaid the note by the sum of $78,28, and that, in arriving at this result, the master inferred, that by giving the note of Feb. 4, 1848, for the interest cast half yearly and compounded, the plaintiff agreed to pay interest up to that date upon that mode of reckoning.

He thereupon taxed interest upon the note by computing it for a half year and then adding the amount of it to the principal; and thus constituting a new principal upon which the next half's interest was computed and added; thus compounding every half year up to April 25, 1845, and from the aggregate, the $190, that day paid, was deducted. The balance was then made to constitute a new principal, upon which the interest was compounded half yearly, until the said Feb. 4, 1848, at which time the balance due appeared to be $24,45. Upon that balance, simple interest was computed, ($4,29,) up to the payment of $50, on Jan. 8, 1851, which overpaid the note by $21,26. Upon that sum, simple interest was computed, ($1,29) up to Jan. 13, 1852, when the second payment of $50 was made, by which the overpayment was increased up to $72,55. Upon that sum, simple interest was computed, ($5,73) up to the time of the decree, making the overpayment with its interest up to that time to amount to $78,28.

To the mode of computation thus adopted by the master, both parties objected.

The Judge decreed, that the defendant should pay back to the plaintiff the said sum, $78,28, with costs of this process, and re-convey the mortgaged premises to him by deed of release and quitclaim. The case was then removed, upon the requirement of the defendant, for a decision by the full Court.

HOWARD, J. — The redemption of mortgaged estates is, upon general principles, within the jurisdiction of courts of equity. This court, as a court of equity of limited power, has jurisdiction in such cases, specially conferred by statute. R. S. c. 96, § 10; c. 125. Where the jurisdiction of a court

of equity which can determine the matter, has rightfully attached, it will in general be retained to afford complete relief, without turning the parties over to a suit at law. 1 Story, Com. Eq. § 64, p. 82; 2 Fonbl. Eq. B. 6, c. 3, § 6. And where the court has jurisdiction for a purpose, it must have it as to the means to accomplish that purpose.

This suit by the mortgager against the mortgagee, is for the redemption of a mortgaged estate, and comes before us on a report from a hearing and decree of a Justice of this Court at *Nisi Prius*, under the provisions of the statute of 1852, c. 246, § 14. It appears that the defendant neglected on request, to render an account of the sum due upon the mortgage, before commencement of the suit. The bill, therefore, may be sustained, without an allegation or proof of tender of payment, upon the offer to pay and perform. It is no objection to the request that it was not made by the plaintiff in person. It was in writing, and sufficiently specific to inform the defendant of the requirement and the purpose of the plaintiff; and it was communicated in season, and in a manner unobjectionable. It authorized the defendant to leave his account of the amount due, with the attorneys of the plaintiff, if more for his accommodation, but did not *require* him to do so. But if the plaintiff's request had been accompanied with directions to the defendant to present his account at a particular time and place, it might have been sufficient, notwithstanding. If the appointments of time and place were unreasonable, performance by the defendant could not be exacted. He had only to render the account in a reasonable time and manner. No unauthorized exactions by the plaintiff, would absolve the defendant from the performance of duties required in this respect, by the plain provisions of the statute. *Roby* v. *Skinner*, 34 Maine, 270.

In his answer, the defendant denies that the mortgage debt had been paid; but the master reports that it had been overpaid. His decision has not been impeached, and it must be regarded as conclusive upon the fact of overpayment.

The rule adopted by the master, in calculating interest upon the note secured by the mortgage, is objected to by both parties; but in our opinion the objections must fail. The effect of the rule is, to require the borrower to fulfil his contract with the lender, by paying the principal with interest semi annually, and interest upon the sums of unpaid interest, after they had accrued by the terms of the note, and according to the agreement of the plaintiff, as found by the master. It also gives to the lender just what he might have realized if the borrower had complied with the terms of his contract. This will do justice to both parties, without violating the statutes of usury. A contract to pay interest upon a sum due for interest, is but an agreement to pay interest on money due, and is not usurious. But where the contract is usurious, even equity requires the borrower to pay to the lender what is really and *bona fide* due to him. *Scott* v. *Nesbit*, 2 Bro. Ch. R. 641; *Mason* v. *Gardiner*, 4 Bro. Ch. R. 436; 1 Fonbl. Eq. B. 1, c. 4, § 7, n. k; 1 Story Com. Eq. § § 301, 302.

The decree at *Nisi Prius* is affirmed, with additional interest and costs.

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

(*) ROBINSON *versus* MILLER.

In trespass *quare*, an amendment enlarging the plaintiff's close, as described in the declaration, cannot be allowed.

A tract of land, granted by courses and distances, without referring to monuments or other locations, cannot be enlarged by proof that the owners of the adjoining lands had, at a former period, concurred with the owner of the tract in establishing one of its side lines upon a course somewhat variant from that described in the grant.

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

TRESPASS, for breaking, entering, and cutting trees upon the plaintiff's close, described as follows; — beginning at,

&c., thence running *southwest* 169 rods; thence northwest to land owned by David Gross; thence northeast to a road; thence southeast to the first bound.

The plaintiff moved for leave to amend by describing the first line of his close as running "*in a southwesterly direction to a birch tree on the line located by Joshua Miller, jr., and by Samuel Robinson*" [the plaintiff's grantor.]

This description would carry the land southeastwardly far enough to include the acts done by the defendant, who owned the land adjoining that of the plaintiff.

The amendment was objected to and disallowed, being considered an enlargement of the close, and therefore *legally inadmissible.*

The plaintiff then offered evidence to prove that said Joshua Miller, jr. and Sam'l Robinson, the former owners of the contiguous lands, now owned by these parties, agreed, about nineteen years ago, to run a southwest line from an agreed point, as and for their dividing line, and that they accordingly run a line from the agreed starting point and terminating at a birch tree, and then agreed that the line thus run should be their dividing line, and that the birch tree should be the corner, whereas in fact the line which they run and the birch tree which they fixed as a corner, were not a southwest course, but were somewhat southerly from that course. And the plaintiff insisted, that as the proprietors had fixed and adopted this line, as and for a southwest line, it is now to be considered as the southwest line described in the declaration. The Judge, however, ruled otherwise.

If this ruling and the rejection of the proposed amendment were correct, a nonsuit is to be entered; otherwise the case is to stand for trial.

Fessenden & Deblois, and
Morrill and *Fessenden,* for the plaintiff.

W. P. Fessenden, for the defendant.

HOWARD J.—The description of the plaintiff's close was

the same in his declaration, as in the conveyance under which he claimed, and did not embrace the *locus in quo*. The proposed amendment, which did embrace it, would operate as an enlargement of the close, and was inconsistent with the original declaration, and not admissible. R. S., c. 115, § § 9, 10; Rules of Court, XV.

If, as assumed by the plaintiff, the former owners of the adjoining lands, now owned by these parties, did agree upon, and run a line "nineteen years ago," as the dividing line between these lands, from a fixed point of commencement, to a monument not in a southwest course, "*as a southwest line;*" yet, he is not aided by such division line, to which no reference is made by the conveyance of the former owner to himself. He must be limited by the line described in his deed, as running from the point of commencement due southwest, without reference to the monument, and is neither a party, nor privy to the conventional line. The effect of the proof offered by him would have been to contradict or vary the plain and unambiguous stipulations of his deed, and to have enlarged his grant, in a manner unauthorized by law.

A nonsuit must be entered, according to agreement.

TENNEY, WELLS and APPLETON, J. J., concurred.

(*) REGGIO *versus* DAY *& al. & versus* JONES & HAMMOND, *Trustees.*

The holding a mortgage of personal property does not expose the mortgagee to the trustee process, if he have never taken possession or control of the property.

The holding a mortgage of personal property to secure the mortgagee against a claim for which he is *not liable*, as well as upon one upon which he *is liable* for the mortgager, will not constitute the mortgagee the trustee of the mortgager.

The holding of a mortgage of personal property to secure the mortgagee against a claim upon which he is liable for the mortgager, will not constitute the mortgagee the trustee of the mortgager, except after a tender by the plaintiff of the amount due to the mortgagee.

Reggio *v.* Day & al. & *v.* Jones & Hammond, Trustees.

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

The question is upon the liability of Jones & Hammond to be charged as trustees.

The case was heard upon their disclosure.

They disclosed, that for various indebtments of the principal defendants to them, and for various liabilities entered into by them for the principal defendants, they, the principal defendants, made to the trustees three mortgages of personal property which were duly recorded.

Of one of the mortgages, dated Oct. 17, 1851, a copy was annexed to the disclosure. Among the liabilities which the trustees had entered into for the mortgagers, and against which the mortgage purports to secure them, the mortgage specifies a note given by the mortgagers to this plaintiff, corresponding in date, amount and pay-day, with the note sued in this action.

The trustees disclose, that they never became liable upon such a note, and that it was named in the mortgage by the mistake of a clerk. No fraud in the transaction is suggested. An examination of the note in suit shows no liability of the trustees upon it.

The trustees further disclose, that they have never taken into their possession or control any of the property conveyed by either of the mortgages.

The mortgage of Oct. 17, 1851, contains a provision, that it should be lawful for the property therein mortgaged to continue in the possession of the mortgagers, until the mortgagees should elect to take the same into their immediate possession, which they are permitted to do at their pleasure.

The Judge ruled that the trustees should be discharged. To that ruling, the plaintiff excepted.

E. L. Cummings, for the plaintiff.

W. P. Fessenden, for the trustees.

Tenney, J. — The supposed trustees were the creditors of the principal defendants; and were also holden for them,

as accommodation indorsers; and as collateral security took a mortgage of personal property on January 17, 1851; another mortgage on Oct. 17, 1851, and a third on Nov. 10, 1851, all of which were duly recorded. In the mortgage dated Oct. 17, 1851, among the liabilities of the trustees, therein referred to, was a note of the principal defendants to the plaintiff, corresponding in description, to the one in suit. It appears from the disclosure, that this note was inserted in the mortgage by mistake, the trustees never having previously become liable thereon; and it does not appear from the note itself, or by any agreement, excepting the mortgage, that any such liability existed. But the counsel for the plaintiff contends, that if the trustees never did become responsible for this debt, they are supposed to hold in their hands, property under this mortgage, on account of this note, unappropriated, for which they should be liable as trustees.

All the property described in the mortgage, is conveyed by one contract; and no portion is for the security of one particular debt, or liability, in distinction from the others. It is all holden, until the debts to the trustees are paid, and their liabilities are removed. The payment by the principal defendants, of one debt alone, secured by the mortgage, with others still outstanding, would not release any portion of the property, so that it could be reached by direct attachment, or by the trustee process, in any other mode than that which the statute provides. It is not perceived, in what manner, the case would differ, where the demand is found, not to be one, designed to be secured, by the indorsement thereon of the names of the mortgagees. If a creditor has a mortgage of personal property, greater in value, than the amount of his claim, and for his liabilities, another creditor is not without his remedy. He may attach the property mortgaged, first paying or tendering to such mortgagee, the full amount of the debt, for which it is so mortgaged. R. S., c. 117, § 38; or he may have the same attached, and seized and sold on execution, subject to the rights and interests of such mort-

gagee, without paying or tendering payment of the debt due to the mortgagee. § 40. As another mode of availing himself of his debtor's right of redemption, in the property, upon payment or tender of payment of the amount due on the mortgage according to the decree of the Court, upon disclosure of the trustee, in an action of foreign attachment against the debtor, and the mortgagee as trustee, he may obtain the benefit of the excess over the sum needed to discharge the mortgage. R. S., c. 119, § 58.

Again, it is contended, that the trustees having taken the mortgage of Oct. 17, 1851, containing the recital, that they were liable upon the plaintiff's note, they are bound thereby; and hence are holden in this process. Assuming the doctrine invoked to apply to this case, so far as to create a liability of Jones and Hammond, of which we give or intimate no opinion, it would not make the property or any part of it, attachable, excepting as before stated, there being no suggestion of fraud; and it could not be better reached by the trustee process, inasmuch as it would be holden by the mortgagees, for their security and protection. The same remark may be made in reference to the suggestion of the plaintiff's counsel, that the plaintiff having supposed, from the recorded mortgage containing the recital, that the mortgagees were holden to pay his note, he had omitted to take measures, which would have been successful for his security. Such liability could have no effect to make the mortgagees chargeable as trustees on account of the property secured to them.

In the mortgage dated Oct. 17, 1851, it is expressly stipulated, that the mortgagers "shall continue in possession without denial or interruption, until Jones and Hammond shall elect to take the same into their immediate possession, which they are permitted to do." It does not appear, whether a similar agreement is contained in the other mortgages, or not. But there is no proof from any document or evidence, that the mortgagees at any time took possession of the property, but they state expressly that the possession was never in them.

It is regarded as well settled, that a mortgagee of personal property is not liable as the trustee of the mortgager, when he has not taken possession. Not being the debtor of the principal defendant, he has no credits to be charged; and he has no goods or effects in his hands to be surrendered to the officer. *Badlam* v. *Tucker & al.* 1 Pick. 389; *Bank* v. *Prentice,* 18 Pick. 396.

Exceptions overruled.

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

(*) BROWN *versus* EMERY EDES AND EDWIN O. LOVERING.

The adjustment of mutual accounts on settlement between the parties, *according to the book kept by the plaintiff,* in which by mistake an article had been wrongfully credited to the defendant, may perhaps give to the plaintiff a right to recover the amount of the over-credit.

But such an adjustment, without further proof, would not show such a fraud or such a fraudulent concealment of the cause of action, as to avoid the statute of limitations.

A written admission by the defendant in such a suit, that "he does not claim," and that he "never did own or claim" the article, and that he "had never claimed any exemption from liability on account of time," would not support the action, if brought more than six years after such adjustment of the accounts.

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

ASSUMPSIT, for money had and received. Plea general issue, with a brief statement of the statute of limitations and joinder. The writ was dated May 15, 1851.

The plaintiff, a merchant in Portland, on the seventh of May, 1842, received from one Wilkinson Edes a quantity of shooks, a portion of which, of the value of $54,80, was supposed to have been sent by the defendants, and were accordingly credited to them in their account with the plaintiff. The plaintiff and the defendants settled their account, November 5, 1842, and the said sum of $54,80, was allowed to defendants. In November, 1850, in a settlement of ac-

counts between Wilkinson Edes and the plaintiff, he, Wilkinson Edes, claimed that *all* the shooks belonged to him, and the plaintiff allowed him for them. The plaintiff then introduced the original receipt given by him to Wilkinson Edes for the shooks received May 7, 1842, upon the back of which was the following memorandum in writing, viz: "Lovering & Edes never claimed or owned any part of the within lumber, nor any exemption from liabilities on account of time. "Emery Edes.

"Naples, August, 1850."

Also a copy of said receipt, with the following memorandum upon the back thereof, viz: "I knew nothing of any part of the lumber contained in the within receipt belonging to Lovering & Edes, or ever directing any part of it to be credited to them. They claim none of it.

"E. O. Lovering."

Upon this testimony, all of which was admitted without objection, the presiding Judge ruled that the plaintiff was entitled to recover against Emery Edes; and if this ruling was correct, judgment is to be entered against said Emery Edes for the sum of $54,80, with interest from such time as the Court shall order; and the plaintiff to discontinue as to Lovering, the other defendant; otherwise the plaintiff to become nonsuit.

Rand, for plaintiff.

Perry, for defendants.

WELLS, J. — The plaintiff had an account against the defendants, which was settled on the 5th of November, 1842. The sum of fifty-four dollars and eighty cents was allowed to them in the settlement as a payment made by them, when it should have been credited to Wilkinson Edes. There are no facts disclosed, which show any fraud on their part in the settlement, by which the plea of the statute of limitations could be avoided.

The action being barred by the statute, there must be an acknowledgment of the debt, or a promise to pay it, made

in writing. R. S., c. 146, § 19. In the memorandum made by Lovering, he does not admit any indebtedness, nor make any promise to pay the debt. The defendant Edes, says, that "Lovering & Edes, never claimed or owned any part of the within lumber, nor any exemption from liabilities on account of time." The statement, that the defendants did not own the lumber, is not an admission that the debt was due, to the payment of which it had been appropriated. And the assertion, that they had never claimed to be exempted from liability on account of time, does not amount to an acknowledgment of the debt or promise to pay it. They make a declaration of what they had not done, and it cannot be construed, as is contended, into a promise not to rely upon the statute.

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

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

BIGELOW *versus* THE YORK & CUMBERLAND RAIL ROAD CO.
JONES *& al. versus* SAME.

A Rail Road Corporation, in making a disclosure by their agent under a trustee process, is not concluded by the entries upon their books.

Although a balance appears to be in favor of the principal defendant, if the agent discloses, that it arose from mistake or fraud in the amount of credit reported, and no facts are disclosed showing there was no such error, the corporation is not chargeable as trustee.

Whether a Rail Road Corporation, who have contracted to issue stock certificates to the principal defendant, is chargeable as a trustee; *quere.*

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

SCIRE FACIAS against the defendants, as trustees of one I. G. Myers.

A disclosure was made *in this suit*, by the treasurer of the defendants, that at the time of the service of the writs

in the original suits, the company had no goods, effects or credits of the principal in their hands or possession.

It appeared by the disclosures, that the principal was a contractor to build a rail road for the defendants and to be paid monthly for his work, on the estimates of the engineer for his work done for the company. The estimates, were made up to, and including the last day of each month, and the amount payable on the tenth day of the next month, a part in cash, part in bonds and the balance in the capital stock of the company.

At the time of the service of the original writs, Feb. 3, 1851, the books showed a large balance due the principal on the following tenth day of that month, but the treasurer disclosed, that such balance was found by errors in the credits of said principal, and that subsequently the accounts were corrected and nothing was due him at that time. The account was open and running, and subsequently a large amount of bonds and stock was delivered to him.

Poor & Adams, for the plaintiff.

J. Pierce, jr., for the trustees.

SHEPLEY, C. J. — These cases are presented on a disclosure made by the treasurer of the company upon a writ of *scire facias*.

It will not be necessary to decide, whether the company might be chargeable by reason of a contract made with the principal to issue stock certificates, stating him to be the holder of a certain number of shares. It may not be improper to observe, that such certificates are rather evidence of property, than property *per se*.

Assuming that the facts are correctly stated in the disclosure, there does not appear to have been any thing due from the company to the principal at the time of service of the original process.

There would appear to have been a balance on account due to him at that time, if the accounts upon the company books be regarded as correctly made and conclusive upon it. But

the company, by its agent, states in substance, that they have been found to be incorrect. That over estimates of work performed had been presented, and credits given on the books for it as performed, and that upon a correction of such credits and a just settlement of all concerns to that time, there would be a balance due from and not to him.

Those previous credits and accounts were not necessarily conclusive upon the company. They were liable to correction upon proof of error or fraud. The Court cannot ascertain from any facts disclosed, that there was no such error as is alleged, or that the proof of it may not be entirely satisfactory. It must assume, that the statement of it as made will prove to be correct, until there be some proof to the contrary.

Exceptions overruled.

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

POWERS *versus* NASH.

In a suit for money paid for defendant as his surety on a note, signed at the request of one of the members of his family, which note plaintiff was compelled to pay; the declarations of the defendant of his dissent to what plaintiff had done, uncommunicated to the plaintiff or to the payee of the note, are not admissible in evidence.

If the maker assents to the alteration of his note by the substitution of another surety, and the note is paid by such surety, he is liable to reimburse him for the money so paid.

And *such assent* may be presumed from his subsequent acts and conduct in relation to it, though he was not present when the substitution was made.

Whether the defendant would not be liable, after receiving the benefit of plaintiff's name and being relieved of his own obligations, even without his assent, *quere*.

It is from the equitable obligation between the principal and surety that the legal liability arises that the surety shall be saved harmless, and a promise is implied from the relations between them, where none in fact existed.

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

ASSUMPSIT for money paid and for money had and received.

The Court were authorized to draw the same inferences of fact, that a jury might, and to render such judgment as the legal rights of the parties might require.

A deposition made a part of the case. That part of it which related to the declarations of the defendant in the presence of his family was objected to.

The Court found the following facts:—

The defendant effected an insurance on his own life and on that of his wife, at the office of the Mutual Benefit Insurance Company, and gave them his premium note with the name of his son, who was a minor, as surety. The agent of the company, having ascertained the minority of the son, sent back the note to the defendant with a request that he would procure another surety. The defendant being at the time absent from the State, the letter was opened by the son, who cut out his own signature, and the plaintiff, at his instance or at that of some of the family, signed it as surety. The note not being paid, a suit was commenced by the payees, to whom it had been transmitted, and judgment obtained against the plaintiff and the defendant, and the amount collected of the plaintiff, who brought this suit to recover of the defendant the amount thus paid.

Gerry, for the defendant.

S. C. Strout, for plaintiff.

1. The judgment was conclusive upon these parties as to every matter that could have been pleaded, except a set-off. *Thatcher* v. *Gammon*, 12 Mass. 269; *Granger* v. *Clark*, 22 Maine, 129.

2. The default in that suit was an admission of the claim set forth in the writ and is a waiver of any matter of defence existing prior to that time. 12 Mass. 269; 13 Mass. 453.

3. The deposition of Henry is inadmissible, because its effect is, to establish a defence on the part of defendant, to the original action, from which he is now precluded. 2 Starkie's Ev. 76; 8 Mass. 536; 14 Mass. 496. And if admissible, the maker of the note is not thereby discharged.

The plaintiff's undertaking was only collateral. 29 Maine, 298.

4. The equity of the transaction between the parties will be taken into consideration. 2 Caines, 154. The plaintiff had a right to regard the request to him as the act of defendant.

5. If the note was guaranteed, without request of defendant, the acquiescence of Nash in the contract, which was the consideration of the note, and his failure to defend the suit against himself and plaintiff amount to a ratification of the act of Powers and a waiver of any objection upon that account. *Brelin* v. *Dubarry*, 14 S. & R. 27; 12 Johns. 300; 12 N. H. 206; 5 Met. 192; Story on Agency, pp. 304, 305.

APPLETON, J. — The plaintiff, by signing the note, unquestionably made himself liable, if the insurance company and the defendant assented thereto. That the company assented to the substitution of the plaintiff's name for that of the defendant's minor son, is to be inferred from the fact that they received the note without objection and collected the amount due. The defendant gave no notice of dissatisfaction, either to the plaintiff or to the company, before the suit on the note was commenced. His statements to his family, of his dissent to what the plaintiff had done, uncommunicated either to him or to the insurance company, are not admissible in evidence. The defendant retained the insurance he had effected, and to which he was not entitled and for which there would have been no consideration, except the note first given and to which subsequently the name of the plaintiff had been affixed. When an action was brought against him and the plaintiff, he interposed no defence. From all the circumstances, the assent of the defendant to the erasure of his son's name and to the substitution of the plaintiff's may be presumed, and in such case they would be jointly liable on the note. *Speake* v. *United States*, 9 Cranch, 28.

Even without assent it would be a grave question whether

the plaintiff would not be entitled to recover, the defendant having received the benefit of his name as surety and the execution upon which he was liable having been paid by him. The rights of a surety, who enters into that relation without the request or knowledge of his principal, are protected and enforced by the civil law. "Where the engagement," says Pothier, in his Treatise on Contracts, part 2, c. 6, § 1, "is made without the knowledge of the debtor, it cannot be supposed to include any contract between the surety and the debtor, but there is supposed to intervene between them that kind of quasi contract which is called *negotiorum gestorum.*" The surety, in the appropriate form of action, can recover what he has thus paid. Burge on Suretyship, 357. The very case is provided for alike in the code of Justinian as in that of Napoleon. Code Nap. Tit. 14, § § 2014, 2028.

It was held in *Hughes* v. *Littlefield,* 18 Maine, 400, that it furnished no defence to a surety that he voluntarily became such without the assent or knowledge of his principal. A debtor sent a promissory note to his creditor in payment of his debt, by the hand of a third person, who, before delivering it, at the request of the creditor and for the purpose of giving credit to the note, put his name on the back of it, and such third person was held liable as an original promisor. *Bryant* v. *Eastman,* 7 Cush. 111. The right of a surety to contribution, at common law, was allowed under circumstances which repelled any promise to contribute in *Norton* v. *Coons,* 3 Den. 130. In this case BRONSON, C. J. remarked, that "where it was settled that the Courts of law would enforce contribution between sureties, what was before only an equitable became a legal obligation; and where there is a legal right to demand a sum of money and there is no other remedy, the law will, for all purposes of a remedy, imply a promise of payment." Much more does this implied promise arise as against a principal. The rights of the surety to subrogation, who became such without the request or knowledge of his principal, have been sustained

against the creditor in *Matthews* v. *Aiken*, 1 Coms. 595. A court of equity will imply a promise on the part of the creditor to subrogate the surety to all his rights and remedies, in case he resorts to the latter for payment upon his guaranty. At law, the legal liability springs from the equitable obligation, and a promise may be implied from the circumstances of the case and the equitable relations of the parties where none in fact existed. *Defendant defaulted.*

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

WATERHOUSE *versus* BIRD.

Upon property attached and delivered by the officer into the hands of receiptors, who promised to pay a sum certain or re-deliver to him the property, the officer's lien is dissolved; and the property is liable to be attached at the suit of another creditor of the owner.

Replevin by the former cannot be maintained against the latter officer for attaching such property.

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

REPLEVIN, for a sloop.

The plaintiff was a constable, and having a writ against one Foss, had attached a sloop of which he owned one-fourth. Two of the part owners, with others, gave him an obligation to pay $100, or re-deliver the sloop in thirty days after the judgment in that suit, and the sloop was given up to them. While the owners of the three-quarters, and the receiptors were in possession of the sloop, and finishing the work undertaken at the time of plaintiff's attachment, the defendant attached the sloop at the suit of another creditor of Foss. Before he made this attachment, he was notified of the former attachment, by the person in charge, and that he with others had receipted for her. Both suits on which the sloop was attached, are pending in Court.

The case was withdrawn from the jury and submitted to

the full Court to enter a nonsuit or default, as the law may require.

Shepley & Dana, for the defendant.

We maintain this proposition, that where property is attached, and delivered by the officer up to the part owners, who have given a receipt in the usual form, that the officer's lien thereon is lost so that he can maintain no action of replevin for the property, on its being subsequently attached by an officer.

The Supreme Judicial Court in Massachusetts, (*Wentworth* v. *Leonard*, 4 Cush. 414,) doubted whether the relation of receiptors to the officer, was as his bailees and agents, or as an original contractor with him, under the receipt. The Court in this State, (*Penobscot Boom Corporation* v. *Wilkins*, 27 Maine, 345,) have decided that they stand as original contractors on their promise, and are permitted to defeat a suit by the officer, by showing that the property receipted for, did not belong to the defendant in the original suit; and this decision is sustained by the reason of the whole thing; and yet it would be anomalous, if the receiptor were simply the keeper of the officer.

It is the established doctrine in Massachusetts, that where a receipt has been taken, and the property has gone back into the hands of the owner, the officer's lien is lost. *Denny* v. *Willard*, 11 Pick. 519; *Robinson* v. *Mansfield*, 13 Pick. 139; and in this State, *Weston* v. *Dorr*, 25 Maine, 176.

A lien is simply a right to retain possession, and of course where there is no possession, there can be no lien. Smith's Mercantile Law, p. 565.

Fox, for the plaintiff, contended, that the attachment made by him was valid at the time defendant attached the same property, and cited *Merrill* v. *Curtis*, 18 Maine, 276; *Bond* v. *Paddleford*, 13 Mass. 394; *Baker* v. *Fuller*, 21 Pick. 318.

TENNEY, J. — The only question involved in this case, is whether the attachment of the sloop, made by the plaintiff,

on the writ in favor of Elizabeth Clough against Lemuel Foss, was dissolved at the time the same property was attached by the defendant on a writ in favor of J. M. Deering.

One fourth part of the vessel, when attached, was owned by Lemuel Foss, and three fourths by Ira Andrews and his brothers, and was then used in the performance of a job of work, in which the owners were jointly interested, and so continued till the job was completed; Ira Andrews being master of the sloop.

On the day of the attachment by the plaintiff, and after it was made, he took the contract of Ira Andrews and three others, in which they agreed with him, for value received, that they would jointly and severally pay to him, constable of Portland, his heirs, executors and administrators, the sum of one hundred dollars on demand; or re-deliver the property, represented in the contract to have been attached by him in the aforenamed suit, on demand, in like good order and condition as when taken, free from expense to the plaintiff; and if no demand should be made for the property, they would re-deliver the same within thirty days after judgment in the action, in which it was attached. On giving the receipt, the vessel was given up to Ira Andrews by the plaintiff, who said, "you have got your vessel back again," and she continued to be used in the job, which the owners had undertaken, and afterwards completed.

This case is unlike that of *Bond* v. *Paddleford*, 13 Mass. 394, which is relied upon by the plaintiff, in which the person, whose property was attached, and for safe keeping, was put into the hands of a third person, a receipt therefor being taken, brought an action against the officer, who took possession of the property afterwards, while the suit was in progress, and undisposed of. The Court considered that the action against the officer was misconceived, and that the receiptor was the servant of the officer, who never parted with the property, and that the owner of the property returned as attached, could not complain of the officer.

We are unable to make a distinction favorable to the plaintiff between the case before us, so far as it respects the question presented, and the cases of *Denney* v. *Willard*, 11 Pick. 519; *Robinson* v. *Mansfield*, 13 Pick. 139, and *Weston* v. *Dorr*, 25 Maine, 176. In the case last referred to, it was held, that where an officer has attached goods on mesne process, and has delivered them up, on the written promise of two persons, to re-deliver them on demand, or pay their value, the receiptors have the election, whether they will pay the value or deliver the property, and the officer must be considered as having abandoned the possession, and permitted the goods to go to whomsoever they may belong.

Here the receiptors cannot be regarded as the servants of the plaintiff; for it is manifest, that he relied upon their contract for his security, and not upon the property itself; and they were left at liberty by him to do whatever they pleased with it; to permit it to go into the hands of the owner, or retain it in their own hands, for their security, on account of their liability on their agreement with the officer. The property attached did in fact go back into the same condition, in which it was before the attachment, and was used in precisely the same manner, in the prosecution of the work, in which the owner had been and continued to be engaged and interested. The plaintiff abandoned the property so far, that the attachment was dissolved, and that made by the defendant was by legal authority. *Plaintiff nonsuit:* —

Judgment for a return.

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

STATE *versus* MERRILL.

The charter of the city of Portland authorized the city to establish such by-laws and regulations, not inconsistent with the constitution or laws of the State, as might be needful for the good order of the city.

State *v.* Merrill.

The establishment of a by-law, imposing a penalty for mutilating any ornamental tree planted in any of the streets or public places of the city, is within the authority granted by the charter.

In a complaint under such by-law, it is not necessary to allege or prove, that the mutilation was malicious, careless or wanton.

Upon the overruling of a demurrer to a complaint or indictment for a misdemeanor, the judgment against the defendant is not a *respondeas ouster*, but is peremptory.

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

COMPLAINT for violating an ordinance of the city of Portland, which provided, that "if any person shall mutilate or destroy any ornamental tree planted, or that may be hereafter planted in any of the streets, &c., he shall forfeit," &c.

The complaint alleged, that the defendant, at, on, &c., "did mutilate and destroy a certain ornamental tree, then and there planted and being and growing in the street," &c.

To the complaint the defendant demurred generally.

The Judge overruled the demurrer, and adjudged the complaint to be good, and the defendant excepted.

M. M. Butler, for the defendant.

Barnes, for the State.

HOWARD, J. — The city of Portland was authorized by its charter to "ordain and publish such acts, laws and regulations, not inconsistent with the constitution and laws of this State, as shall be needful to the good order of said body politic; and impose fines and penalties for the breach thereof, not exceeding fifty dollars, for any one offence." Special Acts of 1832, c. 248, § 1. Under this general authority, and subject to these restrictions, and certain statute regulations, it could establish all suitable ordinances for administering the government of the city, the preservation of the health of its inhabitants, and the convenient transaction of business, within its limits, and for the performance of the general duties required by law of municipal corporations. Among other things the city was bound to establish, and make suitable streets, and to keep them in such repair, that

they would be safe and convenient for the purposes of legitimate use. Incident to these is the right to protect its streets, and to remove therefrom obstructions, for the convenience of the inhabitants, and the accommodation of business and travel.

By an ordinance of the city, in December, 1833, all persons were prohibited, under penalty of five dollars, to set any trees in any part of the streets, without the consent of the constituted authorities of the city. In February, 1852, the ordinance on which the complaint in this case was drawn, was passed, to prevent the destruction of ornamental trees; and provides that, "if any person shall mutilate or destroy any ornamental tree planted, or that may hereafter be planted in any of the streets, lanes, or other public places within the limits of this city," he shall forfeit and pay not less than three, nor more than fifty dollars. This ordinance, it is contended, was unauthorized and invalid. If so, no offence is charged in the complaint. But it appears to have been intended as a regulation of the prudential concerns of the city, affecting the convenience of the inhabitants. It is not inconsistent with the constitution, nor with the laws of the State. No law of the State authorizes a person to mutilate or destroy ornamental trees planted within the limits of the streets of the city of Portland, or on land not subject to his control. The statute "of malicious mischief and trespasses on property," (R. S., c. 162, § 5,) provides a penalty for *maliciously* or *wantonly* cutting down, destroying or injuring any tree not his own, standing or growing for ornament or use. But this ordinance makes it penal to mutilate or destroy any ornamental tree planted in the city of Portland, even without malice or wantonness. The prohibitions of the statute and the ordinance, and their penalties, are different, and are not in conflict.

Though the owner of land bounded upon a street may own to the centre of it, *ad medium filum viae,* yet that portion covered by the street is subject to an easement of a way, with municipal regulations necessary or suitable to its enjoy-

ment. He cannot invade, or impair the servitude, by planting trees upon the street for his own use or convenience, or by any other appropriation of it to himself, inconsistent with the full enjoyment of the easement, by the public. The city of Portland, it seems, early assumed to control the planting of trees upon its streets, as a needful regulation for the good order and safety of the body politic. And it would appear to be a matter for municipal regulation; as much so as the erection of lamp posts, the construction of fences and reservoirs, and providing public clocks, and as numerous other subjects of undisputed municipal jurisdiction, in which the good order, health and common convenience of the inhabitants are involved. Trees upon the streets which are ornamental, are also useful, and in some seasons of the year, necessary for the comfortable and convenient enjoyment of the streets by the public, and they are, properly, under the care and protection of the city. If one person could mutilate and destroy them with impunity, every other person, under like circumstances might do the same, and thus the city be despoiled of some of its most graceful and useful ornaments, in defiance of its authority and jurisdiction. Such a result would be as undesirable, as it would be anomalous and startling.

Trees planted or growing, under municipal authority and protection, in the streets and public places in cities, are not private property, essentially, but are of public concern, in which the corporations have an interest. Should they, however, become injurious to the public, or to an individual, they may be adjudged nuisances, and as such, be removed or abated. R. S., c. 164, § § 7, 8, 9; c. 1, § 3, rule 13. When this subject is not regulated in towns by by-laws, as it may be, (R. S., c. 5, § 22,) the right of an individual to plant and remove trees, upon his own soil, over which the public have an easement, may be less restricted than when subjected to municipal regulations. But in populous villages, and cities, where the easement must necessarily extend over the entire way, as located, then, in order to secure its uninter-

rupted enjoyment, municipal restrictions upon individual rights, may become a matter of necessity, policy and duty. The ordinance in question was authorized, and is neither unreasonable nor invalid.

The complaint sets forth the misdemeanor described in that ordinance, and alleges facts necessary to constitute the offence, and is sufficient in law. The demurrer is overruled, and final judgment must be entered against the defendant. For it has been settled, in misdemeanors, that, if the defendant demur to the indictment, and fail on argument, the decision will operate as a conviction. But in capital cases, and in every case of felony, under the English law and practice, he would have judgment of *respondeas ouster*, if his demurrer to the indictment were adjudged against him. 2 Hale, P. C. 257; Hawk. b. 2, c. 31, § 7; 1 Chitty's C. L. 360, *442; *The King* v. *Gibson*, 8 East, 112.

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

HUNT *& als., Petr's, versus* HUNT *& als.*

By R. S. c. 93, § 3, every illegitimate child shall be considered, as an heir of the person, who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral; unless, before his death, his parents shall have intermarried and had other children, and his father, after such marriage, shall have acknowledged him as aforesaid, or adopted him into his family.

In a petition for partition of the father's estate, *it was held;* that the facts essential to be proved to allow an illegitimate child to inherit his *father's estate*, under this statute, were entirely distinct from such as would authorize him to inherit by *representation* of his father or mother from his lineal and collateral kindred: and

1st. That no illegitimate child could inherit the estate of *his father* as heir, unless the *written acknowledgment* required by this statute had been properly executed. Per SHEPLEY, C. J., and TENNEY and HOWARD, J. J. APPLETON, J., dissenting.

2. But that such child might inherit *by representation* of his father or mother from his lineal and collateral kindred, *without such acknowledgment*, if the parents had intermarried and had other children, and the father after such marriage had adopted the child into his family. *Held*, by APPLETON, J., that when such child could inherit by *representation* from his lineal and collateral kindred, he could, by § 3, inherit from his father.

The rights to an estate vested before the enactment of the Act of 1852, c. 266, must be determined by a legal and judicial, not Legislative construction of the laws in force at the time; and that Act of 1852, cannot alter them.

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

PETITION FOR PARTITION.

The Court were authorized to determine the facts and the law arising thereon.

The facts found were, that three of the petitioners were *illegitimate* children of Moses Hunt, the other was legitimate. The three respondents were his lawful children by his first wife.

After her death, while said Moses employed a housekeeper, he became the father by her of the three illegitimate children mentioned, and subsequently married her, and after such marriage became the father of the fourth above mentioned petitioner.

Moses Hunt died in 1849, seized and possessed of the several parcels of land described in the petition.

The petitioners always lived with him before and after his intermarriage, bore his name, and were treated like the other members of his family.

Swazey, for respondents, contended, that the three illegitimate children could take no part of the estate, as the father had made no acknowledgment *in writing*, as the statute required.

Nor could the statute of 1852, c. 266, have any legal effect on this case, for the construction of a statute is a judicial and not a legislative function. The estate here descended and became vested in the legal heirs of Moses Hunt long before the passage of this Act. The statute cannot be retroactive, neither can it so operate as to divest rights once established.

Fessenden & Deblois and *Baker*, for petitioners.

The facts in this case authorize the petitioners, who are illegitimate, to claim a share in the estate under c. 93, § 3, for its conditions have been complied with.

1. The parents intermarried and had other children.

2. The father, after such intermarriage, adopted them into his family.

Under this state of facts, a construction of the statute that would confirm the right to a claim "as representative of his father," and exclude the right to claim the estate of the father, is to us monstrous. It would allow a collateral, and reject a lineal right. The term *as representative of his father*, is intended to make him heir directly to his father, which is the immediate right, as well as to allow him to claim correlatively.

Again, there are other words which show this to have been clearly the intention of the statute. After reciting the above conditions is the following, "in which case, such child and all the legitimate children *shall be considered as brothers and sisters, &c.*

The general scope and meaning of this statute was to make illegitimate children, adopted by the father, co-heirs with the legitimate children; and its scope and intention should be carried out. *Emily* v. *Caroline*, 9 Wheat, 381; *Pease* v. *Whitney*, 5 Mass. 380.

Again, this is peculiarly a *humane statute*, and should have a most liberal construction. 6 Bacon, Statute 7, p. 389; *Richards* v. *Daggett*, 4 Mass. 534, and 12 Mass. 383.

But should the Court doubt the intention of the Legislature by reason of any ambiguity of the language used, then they will look to c. 266 of Acts of 1852, as explanatory of the section under consideration. This last Act makes no new law, but declares what the law was.

"If it can be gathered from a subsequent statute in *pari materia*, what meaning the Legislature attached to the former statute, this will amount to a legislative declaration of its meaning and will govern the construction of the first stat-

ute." *U. S.* v. *Freeman*, 3 How. U. S. R. 556; *Bull* v. *Loveland*, 10 Pick. 13.

In construing statutes, the intention of the makers is to govern, although the construction may seem contrary to the letter of the statute. 3 Cowen, 89; 2 Pet. 662; 15 Johns. 358; 10 Pick. 235; *Henry* v. *Tilson*, 17 Verm. 479; 2 Sup. U. S. Dig. 808; *Brown* v. *Wright*, 1 Greenl. 240.

A statute may in some instances be expounded contrary to the words. 6 Comyn's Dig. Parliament, 252.

SHEPLEY, C. J. — Three of the petitioners being illegitimate children of Moses Hunt, deceased, claim as his heirs, to be entitled to a distributive share of his real estate.

Who are entitled to inherit as heirs of a deceased person, is in this State, to be determined only by the provisions of the statute in force at the time of his decease.

No rules of the civil or common law, further than they are adopted by the statute, can afford them the least aid. The rights of the petitioners must depend entirely upon the provisions of the statute, c. 93, § 3.

The first clause of that section determines very clearly, by the following words what facts are required to be proved, to enable an illegitimate child to inherit from the father or mother as an heir. "Every illegitimate child shall be considered as an heir of the person, who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate in the same manner as if he had been born in lawful wedlock."

There is no other provision of the statute intended to have any effect upon the rights of an illegitimate child to inherit as the heir to his father or mother. Every other clause of the section was inserted for a different purpose, which by the language used is clearly exhibited.

The language of the next clause is, "but he shall not be allowed to claim as representing his father or mother any

part of the estate of his or her kindred either lineal or collateral," without proof of other facts.

It is apparent, that it was intended to provide, that an illegitimate child might inherit as heir of the father or mother, while he could not inherit from a grand-father or mother, or from an uncle or aunt. From these he cannot inherit, as the third clause declares, "unless, before his death, his parents shall have intermarried and had other children, and his father after such marriage shall have acknowledged him as aforesaid, or adopted him into his family."

This clause surely was not designed to determine by what facts an illegitimate child should be considered as an heir to his father. The purpose was entirely different. It was to determine by what facts he should be regarded as an heir and capable of inheriting from lineal and collateral kindred. To use this clause or any part of it, to determine when he should inherit from his father, is to make use of it for a purpose wholly different from that for which it was enacted.

It is true, that it may authorize an illegitimate child, when so adopted into the family of the father, to inherit from lineal or collateral kindred, when he could not inherit from his father.

The substance of the argument against a literal construction admitting it, appears to be, that this would be contrary to the rules of the civil and common law; and absurd to permit one to inherit as heir to his father, and through him the estate of lineal and collateral kindred, when he could not inherit the estate of his father.

The statute fixes its own rules without any regard to the rules established by other laws, further than it adopts them. It may make one an heir to lineal or collateral kindred without allowing him to inherit from his father, as well as make him an heir to his father without allowing him to inherit from such kindred. The reason for such an enactment, may perhaps be sufficiently discerned to redeem it from the charge of absurdity. When a father has married

the mother and has had other children by her, and has adopted her former illegitimate child into his family, he has given full notice to his kindred, that he regards such illegitimate child as one of his children; and if they do not wish it to inherit from them, they will have opportunity to prevent it. And the right of the father to determine whether such child shall inherit any part of his estate, is preserved to him, and is made to depend upon his own pleasure to make a written acknowledgment of him. Circumstances may arise under the provisions of the statutes, in which it might be in furtherance of equality and apparent justice, that a father should place such a son in a condition to enable him to inherit from lineal or collateral kindred and not from himself. His mother may have property, and he will be entitled to inherit from her, when the father's former children by another wife would not. But whether sufficient reasons for such a difference can be perceived or not, when it is clearly made by a legislative enactment, it is not the province of a judicial tribunal to destroy it by a forced construction. It can only be disregarded by a construction of the section, which would give no effect to the words of the first clause requiring a written acknowledgment of the father signed in the presence of a competent witness to make an illegitimate child his heir, if he had adopted him into his family. While such an adoption is not by the statute made to constitute any part of the requirements to make him an heir of his father.

The construction contended for can receive no aid from the subsequent provisions of the section.

The next clause provides for another distinct matter; under what state of facts legitimate and illegitimate children shall be regarded as brothers and sisters and shall inherit from each other.

The last clause saves to the father and mother their right of inheritance as heirs to their children in like manner as if all had been legitimate.

Each of these clauses was designed to accomplish a spe-

cific purpose clearly exhibited and not obscurely provided for, but not including any intention to affect the right of an illegitimate child to inherit from its father. All the children are by the last clause placed on a footing of legitimacy for certain purposes named, not for all purposes.

In this case the essential fact is wanting to enable three of the petitioners to inherit as heirs to their father, that he has made no such written acknowledgment of them as his children as the statute requires.

The Act approved on April 21, 1852, although it may have been enacted for that purpose, can have no effect upon their rights. The titles of these parties to the estate of their father had become established beyond the power of any legislative body to alter them, before the enactment of that legislative declaration. Their rights must still depend upon a legal and judicial and not upon a legislative construction of the existing statute.

Judgment for partition for the share of Moses Hunt alone.

TENNEY and HOWARD, J. J., concurred.

APPLETON, J., dissented.

Dissenting opinion by —

APPLETON, J. — The petitioners and respondents claim title as heirs of Moses Hunt. It was admitted, that the mother of the petitioners at the time of their birth, resided in the family of Hunt as his house-keeper; that after their birth she was legally married to him, and after such marriage, and during its continuance, had one child by him. The petitioners were born in his house, and were members of his family till his death. They were treated as his children, were called by his name, and were maintained by him and no difference was made by him between them and the respondents, his legitimate children. Upon these facts the question submitted, is whether they are entitled to their distributive share of the real estate of which said Hunt died seized.

In this State the statute of descents, R. S., c. 93, determines the rules of succession as to the legitimate and the illegitimate. It deduces the right of inheriting from paternity and defines the facts upon proof of which it shall be considered as proved, and when proved the illegitimate acquire by its provisions, the inheritable rights of legitimacy.

The third section of R. S., c. 93, relates to the heirship of illegitimate children, and provides for two classes of cases. The first embraces children between whose parents no marriage has taken place. In this case, no provision but for the lineal descent of the estate of the father or mother is made. By the first clause of this section it is enacted that "every illegitimate child shall be considered as the heir of the person, who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as the heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in *the same manner* as if born in lawful wedlock." The time when this acknowledgment is made is immaterial. The father may at any time make his illegitimate son his heir. The inheritance conferred is limited to the estate of the father and mother, and by the next clause in the same section, the illegitimate child is prohibited from taking any thing by representation, except on certain conditions. As there is no written acknowledgment in this case, the petitioners acquire no rights under this clause of the third section.

The latter clause of this section prescribes primarily the conditions upon which the illegitimate may claim the estate of the kindred of his father and mother, whether lineal or collateral. It enacts, that the illegitimate child thus acknowledged, "shall not be allowed to claim, *as representing* his father and mother, any part of the estate of his or her kindred, either lineal or collateral; *unless* before his death *his parents shall have intermarried and had other children,* and his father, *after* such marriage, shall have acknowledged

him as aforesaid *or adopted him* into his *family;* in which case *such child and all legitimate children* shall be considered as brothers and sisters, and on the death of either of them, intestate and without issue, the others shall inherit his estate and he theirs, as provided in the first section of this chapter, *in like manner as if* all the children had been legitimate; saving to the father and mother respectively, their rights in the estate of *all* the children, as provided in the first section, in like manner as if all the children had been legitimate." The clause in this section, relating to the conditions requisite for inheriting by representation, differs from the original report of the commissioners by the insertion of the words "*or adopted him into his family.*" As the bill was originally reported, the subsequent marriage of the parents, the birth of children after such marriage and the written acknowledgment of paternity in the presence of a competent witness, were required before the illegitimate child could claim, by representation, the estate of the kindred of his father or mother. But it might happen that marriage, birth of children, and adoption into the family, might have ensued and yet no written acknowledgment of paternity have been made. Was it the intention of the Legislature to provide for this class of cases, by rendering adoption into the family equivalent to the written acknowledgment, or to make legitimation more difficult by imposing the further condition of adoption into the family, without which the others would be of no avail. If it was their purpose, that neither subsequent marriage, birth of children and a written acknowledgment of paternity should suffice, but that something more was to be added thereto, then the usages of language required "*and,*" the conjunction of addition, instead of "*or*" which is used to mark an alternative. Had this change been made no doubts could have arisen. If using "*or,*" it be construed as *and,* then they have adopted an awkward and unusual mode of expressing the idea intended.

In construing a statute words should receive their ordinary

signification. "But whatever the intention of the Legislature was," remarks Lord CAMPBELL, in *Regina* v. *St. Leonard*, 14 Ad. & El. N. S. 343, "we must judge of it only from the words employed." The general rule is to construe words according to their ordinary and natural sense. *Regina* v. *Commissioners of Sewers*, 1 El. & Black. 694. *Regina* v. *Archbishop of Canterbury*, 11 Ad. & El. N. S. 483. But the Court will not put such a construction upon the words used, as would in effect substitute others in lieu of those used by the Legislature, upon a mere conjecture as to the supposed intention. *Ripton* v. *Hodgdon*, 1. Ad. & El., N. S. 84. "We cannot," says WIGHTMAN, J., in *Cox* v. *Lawrence*, 1 El. & Black. 517, "get rid of grammatical construction and adopt the suggestion of dislocating some words and introducing others." If then we regard the Legislature as having intended to use the words they employed in their usual meaning and according to their obvious grammatical construction; if we apply to the section under consideration the recognized principles of interpretation, then the right to inherit, as representing the father and mother, is conferred, when there has been a subsequent marriage of the parents, the birth of children after such marriage and a written acknowledgment of paternity, or when to the two first mentioned conditions there is added the adoption by the father of his illegitimate children into his family. In other words, the two first requisites being the same, the written acknowledgment of paternity is legislatively recognized as equivalent to adoption into the family.

The petitioners in this case are entitled to claim, as representing their father and mother, any part of the estate of his or her kindred lineal or collateral. Their father and mother have intermarried and since such marriage have had a child. Whether they have had one or more is immaterial, as by R. S., c. 1, § 3, it is provided that in the construction of a statute "every word importing the plural number may be applied and confined to the singular number as well as the plural." The reputed father has adopted the children

into his family, and adoption is the alternative for and the equivalent of the written acknowledgment, which is required to enable the illegitimate son to inherit his father's estate. The petitioners and respondents are to be considered as mutually entitled to inherit the estate of the kindred of their father by representation equally as if they were all legitimate.

While the petitioners are permitted *as representing their father*, to claim the estate of his kindred either lineal or collateral, can they directly inherit his estate? Was it the intention of the Legislature, that illegitimate children should inherit by representation the estates of their father's kindred, whether lineal or collateral, and fail to inherit that of their father, as whose representatives alone they claim the estate of his kindred.

It is apparent that by § 3, less is required to enable an illegitimate child to inherit the estate of his father than that of his father's kindred. In the former case a written acknowledgment of paternity in the presence of a competent witness makes the child acknowledged the heir of the person thus acknowledging. In the latter the intermarriage of the parents, the subsequent birth of children after such marriage, the written acknowledgment of paternity or its equivalent, adoption into the father's family, are required before the illegitimate child can successfully claim the estate of the father's kindred. Without the latter clause, children who might claim the estate of their father could never inherit by representation. If the construction for which the respondents' counsel contends, were allowed, the illegitimate child might inherit by representation, and not lineally, against the obvious intention of the Legislature, which was to guard with more vigilance the rights of collateral than those of lineal inheritance.

When the illegitimate child claims by representation the estate of the lineal or collateral kindred of his father, that very claim involves and includes the idea of heirship. Claiming by representation is claiming derivatively. No one can

claim through one, to whom such claimant is not an heir. The person representing enters into the place, and succeeds to the rights of the person represented. The illegitimate and the legitimate, equally represent their father. Representation assumes paternity as having been established, and being established, the statute confers equal right to inherit upon legitimacy and illegitimacy. The illegitimate child inherits from and through his father, because, in each case, upon certain facts being proved, the law adjudges him his son and heir. If he claims as representing his father, it is because he is to be regarded as a son, and if a son to represent, he is equally a son to inherit. Representing the father, and through him inheriting the estate of others and yet not inheriting his estate would be absurd and contradictory. It would be to allow a collateral and remote claim, and to reject a lineal and direct right; to give to the illegitimate the inheritable rights of legitimacy as to all but the father, but as to him, to refuse and deny them.

The term "right of representation," *jus representationis*, used in the statute of descents, like most of the phraseology of that statute, as well as that of Wills, is derived from the civil law. By the provisions of that code, the heir is regarded as *una eademque persona cune defuncto.* He represents the person and estate of his ancestor and succeeds to his rights and obligations. His substitution for him is like the continued succession of corporate existence.

"Succession by law is the title by which a man, on the death *of his ancestor*, dying intestate, acquires his estate, whether real or personal, by the *right of representation as his next heir.*" Halifax Analysis of Civil Law, 47. The fourth canon or rule of descent is, *that the lineal descendants in infinitum* of any person deceased shall *represent their ancestor;* that is, shall stand *in the same place* as the person himself would have done, had he been living. 3 Cruise's Dig. 333. It is apparent, that representation is the result of and flows from heirship — and that consequently no one can represent who is not an heir. Whoever, there-

fore, can claim by representation is necessarily heir to the person represented, and as the petitioners, as his representatives, might have claimed what would have belonged to their father had he lived, so they may claim what in fact belonged to his estate as his heir — for if they are entitled to what might have been his but was not, much more are they to what was his.

The provision that "*such child* and *all* the legitimate children shall *be considered as brothers and sisters,* and on the death of either of them intestate and without issue, the others shall inherit his estate and he theirs, *as provided in the first section of this chapter, in like manner as if all the children had been legitimate,*" is important in elucidating the meaning of the Act. If they are to be considered *inter sese* as brothers and sisters, it is only because they are the children of common parents. If the rights of legitimacy are so far conferred, that the illegitimate can claim as heirs to their legitimate brothers and sisters — *a fortiori,* must it have been the legislative intention that they should claim as heirs to their father. If they are considered as brothers and sisters *in like manner* as if legitimate, they inherit by § 1, the estate of their father. They do not inherit *in like manner* as if born legitimate, if the legitimate inherit the parental estate, and the right to the same inheritance is denied to the illegitimate. If they do not inherit, it is only because not considered as legitimate brothers and sisters. But the statute imperatively requires that they shall be so considered, and consequently they must inherit the estate of their father.

The clause "saving to the father and mother, respectively, their rights in the estate of *all* the said children, as provided in the first section, in like manner as if *all* had been legitimate," leads still more conclusively to the same result. "*All the said children*" are placed on the footing of legitimacy. The father, by § 1, inherits the estate of his legitimate children, if they die without issue. But by this saving clause, the father equally inherits the estate of the illegiti-

mate as the legitimate children, if a compliance with the prescribed conditions is shown. Moses Hunt, upon the facts as admitted, would have inherited the estate of his illegitimate children dying without issue — but he would have inherited it only as their father and because his paternity had been established. As a father he would have inherited alike the estates of the legitimate and the illegitimate. If then, he could inherit the estate of his illegitimate child, could not such child inherit his? Was it the intention of the Legislature that the guilty father should inherit the estates of his illegitimate child, and to deny to the innocent child, the reciprocal right of inheriting that of his father? Is the benefit of the statute to accrue to the father alone and not to the son, for whose advantage, it was specially enacted? The father is not to be regarded in the anomalous condition of a father and yet not a father — of a father so that he may inherit the estate of the son — and not a father, when the son claims to inherit his estate.

The illegitimate may inherit the estate of his legitimate brother or sister, and they may inherit his — the father may inherit the estate of the illegitimate child and the illegitimate child the estate of his grandfather, by representation, yet, if the construction here suggested should not be adopted, the illegitimate child cannot succeed to the estate of his father, and if the legitimate child should die before the father, the inheritance which would descend to the illegitimate children, the father having deceased, would pass from them to the general heirs of the father.

The whole section must be construed together for the purpose of ascertaining by a comparison of one part with another what was the meaning of the Legislature. Upon such comparison we can have no doubt, that it was their intention to include in representation heirship to, as well as through the person represented, and to confer the full and entire inheritable rights of legitimacy upon the illegitimate, when the father and mother of such illegitimate, marry and have children and the father acknowledges his paternity in

writing in the presence of a competent witness, or by adoption into his family. The legitimation in either case is entire, not partial.

The law of succession to persons who die intestate, is founded on the presumed will of the deceased. It assumes that his wishes are in accordance with his duty and his natural inclinations, and they point to the child as the natural heir of the father. Consequently, by the law of all nations, the child succeeds to the paternal estate. The natural right of inheritance includes illegitimate as well as legitimate children, for it is the duty of parents to make provision for the support of both. But to inherit, the existence of the paternal relation must be proved, and when proved, the heirship of the son follows. *Pater est quem nuptiae demonstrant* is the rule of the common law. Hence, when a child is born out of wedlock, as "the child's father is not known, by order and judgment of law" he is called *filius populi.* The parentage being uncertain, this is deemed "an unlawful state of birth, disabling the party to succeed in inheritance." "Though the father afterwards marry the mother," says Godolphin, in his Abridgment of the Ecclesiastical Law, 478, "yet in the judgment of the common law it is still a bastard, but by the canon law it is otherwise." By the civil law, children born before marriage, are made legitimate by the subsequent marriage of the parents. Indeed, this legitimation is a privilege or incident so insuperably annexed to the marriage, that though both parents and children should refuse to waive it, the children would nevertheless be legitimate. The Code Napoleon establishes the legitimacy of children born out of wedlock, when their father and mother shall have legally acknowledged them before the marriage, or in the act of its celebration. The provisions of the statute under consideration seem manifestly intended to confer important rights upon the illegitimate.

"A thing," says THOMPSON, C. J., in *People* v. *Utica Ins. Co.* 15 Johns. 380, "which is within the intention of the makers of a statute, is as much within the statute as if it

were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." The design of this statute was to confer legitimation upon the illegitimate. It designates the conditions upon which they may inherit collaterally. But it could not have been the intention of the Legislature, that the father might inherit the son and not the son the father — that the illegitimate and the legitimate should mutually inherit each others' estates and not that of their common parent — that the illegitimate should inherit the estate of their grandfather and not that of their father — that as heirs of their brothers they should acquire the very estate of their father, and be precluded from taking it by direct descent — that they should inherit mediately and not directly — that they should have the general rights of legitimacy as to every one, but the father who adopted them, but as to him alone they should be and remain illegitimate; yet such are the unquestionable results of a different construction from the one here insisted upon. Such results I cannot believe were ever intended by the Legislature.

The construction here proposed conforms most to the just and enlightened legislation, which induced a change of the law and is in entire accordance with that principle of interpretation by which a liberal construction is to be given to all remedial statutes.

That the true construction has been given to this section is further evidenced by the explanatory Act of 1852, c. 266. A declaratory law in a case where the meaning is doubtful is not to be disregarded. If it can be gathered from a subsequent statute *in pari materia* what meaning the Legislature attached to a former statute, this will amount to a Legislative declaration of its meaning and will govern the construction of the first statute. *U. S.* v. *Freeman*, 3 How. (U. S.) 556.

The facts necessary to establish the claim of the petitioners having been proved, they are entitled to partition as prayed for.

PORTER *& als. versus* ANDROSCOGGIN AND KENNEBEC RAIL ROAD COMPANY.

By c. 91, § 14, R. S., "all deeds and contracts executed by an authorized agent for an individual or corporation, either in the name of the principal, by such agent, or in the name of such agent, for the principal, shall be considered the deed or contract of such principal."

Where a corporation makes a contract through an agent, who puts to it a *seal*, it becomes by law the *deed* of the corporation, though it has not their *common seal.*

Upon such a contract an action of *assumpsit* cannot be maintained.

ON FACTS AGREED.

ASSUMPSIT. The writ contained the money counts, a count on an account annexed and one count upon a contract signed by Hobart Clark, the defendant's agent, lawfully authorized as alleged in the writ.

All the claims of plaintiffs, in the several counts in their writ, originated under the contract declared on.

That contract was *signed and sealed* by the plaintiffs and by Hobart Clark, an agent of the defendants.

The defendants' corporate capacity was admitted, and as such, vested with the usual privileges and subject to the common liabilities of other corporations. The contract was without a *corporate seal,* but had a common seal used and adopted by the defendants in this case.

Whether the action was maintainable was submitted to the Court.

Codman and *May,* for the plaintiffs.

W. Goodenow and *Fessenden & Deblois,* for defendants.

1. The law will not *imply* a promise on which to ground an action, where there is an *express* promise. *Charles* v. *Dana,* 14 Maine, 383; *Whiting* v. *Sullivan,* 7 Mass. 109; *Cutter* v. *Powell,* 6 Term. R. 324; *Marshal* v. *Jones,* 11 Maine, 54.

2. Here was a contract under seal, and the action should have been covenant. *Bulstrode* v. *Gilburn,* 2 Strange, 1027; Espinass. N. P. 96; *Richards* v. *Killam,* 10 Mass. 243; *Kimball* v. *Tucker & al.,* 10 Mass. 192.

3. The sealing by the corporation was sufficient. Angel & Ames on Corpo., § 217; *Mill-Dam Foundry* v. *Hovey,* 21 Pick. 417; *Bank of Columbia* v. *Patterson,* 7 Cranch, 304; *Randall* v. *Van Vechten,* 19 Johns. 60; *Bank of Metropolis* v. *Guttschlick,* 14 Pet. 29; *Stinchfield* v. *Little,* 1 Greenl. 231; *Decker* v. *Freeman,* 3 Greenl. 338; R. S., c. 91, § 14.

TENNEY, J. — This is an action of *assumpsit* to recover payment for certain labor alleged to have been done, money paid, services rendered, and materials found by the plaintiffs, under a written contract dated May 16, 1848, signed and sealed by the plaintiffs and by Hobart Clark, an agent of the defendants, with a common seal, used and adopted by the corporation in this case, though not the corporate seal.

It is well settled, that the action of assumpsit cannot be maintained against a party upon the sealed instrument of that party. The action must be debt or covenant. 1 Chitty's Pl. 94 and 95; *Banorgee* v. *Hovey & al.,* 5 Mass. 11; *Kimball* v. *Tucker & al.,* 10 Mass. 192; *Charles & al.,* v. *Dana,* 14 Maine, 383.

By R. S., c. 91, § 14, "all deeds and contracts executed by an authorized agent for an individual or corporation, either in the name of the principal, by such agent, or in the name of such agent, for the principal, shall be considered the deed or contract of such principal." No question is made, that the contract relied upon in this action in its support, is that of the corporation. The action is brought upon it against the defendants; and they in their argument admit it to be their contract. It was executed by the plaintiffs, and by the agent of the defendants, as a deed, seals being affixed thereto. The adoption of the seal placed there by Clark when he executed the instrument, must be supposed to have been done by an act which was legally binding upon the corporation. It is not material with what seal the instrument is sealed, for the seal of a stranger is

sufficient, and if a corporation seal, there is no need to say, *sigillum nostrum commune.* 4 Com. Dig. Fait. A. 2.

In *Mill-Dam Foundry* v. *Hovey,* 21 Pick. 417, PUTNAM, J., in delivering the opinion of the Court, says, "a corporation as well as an individual person, may use and adopt any seal. They need not say it is their common seal. This law is as old as the books. Twenty may seal at one time with the same seal."

It was therefore the deed of the defendants, whether the agent executed it in the name of the corporation, or in his own name for the corporation. It was the defendants' deed also by the ratification of the agent's act, by adopting the seal. *Plaintiffs nonsuit.*

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

CHASE *& als. versus* JEWETT.

In an action upon written orders for the delivery of goods, which contain no reference to any prior negotiation between the parties, parol testimony to show a previous agreement for a longer term of credit than that expressed by the orders, is inadmissible.

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

ASSUMPSIT, for goods delivered to defendant on three orders, by him drawn on the plaintiffs, of the following tenor:

"PORTLAND, July 30, 1851.

"Please let Mr. B. Rand have hardware to an amount not exceeding one hundred and fifty dollars, and I will settle with you for the same."

"Nov. 29, 1851.

"Please let B. Rand have goods to the amount of fifty dollars and charge the same on account."

Another dated Feb. 17, 1852, similar to the preceding.

The suit was commenced on Feb. 28, 1852. Plaintiffs proved the delivery of items of hardware after the date of the orders to their amount.

The defendant showed by Rand that he, witness, was sent

by him to the plaintiffs to make the trade for hardware for his house which he was building. That he told one of the plaintiffs he should want about $200 worth, and wanted the account to run a year. He said, he had no objection if Woodbury, his partner, would consent. The witness saw Woodbury soon after and he said he would let the defendant have the goods on one year.

The orders were made at the request of the witness, and the first one was drawn soon after the conversation with Woodbury. The witness made known to defendant that the goods were to be on a year's credit, when the order was given.

All the testimony of Rand was objected to, especially all testimony tending to show any different contract than that contained in the written orders, or any different term of credit than was provided for in the written orders, but the presiding Judge admitted the evidence.

The jury returned a verdict for defendant. To the instructions exceptions were taken, as well as to the admission of defendant's testimony, but the point, upon which the opinion of the Court was based, renders it unnecessary to give the instructions.

Shepley & Dana, in support of the exceptions.

That the testimony of Rand was inadmissible and should have been excluded, they cited *Goss* v. *Lord Nugent,* 5 B. & Ad. 58; Phil. on Ev., Cowen & Hill's notes, part 2d, Note 295, page 358, 3d Am. Ed., where the cases are collected. *Barker* v. *Prentiss,* 6 Mass. 434; *McCullough* v. *Girard,* 4 Wash. C. C. R. 292; *Mead* v. *Steger,* 5 Porter, 505; *Barringer* v. *Sneed,* 3 Stew. 201; *Simpson* v. *Henderson,* 1 Moody & Mal. 300; *Thompson* v. *Ketchum,* 8 Johns. 189; *Hunt* v. *Adams,* 7 Mass. 518; *Pattison* v. *Hull,* 9 Cowen, 747.

S. C. Strout, contra.

TENNEY, J. — The foundation of this action is three orders given by the defendant on the plaintiffs for goods, which were proved to have been delivered thereon; on one, the

defendant promised, "I will settle with you for the same;" and on each of the others were added the words, "and charge the same on account."

The import of these orders was, that the goods directed to be delivered were to be paid for, on demand. Without the evidence in defence, the orders and the proof of the delivery of the goods, would entitle the plaintiffs to prevail in a suit instituted immediately afterwards.

If instead of the orders, the defendant had received the goods and thereupon had given his note for the amount without specifying the time of payment, the contract would not have varied essentially from those now relied upon, in respect to the time when he would be bound to pay the amount. In both cases the law would require payment presently.

"Parol cotemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." 1 Greenl. Ev. § 275. And in obedience to this principle, when the instrument purported to be absolute to pay at a specified day, parol evidence at the same time, that the payment should be prolonged, was held inadmissible. *Hanson* v. *Stetson*, 5. Pick. 506, was an action of assumpsit, on a note of hand, given by defendant to the plaintiff, to pay fifty dollars on demand. In defence, parol evidence was offered, that the note should not be called for, so long as the interest should be paid. The maker of the note always paid the interest punctually. The evidence was rejected. And the Court held the evidence in direct contradiction of the note. *Spring* v. *Lovett*, 11 Pick. 417.

The case of *Hunt* v. *Adams*, 7 Mass. 519, was that of a note given by Joseph Chaplin to Isaac Bennett, and on the same paper below, was the following: "I acknowledge myself holden as surety for the payment of the demand of the above note," and signed by the defendant. At the trial, the defendant offered to prove, by oral testimony, that it was agreed between Bennett and Chaplin, at the time the note was given, that the defendant was liable only in the event of a final loss, occasioned by the inability of Chaplin, and

that event had never occurred. The evidence was rejected. The opinion of the Court was delivered by SEWALL, J., who says, "In this case, the agreement preceded the making of the note in question," — "and this evidence may be objected to as irrelevant. In the motion, the previous agreement between Bennett and Chaplin, is not stated to have been communicated to Adams, the defendant; and then it is in no sense his agreement; or if it was communicated, there is no necessary presumption, that he substituted his guaranty with any reliance upon that stipulation." The evidence offered and rejected, was held inadmissible and incompetent to control the legal effect of a written contract.

The evidence adduced in the defence of the present action, on the authority of the case last referred to, was irrelevant; the negotiation between Rand and the plaintiffs having preceded the orders. Nothing upon their face shows that they were drawn with any reference to that negotiation; and they must be construed according to their own terms, unaffected by parol evidence, which was introduced for the purpose of changing their legal effect.

The evidence received was inadmissible when objected to, and the instructions based upon it were erroneous.

Exceptions sustained. — New trial granted.

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

SYMONDS *versus* HALL *& al.*

The lessee of a farm, who stipulates that one half of the hay shall be consumed on the farm and the other half divided between the lessor and lessee, has the *entire* property in the hay, until *division* be made.

A *division* made under such contract vests the portions divided separately in the lessor and lessee, but the undivided half to be consumed on the farm without a *delivery* to the lessor, remains the property of the lessee.

An officer who seizes goods as the property of a debtor, which do not belong to him, is a trespasser, and no subsequent disposition of the property can deprive the true owner of his rights thereto.

Symonds *v.* Hall.

A purchaser of such goods at a public sale acquires no title to the property as against the owner, and if he remove them, is liable to an action of trespass.

And the officer and purchaser may be joined in one action.

But damages for the separate trespass of one of the defendants cannot be included in a judgment against both.

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

TRESPASS *de bonis asportatis* for a quantity of hay.

Hall, one of the defendants, claimed to have seized and sold the hay, as a deputy sheriff, on an execution against one James H. Foster, as his property, and *Morrill*, the other defendant, claims that he was the owner of the hay, having bought it at a public sale by the other defendant, in his capacity as deputy sheriff.

It appeared, that the plaintiff was the owner of the farm on which the hay was cut, and that James H. Foster occupied the farm under this contract.

The parts of it bearing upon this case were as follows:—

"The said Symonds, for the consideration hereinafter mentioned, doth hereby covenant and agree, that said Foster shall have the use and benefit of the Symond's farm and buildings in said Raymond with all the product of the farm and benefit of the buildings, excepting what is hereinafter mentioned and for the term of three years. Said Symonds reserves the privilege of stowing the hay that is now in the barn and his part of the hay cut on the place, and also the stock that he may keep to eat up his part of the hay. Said Foster on his part agrees to carry the farm on well, secure the hay in good season and order. One half of the hay cut on the farm is to be eat by the stock kept on the farm, the other half of the hay is to be divided equally between the contracting parties, and to pay forty dollars a year for rent," &c.

It also appeared, that before the attachment by defendant Hall, Foster and plaintiff met and divided the hay according to the contract; one fourth to each, and the remaining half to be kept and used on the farm. This division was made in the barn by the parcels in the different places.

In the ground mow, the plaintiff was to have the lower part up to the girts, and Foster to have the part above that point; that afterwards the defendants came with teams and took and carried away the greater part set off to the plaintiff, and all which was to be consumed on the farm.

The case was submitted to the full Court, with power to draw inferences as a jury might do, and to enter judgment according to the rights of the parties.

Shepley & Dana, for the defendants.

Fessenden & Deblois, for the plaintiff.

1. The defendants were trespassers in taking the three parts of all the hay. So much of it belonged to the plaintiff under the written contract, fairly construed. *Tooke* v. *Hollingwood,* 5 Term R. 228; Long on Sales, 107; *Patrick* v. *Grant,* 14 Maine, 233; 12 Maine, 429; 25 Maine, 401; 19 Maine, 394; 29 Maine, 346; 8 Mass. 214; 2 Story, 122.

2. Morrill, the purchaser, under the circumstances was a trespasser. *Commonwealth* v. *Kennard & al.,* 8 Pick. 133; Chitty's Pl. §§ 129, 185, 170; *Bond* v. *Ward,* 7 Mass. 123; *Woodbury* v. *Long,* 8 Pick. 543; *Towne* v. *Collins,* 14 Mass. 500; *Bradeen* v. *Brooks,* 22 Maine, 474.

HOWARD, J. — The contract between the plaintiff and Foster was in legal effect a lease, by which the latter was entitled to the "use and benefit" of the farm of the former, with all the products of the farm, and benefit of the buildings, excepting what is hereinafter mentioned." The lessor reserved to himself a specified portion of the dwellinghouse and "a privilege of stowing the hay that is now in the barn, and his part of the hay to be cut on the farm, until sold or disposed of." The lessee was to "carry the farm on well, secure the hay in good season and order," and, as stipulated in the lease, "one half of the hay cut on the farm is to be eat by the stock kept on the farm; the other half of the hay is to be divided equally between the contracting parties." There is no provision in the agreement as to keeping stock upon the farm, excepting what applies to the

lessee. He was to have a sufficient part of the barn and shed to "stow and keep all his part of the hay cut on the place, and the stock he may keep to eat up his part of the hay;" and he was to pay forty dollars rent, annually.

Under this contract, Foster, the lessee, entered into possession, and cultivated the farm, and secured the products, as it seems, according to the agreement. He thus became owner of the entire products, until there had been a division of the hay as stipulated in the agreement. Till then, the plaintiff could not take any portion of the hay, as his own property; but his rights and remedies were *ex cathedra*, in respect to the lease, upon the stipulations of the lessee. The contract, until executed, gave him no claim *in rem* upon the hay, or other crops of the farm. *Bailey* v. *Fillebrown*, 9 Maine, 12; *Dockham* v. *Parker*, 9 Maine, 137; *Turner* v. *Bachelder*, 17 Maine, 257; *Garland* v. *Hilborn*, 23 Maine, 442; *Butterfield* v. *Baker*, 5 Pick. 552. These cases fully support this construction of the agreement between the plaintiff and Foster.

The evidence establishes the fact of a division of the hay, contemplated by the parties to the lease, before the attachment. By that division, the plaintiff became possessed, as owner, of the "first mow, or scaffold, next to the road," and the "ground mow below the top of the girts," in the large barn, as his quarter part of the hay cut upon the farm. But to the "undivided half" of the hay, he acquired no title, by division or by delivery. This remained the property of the lessee, upon the legal construction of the contract, as before stated.

By an act of trespass, one cannot acquire a right in the property of another, as against him. An officer who seizes on execution the goods of one who is not the debtor, is a trespasser; and if he keep and sell them, these are but additional acts of trespass, commencing, continuing and ending in wrong, and from which no rights accrue against the owner. The purchaser can acquire no title to the goods from one who had no right to them; for neither the official character

of the vendor, nor the publicity of the sale, can legalize the trespass and sustain the purchase. *Wheelwright* v. *Depeyster*, 1 Johns. 471; *Carter* v. *Simpson*, 7 Johns. 535; *Saltus* v. *Everett*, 20 Wend. 267; *Commonwealth* v. *Kennard*, 8 Pick. 133; 1 Chitty's Pl. 185; *Cooper* v. *Chitty*, 1 Burr. 32. But sales of property authorized by law, will be upheld, notwithstanding irregularities in the proceedings of the vendor in effecting the sale. Public policy requires that the innocent purchaser should not suffer by the neglects of an officer in executing a legal precept within his authority and jurisdiction. *Ladd* v. *Blunt*, 4 Mass. 402; *Hunter* v. *Perry*, 33 Maine, 159. So, if one obtain goods by fraudulent purchase, which is void in respect to himself, and transfer them to another, *bona fide*, and without notice, the property has been held to pass to the latter, and the vendor cannot maintain trespass for the property. *Mowrey* v. *Walsh*, 8 Cow. 238; *Parker* v. *Patrick*, 5 T. R. 175.

In taking and selling the hay of the plaintiff, on the scaffold, on November 15, on an execution against Foster, after the division had been effected, the defendant Hall was a trespasser; and Morrill, the other defendant, by purchasing that portion of the hay and removing it, with the assistance of the officer, became a joint trespasser; and both will be held responsible to the plaintiff for the damages accruing to him from that sale of his hay. The officer, Hall, is also accountable in like manner, for taking, selling and delivering to others, the remaining portion of the plaintiff's hay, in the "ground mow," on November 29, in which Morrill did not participate, and for which he is not accountable, upon the pleadings and proof.

The plaintiff is entitled to judgment against both defendants for the joint trespass, but not for the several trespass of Hall. Or, he may discontinue as to Morrill, and take judgment against Hall for both trespasses.

As we are unable from the evidence reported, to assess the damages accurately, there must be a further hearing for

that purpose, unless the amounts shall be agreed upon by the parties. *Defendants defaulted.*

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

LIBBY, *pro ami, versus* LIBBY, *administrator.*

Where the husband effects an insurance on his life "for the sole and separate use and benefit of his wife," if she dies before her husband, the property in the contract of insurance becomes vested in her heirs.

If the assured leave children by a former wife, *they* can take no portion of *such* insurance by inheritance, while any issue of the second wife survive.

But if the wife and her children die before the assured, then the beneficial interest of the contract of insurance is in him, and his administrator is authorized to receive the sum insured.

And if the assured leave children by a former wife, by our statute *they* shall inherit the sum secured by the policy, less the amount of premium paid and interest thereon, without being subject to administration.

ON FACTS AGREED.

ASSUMPSIT against defendant as administrator of the estate of Charles Libby.

On the 27th day of January, 1852, Charles Libby, the father of plaintiff, effected a policy of insurance upon his life, which "was made for the sole and separate use of Hannah E. Libby, (wife of said Charles,) and in case of her death before the said Charles, the amount of the said insurance shall be payable to her children for their use."

On the 18th of April, 1852, said Hannah died, leaving one child only, named Oscar, being also the child of said Charles, and also leaving the plaintiff, a son of said Charles, by a former wife. Her father, Stephen H. Davis, survives her.

On the 11th day of June, 1852, said Oscar died, and on the 13th day of the following August, Charles Libby, the assured, also died, leaving the plaintiff now under guardianship.

The question arising between the several parties and

the insurance company, to whom the policy should be paid, was referred to one learned in the law, who determined that the administrator of said Charles Libby was alone entitled to collect and receive the same, and to whom it was paid. The defendant claimed to administer upon it as part of the estate of Charles Libby.

It was stipulated, that if in the opinion of the Court, the plaintiff is entitled to the money, the defendant is to be defaulted, otherwise the plaintiff is to become nonsuit.

Anderson and *Harmon,* for defendant.

Shepley & Dana, for plaintiff.

SHEPLEY, C. J. — Charles Libby, on January 27, 1852, procured a policy of insurance on his own life, payable to his wife, who became legally entitled to the benefit of it by the provisions of the statute approved on Aug. 2, 1847, c. 27. Upon her decease, on April 18, 1852, her son and only child, Oscar Libby, became entitled to it by inheritance; and upon his decease on June 11, 1852, his father, Charles Libby, being his heir at law, became entitled to the benefit of it; and by the common law, the amount payable upon his decease, would have constituted a part of his personal estate, in which his creditors might have had an interest.

It is provided by statute approved on March 21, 1844, c. 114, "whenever upon the death of any person, who shall leave a widow and issue, or either, upon whose decease any sum or sums of money shall become due on account of any insurance on his life, obtained and effected by said deceased person, such sum of money, which is over and above the amount of premium paid by said deceased for such insurance, together with interest on said premium," "shall not make any part of the estate of the deceased," "but the same shall be distributed, if the deceased died intestate, without diminution, as provided in the sections following."

By the third section it is provided, that the issue shall be entitled to the whole, except the premium and interest thereon, if there be no widow.

To bring a case within the provisions of the statute, it must be shown, that the policy was effected by the deceased person upon his own life for an amount payable upon his decease, and that he at the time of his decease was entitled to the benefit of that insurance, and that he died leaving a widow or issue.

No provision is found in the statute requiring, that the amount insured should by the policy be made payable to the person whose life is insured. It is sufficient, that he was at the time of his decease legally entitled to the beneficial interest secured by the policy, and that there has been a compliance with the other requirements of the statute.

Deducting the premium, with interest upon it, to the time of the decease of Charles Libby, the plaintiff will be entitled to the remainder. *Defendant defaulted.*

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

STATE OF MAINE *versus* PAYSON.

An indictment cannot be said to contain *two offences* in one count, which alleges a nuisance and describes the place of its existence.

If the defendant is found guilty of a part only of the offence charged, he is legally acquitted of the rest of the indictment.

ON EXCEPTIONS, HOWARD, J., presiding.

INDICTMENT, against the defendant, "for, that on, &c., at, &c., near to a certain public street and common highway there, and near the dwellinghouses of divers citizens of said State, he did, and still doth keep twelve hogs and pigs in a certain pen and yard, there near to the said public street and common highway, &c., and unlawfully and injuriously, said hogs and pigs did feed, and yet doth feed with offal, &c., and did unlawfully and injuriously collect, and did cause and suffer to be collected and to remain near to said public street and common highway, and dwellinghouses, large quantities of offal, &c., by reason of which said keeping of said hogs and pigs there as aforesaid, and of feeding

said hogs and pigs there in manner as aforesaid; and by reason of which said collecting and causing and suffering to be collected and to remain the said large quantities of offal, &c., divers noisome and offensive smells and exhalations arose and corrupted the air," &c.

The jury rendered a verdict — "Defendant guilty of a nuisance by making deposits in the field."

A motion was filed in arrest of judgment.

1. Because the indictment in a single count charges two distinct substantive offences, each in itself complete, and requiring its own defence and each requiring its own verdict.

2. Because if the indictment contains a charge of but *one* offence, the jury have found the defendant guilty of but a part of that offence, which they had no right to do.

The motion was overruled and exceptions taken.

Payson, in support of the exceptions.

Deane, County Attorney, *contra*.

SHEPLEY, C. J. — One of the reasons assigned for an arrest of judgment is, that two distinct offences are alleged in one count. That the first consists in the erection or continuance of a pen, in which swine were kept, and the second in the accumulation of offal near that place.

The allegation respecting the first is, that swine were kept "in a certain pen and yard there near to the said public street and common highway," and that they were fed with offal, &c. There is no other allegation respecting the pen, and that does not describe the offence of erecting, continuing or using any building for the exercise of any employment, occasioning offensive smells, prohibited by the first clause of the first section of the statute c. 164. It does not allege that the accused erected, continued or used the pen for any employment occasioning offensive smells. It is only a description of the place, where the swine were kept, which were fed with such matter as occasioned a nuisance.

The other reason assigned is, that the jury have found the

accused to be guilty of a part only of the offence charged, and have not found that he was not guilty of the residue.

When a person indicted for an offence shall, by the verdict of a jury, be acquitted of a part of it and found guilty of the residue, he is, by the provisions of the statute c. 166, § 7, to be considered as convicted of the offence, if any, which is substantially charged by the residue, of which he is found guilty. The verdict in this case, as presented, does not contain any formal words of acquittal of a part of the offence; yet such is its legal effect. For when the verdict of a jury finds the accused guilty of a certain part of the offence only, the effect is an acquittal of every thing else charged. The legal effect of the verdict, and not the language used in it, must have been intended by the provisions of the statute, for such verdicts are in the customary course of business, presented orally and not in writing.

The verdict does find the accused guilty of a nuisance occasioned by making deposits in the field, meaning such deposits as are alleged in the indictment to have been made, and he is legally acquitted of the other part of the offence charged. *Motion overruled.*

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

HUNT *& als. versus* HALL.

By c. 129, R. S., it is provided, that one having the next immediate estate of inheritance, may maintain an action of waste, against a tenant for life, who suffers or commits any waste on the premises.

No *such action* can be maintained by one having only a *contingent* remainder.

A testator devised land to his wife during her life, and at her decease to be divided among his children, and the heirs of such as may then be deceased. *Held*, that the remainder, after the termination of the life estate of his wife, was contingent until her death.

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

CASE in the nature of waste. The defendant justifies his acts upon the estate by a license and permit from the tenant for life.

It appeared, that Ephraim Hunt at his decease was the owner of the premises described in the writ, and that the persons alleged to be his co-tenants were his children and the children of Jeremiah Hunt, a deceased son of said Ephraim, and that he had no other children.

Three of the children of Ephraim had conveyed their interest to their brother, one of the plaintiffs, and their deeds were produced.

The will of Ephraim Hunt had been duly proved, by which he disposed of his estate thus: —

1. I give, devise and bequeath to my beloved wife, Martha Hunt, my homestead estate, being all my real estate in the town of Brunswick, together with all my household furniture, to have and to hold, occupy and improve the same during her natural life, and at her decease to be disposed of as hereafter directed.

2. After the decease of my dear wife, my will is, that my executor hereinafter named, cause an equal division to be made among all my children and the heirs of such as may then be deceased, of all my property, both real and personal, &c.

Martha Hunt is still alive. Evidence was introduced tending to prove the acts alleged in the writ.

After all the evidence was produced by plaintiffs, the defendant moved for a nonsuit on the ground that they had no such interest in the said estate of Ephraim Hunt under and by virtue of his will, as would enable them to maintain this action.

The presiding Judge ordered a nonsuit, and the plaintiff excepted.

Fox & Simmons, in support of the exceptions, cited the following authorities. — 4 Kent, 214, 7th Ed.; *Moore* v. *Lyon*, 25 Wend. 119; *Dingley* v. *Dingley*, 5 Mass. 535; *Bates* v. *Webb*, 8 Mass. 458; *Nash & ux.* v. *Cutler & al.*, 16 Pick. 491; *Ballard* v. *Ballard*, 18 Pick. 43; *Hall* v. *Tufts*, 18 Pick. 455; *Child* v. *Russell*, 11 Metcalf, 16;

Browne v. *Lawrence*, 3 Cush. 390; *Wright* v. *Shaw*, 5 Cush. 60.

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

1. No person can maintain an action of waste, or in the nature of waste, except he who has the next immediate estate of inheritance in the property wasted, and where the fee is in abeyance, it may follow, that the tenant for life is dispunishable for waste. 1 Cruise, Tit. 1, § § 56 and 57, pp. 18 and 19; 1 Cruise, Tit. 3, § 40, p. 70; R. S., c. 129, § § 1 and 4.

2. The nonsuit was rightly ordered, because the plaintiffs here have no such interest in the estate as entitles them to maintain an action. Their interest is purely contingent. *Olney* v. *Hull*, 21 Pick. 311.

APPLETON, J. — This is an action of the case in the nature of waste, and is brought under the provisions of R. S., c. 129, § § 4 and 5.

Ephraim Hunt, under whom the plaintiffs derive title, by his last will gave a life estate in the premises in which waste is alleged to have been committed, to his wife, and after her decease, directed that equal division should be made among all his children, and the heirs of such as might then be deceased, of all his property, both real and personal. The tenant for life is still living, and the defendant represents her estate.

The rights of the parties depend upon the nature of the estate, which was devised by the will of Ephraim Hunt, which was in the words following: — "*After* the decease of my dear wife, my will is that my executor hereafter named cause an equal division to be made among *all my children and the heirs of* such as may *then* be deceased." The persons who are to take are not those who are living at the death of the testator. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator, an heir might convey by deed his

share of the estate, and if he should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provisions of the will, which provide that the estate should be divided "among his children and the heirs of such as may then be deceased." By the terms of the will, the estate is not to vest till after the death of the widow, and then the division is to ensue. Till then there is a contingency as to the persons who may take the estate.

"Contingent or executory remainders, (whereby no present interest passes,) are when the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious or uncertain *event;* so that the particular estate may chance to be determined and the remainder never take effect." 2 Bl. Com. 169. In *Olney* v. *Hull*, 21 Pick. 311, the words of the devise were almost identical with those in the case now under consideration, and the Court held that until the death of the widow, it was uncertain, who would then be alive to take, and that therefore no estate vested in any one before that event happened. Where an estate is limited to two persons during their joint lives, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive. 2 Cruise's Dig. Title 16, Remainder, c. 1, § 21. So where one devised lands to his daughter H. and her husband, for their respective lives, and after their death to the heirs of H., it was held that the remainder was contingent until the death of H., and then vested in the persons who were then heirs. *Richardson* v. *Wheatland*, 7 Met. 169; *Sisson* v. *Seabury*, 1 Sum. 235.

It is obvious that by the terms of the will, the plaintiffs took a contingent and not a vested remainder. They are not within the provisions of R. S., c. 129, and consequently are not entitled to maintain this action.

Exceptions overruled. — Nonsuit confirmed.

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

JOSE *versus* MOULTON.

A person who instructs a town school without the statute certificate from the Superintending School Committee, cannot recover his wages against the *town*.

And if for the year in which such school is kept, no Superintending School Committe has been chosen, such omission of the town will not aid the plaintiff to recover.

Nor can *such teacher* collect his wages from the agent who employed him, although the district itself, might not in all respects, have been originally legally established, or such agent might not have been sworn.

ON FACTS AGREED.

ACTION ON THE CASE.

In September, 1849, the defendant claiming to act as agent of district No. 9, in Scarborough, agreed with the plaintiff to teach their school the following winter, at a price agreed. The contract was performed, and at its termination the plaintiff received a certificate from defendant in his capacity of agent, of the amount of his wages as due from the town.

In 1836, the limits of the school district were described upon the town records, but no acceptance was found. But the town had set off individuals from that to other districts; and the inhabitants residing within the limits of the supposed location, had usually acted as a district.

For the year 1849, three Superintending School Committee were chosen, but neither of them were ever sworn, and two of them did not reside in the town of Scarborough.

The agent was not sworn until May 7, 1850.

It was stipulated, that the Court might draw such inferences as a jury might, and render judgment according to the legal rights of the parties.

Fox, for the plaintiff.

Butler, for the defendant.

TENNEY, J. — The plaintiff seeks to hold the defendant liable for his wages for instructing a school in district No. 9, in Scarborough, in the municipal year 1849, on account of

an omission in the records of the town, to show that the district was legally constituted, the defendant having employed the plaintiff, assuming to act in the character of agent for such district. Unless compelled by inflexible rules of law, a court would reluctantly hold liable a person who honestly believed himself the agent of a school district, authorized to act as such, which district for many years had been recognized by the town in its corporate action, and by the citizens of the territory composing it, and which had received the proportionate part of the money raised for the support of schools, merely because the records failed to show all the required formalities in its erection. But we do not find ground to hesitate in coming to a conclusion in favor of the defendant, upon the facts of the case.

The plaintiff contracted with the supposed agent to keep a school for the town of Scarborough, in district No. 9. He understood it to be a town school. This is manifest from the fact, that at the close of the school he took from the defendant, a bill signed by him as agent for that district, against the town for his wages, at the price agreed; and it is also manifest from the averments in his writ.

If the plaintiff, by his own neglect of duty, was unable to recover his wages of the town, for instructing in a legally constituted district, he cannet be permitted to avail himself of such omissions in the town's proceedings, in the attempt to form the district, which omissions prevented the attainment of their object, and for that cause hold the defendant personally liable.

No person under the penalty provided by R. S., c. 17, § 45, shall teach any public school, without the certificate therein specified. Stat. 1847, c. 25, § 6. And by the section referred to in that provision, the person so teaching, shall, in addition to a forfeiture, be barred from recovering any pay for teaching the school.

The plaintiff had no certificate, that he possessed the requisite qualifications, and such certificate as he had, was not from the superintending school committee for the year in

which he kept the school. *Jackson* v. *Hampden*, 20 Maine, 37.

The case finds that two of the committee for the year 1849, were not residents of the town of Scarborough, and neither of them took the oath of office. Assuming that there was no committee that year, authorized to act as such, the plaintiff cannot therefore recover, against the express prohibition in the statute. In *Jackson* v. *Hampden*, just referred to, it is said by the Court, "if all the members [of the committee] should neglect, or even wantonly refuse to examine a person, he would not be authorized to teach and recover his wages without the required certificate. The production is an indispensable prerequisite to a legal employment." And it is no less so in this case.

Plaintiff nonsuit.

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

INHABITANTS OF BALDWIN *versus* TRUSTEES OF MINISTERIAL FUND IN BALDWIN.

It is provided by law, that "all personal property of the *inhabitants* of this State" shall be subject to taxation in the *manner* therein declared.

The term "inhabitants," as used in the Revised Statutes, embraces bodies corporate as well as individuals.

The property of corporations, when not otherwise subjected to assessment to the shareholders, is taxable to such corporation.

To incur such liability, it is not necessary that the corporation should be the owner of the property, or should have a beneficial interest therein; it is enough that they have the *legal* ownership.

Thus the trustees of a *fund* for the support of the gospel ministry, though living in different towns, are liable to be assessed for such *fund* in the town where the income is to be applied.

ON FACTS AGREED.

ASSUMPSIT to recover the taxes assessed in the year 1850, upon a fund held by defendants. [All objections to the form of the action were waived.]

The defendants are the trustees of the ministerial fund in Baldwin, under the provisions of an Act of Massachusetts, passed Feb. 15, 1816, making them a body politic and corporate forever.

The lands referred to in said Act, were originally reserved in the grant of the township, afterwards Baldwin, by the Commonwealth of Massachusetts, for the support of the gospel ministry in that town. Under the provisions of the Act of 1816, they were sold in the year 1818, and the proceeds were, and have continued to be funded ever since in the hands of the trustees. The income is to be appropriated to the support of the gospel ministry in that town.

In 1826, the town of Sebago was formed from territory originally a part of Baldwin. By the Act incorporating Sebago, it was provided, that the Act should not be construed to affect a division of the Congregational parish in Baldwin, or the ministerial fund of said parish, but the same shall be and remain as if this Act had not passed.

Since that time the inhabitants of said towns have continued, as formerly, to act in parish meetings, as one and the same parish, and the income of the fund has been appropriated, by vote of the trustees, according to the votes of the inhabitants of the two towns, in parish meeting assembled.

The board of trustees has always been constituted, since the division of the town of Baldwin, of individuals, part of whom resided in Baldwin, and part in Sebago. The treasurer, in 1850, resided in Baldwin.

It was agreed, that if said fund was legally liable to assessment in said town of Baldwin, the defendants should be defaulted; otherwise the plaintiffs should become nonsuit.

Willis and *Fessenden*, for the defendants.

1. This fund does not come within the provision of c. 159, of Acts of 1845, § 2. It is not the property of the trustees. They hold for a purpose in which they have no interest, and cannot be assessed for it as of their own estate.

It was not the property of any inhabitant, or number of

inhabitants. It was controlled by the first parish in Baldwin. *Richardson* v. *Brown*, 6 Greenl. 355.

But they had no property in the *fund*. It was not theirs.

2. To render personal property *taxable*, there must be a person to be taxed. The language of § 2, sustains this position. Where there is no *person* to whom such property is taxable, it cannot be liable.

The objection is not obviated by § 9 of the same Act. The trustees are not owners and they reside in different towns.

3. It cannot be assessed to the treasurer of the first parish in Baldwin, for the property is not *held* by any religious society as a ministerial fund. It is *held* by trustees who are bound to appropriate it in a certain specified mode. The treasurer of the trustees in not *ex officio* the treasurer of a religious society. *Hunt* v. *Perley*, 34 Maine, 29. It results from these positions that the property is not liable to assessment, because there is no legal mode in which such assessment can be made or enforced. An assessment of the *fund* is merely nugatory.

Shepley & Dana, for the plaintiffs.

SHEPLEY, C. J. — The action has been commenced to recover the amount assessed in the year 1850, by the plaintiffs, upon a fund held by the defendants. It is provided by the Act approved on April 5, 1845, c. 159, § 2, that "all personal property of the inhabitants of this State" — "shall be subject to taxation in the manner provided by this Act."

It is contended, that the fund does not come within this provision. By the Act approved on February 15, 1816, it is provided, that the trustees and their successors, "shall be and continue a body politic and corporate forever." And by the Revised Statutes, that the word "person" may extend to and include bodies corporate as well as individuals. That word is not used in the clause quoted from the second section, but it is followed by a provision, that the personal property of "persons not inhabitants of the State, shall be

subject to taxation." In enactments since the Revised Statutes were operative, it has not been considered necessary to name corporations, when it was intended to subject them to the provisions of the enactment; and the word person, may not have been carefully used in such cases. If the word "inhabitants" were not considered as including bodies corporate, there would be found in the Act no express provision subjecting all their property to assessment. For they may have much personal property not subject to assessment in the manner provided for by the second mode of the tenth section. Provision is there made only for the assessment of real estate, machinery, and manufactured or unmanufactured goods of the corporation. Yet it is quite apparent from those and other provisions of the Act, that no property of corporations in this State, except that of literary, benevolent, charitable and scientific institutions incorporated, was intended to be exempted from assessment to them, when not assessed to the owners of their shares.

The argument for the defence would require such a construction of the Act as would leave certain descriptions of personal property owned by corporations in the State, neither subjected to nor exempted from taxation by the Act. While the intention appears to have been to do one or the other; and such should be its construction, if it may be consistently with the use of language and the rules of law. The property of corporations, unless specially exempted, must be considered as liable to assessment to the corporation, when not otherwise subjected to assessment to the shareholders.

It is further insisted, that property is subjected to assessment only in the manner provided by the Act; that no provision is made for the assessment of this fund; that it is not included in the provision for the assessment of personal property to the owners, because the trustees are not the owners, having no interest in the fund.

It is true, that the persons composing the trustees have no interest in it; and that the corporation, by them repre-

sented, has no beneficial interest in it. It is not the less true, that the legal interest is vested in the corporation, although it holds the fund in trust to apply the income, as others may direct.

It is true, as the argument for the defence asserts, that the fund does not appear to be included in the cases enumerated in the ninth section, excepting certain property from assessment to the owners, in the town where they reside. This does not prevent its being subject to assessment, as in other cases of non-enumerated property.

There may be personal property, held by a corporation in trust and not as an accumulating fund, as provided for in the tenth section, and which may be liable to assessment to the legal owners although held in trust.

The Act does make a distinction between the assessment of property held in trust, of certain enumerated descriptions, and property not so held; but it does not appear to have done so in all descriptions of property. In other cases it appears to have been left subject to assessment to the legal owner, whether held in trust or not.

Defendants defaulted.

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

WALKER *& al. versus* BLAKE.

Where one agreed to build a barn for another, giving him the election, to keep it and pay for it in other property, or allow the builder to move it off, the property in the barn, when accepted, passed from the former to the latter.

And *the using* of such barn, without objection, is sufficient evidence of *acceptance.*

When it appears from the finding of the jury, that the plaintiffs have no title to the property sued for, their requested instructions become immaterial.

What effect the license of a mortgager in possession, to erect a building on the land by another, may have upon the rights of the mortgagee, *quere.*

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

TROVER, to recover the value of a barn.

The plaintiffs built a barn on land in possession of Ephraim Walker, which was mortgaged. Under this contract as found by the jury upon the evidence, Ephraim had the election, either to keep the barn as his, or if he chose not to help one of the plaintiffs to build a barn on his own land when wanted, then to let them take this one off the lot. He used the barn a number of years.

Ephraim's right as mortgager, before the commencement of this suit, was conveyed to defendant, who also held an assignment of the mortgage.

When Ephraim conveyed his equity of redemption, he notified defendant of plaintiffs' claim to the barn.

The plaintiffs attempted to take away the barn, but were prevented.

The counsel for plaintiffs requested the instruction, that if the plaintiffs went on and built the barn by consent of Ephraim Walker, the mortgager, on the land under mortgage, and the barn was to remain the property of the plaintiffs, until he should build another or pay for it, then the plaintiffs are entitled to recover.

This was given with this qualification, that if the plaintiffs thus built the barn, with the consent of the mortgagee, express or implied, then the plaintiffs would be entitled to recover.

A further request was, that the consent of Ephraim Walker, the mortgager in possession, was a sufficient consent of the owner, to enable the plaintiffs to claim or hold the property, which request was refused.

A verdict was rendered for defendant.

Gerry, in support of the exceptions.

S. C. Strout, contra, cited *Holbrook* v. *Armstrong*, 10 Maine, 31; *Dearborn* v. *Turner*, 16 Maine, 17; *Perkins* v. *Douglass*, 20 Maine, 307; *Southwick* v. *Smith*, 29 Maine, 228; *Buswell* v. *Bicknell*, 17 Maine, 344.

SHEPLEY, C. J. — The action is trover for a barn, alleg-

ed to have been built by the plaintiffs on land of their father, Ephraim Walker, by his consent. The case is presented by a bill of exceptions and a report of all the testimony.

It appears, that the land on which the barn was erected, was conveyed in mortgage by Ephraim Walker to Joseph Smith, on August 13, 1841. That Joseph Smith, with others, conveyed the interest of the mortgagee in the same, to the defendant on June 9, 1851. That Ephraim Walker released his title to the same to the defendant on May 8, 1851. That the barn was built on that land during the month of June, 1845. That Ephraim Walker occupied the land and barn, until he conveyed to the defendant, then stating to him, that his sons claimed the barn.

From the testimony, and from a special finding of the jury, on a question submitted to them, the barn must be considered as built by the plaintiffs by an agreement in substance with their father, that they might remove it, if he did not build another barn for them, or one of them, when and where they wished it.

If the barn thus built, and accepted by the father, became his property, the plaintiffs were not the owners of it, when their suit was commenced. The instructions, in such case, would be correct, and those requested and refused would be immaterial.

The rule of law is well established by the cases cited in argument and by others; when a chattel is delivered by one person to another, who has an election to return it, or to pay for it, or to return some other property as a compensation for it, such chattel becomes the property of the person so receiving it.

It is insisted by the argument for the plaintiff, that the agreement having been made before the building existed, it could not be within the statute of frauds, and could not amount to a sale of the building.

The agreement was not within the statute of frauds, and

the property could not pass, until the barn had been built and accepted, when the property in it would be transferred.

If one by agreement should build a carriage for another, to be by him returned or paid for in cash or by another carriage; the carriage, when thus built, delivered and accepted by the other, would become his property.

The barn having been on land claimed and occupied by the father, no formal or other delivery was necessary. His occupation of it without any objection, amounted to an acceptance, and it became his property.

It is urged, that it was not completed, but the agreement does not state the manner in which it should be built, or how completely it should be finished. The use of it by the father, in the manner before stated, is sufficient to preclude the plaintiffs from claiming the property, because they had not fully performed their agreement.

It is not necessary to consider what effect a license by the mortgager, to have it placed on the land, would have upon the rights of the mortgagee or his assignee.

Exceptions and motion overruled.

RICE, HATHAWAY and CUTTING, J. J., concurred.

JORDAN *& als. versus* MUSSEY.

Construction of a deed.

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

WRIT OF ENTRY.

The case will be readily understood from the opinion.

Rand, for the tenant.

Poor & Adams, for the demandants.

HATHAWAY, J. — A writ of entry, in which the heirs at law of Thomas Merrill, deceased, are the demandants. The plea is *nul disseizin*, and the question one merely of title.

In January, 1817, Thomas Merrill purchased of the Union

Bank, the lot of land in controversy, which is bounded easterly by a lot of flats formerly laid out to Theophilus Bradbury; northerly by Fore street; southerly by Commercial street, extending in width eight rods westerly from the Bradbury lot. On the 24th of December, 1817, he conveyed one undivided quarter of it to the tenant.

On the 30th of December, 1817, the tenant and Merrill, by indentures divided from the common estate, a strip fifty feet wide on Fore street, of which they by the same indentures made partition, conveying to Merrill a part of said strip eighty-four feet long on the easterly end of it, and the residue thereof to the tenant, up to a passage way, twenty feet wide on the west side of the lot, which passage way, was to be kept open from Fore street to the common estate forever. In the indentures it was also stipulated, that the residue of their interest in the premises, should be forever held in *common and undivided*, unless divided by the consent of all interested. Upon the lot, on Fore street, set apart and held in severalty by Merrill and the tenant, five brick stores were erected; one of them upon the tenant's lot, and four upon Merrill's, to one of which, adjacent to the tenant's store, and designated on the plan as "William Merrill's store," the tenant subsequently acquired title. The tenant became also, by mesne conveyance from Merrill, the owner of another undivided quarter of the *common estate*, exclusive of the fifty feet strip on Fore street.

In February, 1824, Merrill conveyed to the tenant and Charles Mussey, an undivided half of his easterly corner store, being twenty feet and seven inches wide on Fore street. Merrill *then* owned, of the fifty feet strip on Fore street, one undivided half of the easterly corner store; the whole of the two next westerly from it, and one half of the estate south of the fifty feet strip, which was held by the tenant and him in common and undivided, and upon which there were two wooden stores and a distillery; and in July, 1827, he executed a mortgage to the tenant and Charles Mussey of "one half part in common and undivid-

ed of a certain lot of land, wharf and flats and one moiety of the buildings thereon standing, consisting of a distillery and two stores, situated on the southerly side of Fore street, in said Portland, being part of the same land I purchased from the president, directors and company of the Union Bank at Boston, as by reference to their deed to me, will fully appear." Charles Mussey assigned his interest in the mortgage to the tenant, which was duly foreclosed.

What was conveyed by that mortgage? The rights of the parties in this suit depend upon the true answer to this question.

The tenant contends, that one undivided half of the common estate, and also one undivided half of Thomas Merrill's brick stores on Fore street were conveyed by it.

The demandants say, that the brick stores on Fore street constitute no part of the estate described in, and conveyed by the mortgage, which they alleged, conveyed a moiety of the estate held in *common and undivided* only, and did not include any portion of the strip, of which partition had been made, and such is the opinion of the Court. There is no ambiguity in the description of the land in the mortgage, it is indeed a very accurate description of the estate, which Merrill and the tenant held in common and undivided, exclusive of that part of the original lot, of which they had made partition.

The land was no less on the *southerly* side of the street, because the brick store lots intervened. If the brick stores had been included in the mortgage, they should, and probably would, have been described as bounded by Fore street. The buildings specified in the mortgage identify the lot of land conveyed. The distillery and two wooden stores were upon the lot of land described by the other language of the mortgage, making all its language harmonize in describing the lot owned in common, and not including any part of the lot, which had been separated from it. In regard to the deposition of Walker, it is immaterial whether it were admitted or not. The mortgage could not, by any construc-

tion, convey more than one half of those stores; and yet, according to Walker's testimony, the defendant was put into possession of the whole; showing clearly, that such entry *could not* have been warranted by this mortgage. His testimony, therefore, which was objected to, could have no effect to change its construction.

In April, 1844, the tenant became the owner of Charles Mussey's quarter of the easterly brick store, of which the tenant and demandants are owners as tenants in common. The demandants have established their title to one undivided half of the easterly brick store on Fore street, and to the whole of the two stores next to, and westerly from it, and, under the pleadings in the case, they are entitled to judgment for all those parts of the demanded premises, to which they have proved title. *Tenant defaulted.*

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

PROPRIETORS OF LONG WHARF *versus* PALMER *& al.*

Where no objections are made to the *legality* of the records of a proprietary, it is a presumption of law, that they have been made conformably to the requirements of the statutes in force at the time of the transactions therein recorded.

And no objections can be made against the admissibility in evidence of such records, by one claiming title from *grantors*, who were members of such proprietary, during the time the records were made.

A wharf, called Deering's wharf, was formerly built in P., one portion of it was owned by N. D. & J. H. I. and others, and the other portion by P. & J., on which the owners erected stores. The *owners*, and others associated with them, proposed to build a wharf to the channel, and divide it into shares, and widen the *Deering wharf*, and that the owners of the Deering wharf should keep the new part open, and that width to be continued to the end of said wharf for a passage way forever. The *associates* purchased the flats on which to build, and for a dock, to be held by them as *tenants in common.* The owners of Deering wharf "covenanted with the associates, to enlarge their wharf to the width specified; each owner building according to his ownership. In the deed of D. I. and others, of certain flats to the associates, was this covenant, that so much of Deering's wharf as they widened and built, "should remain open, and to be used as a free pas-

sage and way for all the said associates and their assigns to pass to, from and upon the intended wharf and transact any business in common forever." The deed of P. & J. to the associates, contains this clause, "to the end that the said part of said wharf now owned by us, may not obstruct or impede the free passage to, from and upon the said intended wharf, we covenant, (the part of Deering's wharf enlarged by them,) shall remain open as a free passage and way for them, their heirs and assigns, to pass to and from and upon the wharf intended to be built from the end of Deering's wharf as aforesaid, and transact any business forever." The wharf was built. A question being raised by the grantee of that portion of the Deering wharf, originally owned by P. & J., as to the right of the company to demand wharfage originating on his part: — *It was held*: —

1. That the Deering wharf remained the property in severalty of the original owners or their grantees.

2. That the part added thereto, by widening, remained for use as a *wharf* and passage way, and was an estate *in common* with the associates.

3. That the proprietors of the *common estate* were authorized to collect all wharfage accruing from any portion of the wharf.

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

Assumpsit to recover for wharfage on merchandize, shipped on board of a schooner lying at Long Wharf in Portland, at the dates of the several charges.

That a debt for wharfage for the sum sued for was incurred, was not denied; but the defence was, that the plaintiffs had no right to recover, David T. Chase claiming the amount to be due to him.

On such portions of the evidence adduced, as was legally admissible, it was stipulated, that the Court might draw such inferences as a jury would be authorized to do, and to enter a judgment in accordance with the legal rights of the parties.

The facts found are all stated in the opinion of the Court.

Shepley & Dana, for the defendants.

Willis and *Fessenden*, for the plaintiffs.

Hathaway, J. — Nathaniel Deering, Joseph H. Ingraham and others, and Ebenezer Preble and Joseph Jewett were owners of the wharf called Deering's wharf, in Portland.

Deering, Ingraham and others, owned the part adjoining the shore, and Jewett and Preble, the portion extending therefrom towards the channel; they each owned their respective parts in severalty. On the eighth day of December, 1792, they and others associated with them, proposed in writing, to build "a wharf on a line with the easterly side line of Fish street; the wharf to extend to the channel. The present proprietors of Deering's wharf, so called, to keep the whole width open, from the upper store to the easterly side of Fish street, and so to continue that width, the whole way down to the east end of said wharf for a passage way forever."

To accomplish the object proposed, it was necessary for the associates to purchase the flats, upon which to build, and the flats for a dock, and to acquire a right to the contemplated use of that part of Deering's wharf and flats, lying between the stores thereon and the easterly side line of Fish street extended, which was to be the line between the dock and the wharf, when completed as proposed.

In pursuance of the proposals, the associates purchased the flats upon which to build, of Deering and others, January 3, 1793, and the flats for the dock, of John Fox, January 10, 1793, as appears by the deeds in the case, to be held by them as tenants in common, and January 12, 1793, Deering, Ingraham, Preble and Jewett, by their instrument under seal, "in consideration of the conveyance of certain flats to them and others by John Fox, to serve as a dock for a wharf yet to be completed, to extend from Fore street in said Portland, including Deering's wharf, so called, to the channel of Fore river," covenanted with their associates to cause Deering's wharf to be extended and enlarged, so that the same should every where extend to the easterly side line of Fish street, continued for that purpose to the end of said Deering's wharf.

In the deed of Deering, Ingraham and others, of January 3, 1793, conveying the flats, they covenanted that the flats between their stores and the easterly side line of Fish street

continued, and the wharf included, or that might be built, within those bounds, should remain open and to be used as a free passage and way for all the grantees and assigns to pass to, from and upon the intended wharf, and transact any business *in common* forever.

Jewett and Preble, by their deed of January 12, 1793, referring to the conveyance and covenants of Deering and Ingraham, and to the conveyance of Fox, covenanted that the wharf between their stores and the dock, should "remain open as a free passage and way for them, (their associates,) their heirs and assigns, to pass to, from and upon the wharf intended to be built from the end of Deering's wharf as *aforesaid*, to transact any business forever." The defendants contend, that by this deed, Jewett and Preble conveyed to the grantees, (their associates,) the right of a passage way across their wharves, *only*, and no other estate in common therein. The language of the deed is not free from ambiguity. In the construction of a grant, the Court will consider the circumstances attending the transaction, and the particular situation of the parties, and the thing granted, in order to ascertain the intention of the parties. 3 Mass. 352.

By the instrument executed by Deering, Ingraham, Preble and Jewett, January 12, 1793, the wharf to be built is described as a "wharf yet to be completed, to extend from Fore street in said Portland, including Deering's wharf, so called, to the channel of Fore river." Fore street and the channel were the limits of the intended wharf, in its length, and those limits embraced the whole of Deering's wharf, including that of Jewett and Preble. In its breadth the intended wharf was to extend to the line of Fish street continued, and the proprietors of Deering's wharf, were to widen Deering's wharf to that extent. From the language of this instrument, there can be no doubt, that it was the intention of the parties to it, that the wharf intended to be built, including Deering's wharf, should constitute one wharf.

The flats were conveyed, by Deering and others, and by

Fox, to be held in common. Deering and Ingraham had conveyed to their associates, the right to the common use of their part of Deering's wharf, lying between their stores and the Dock. Jewett and Preble were parties to all those conveyances, and referred to them in their deed of Jan. 12, 1793. According to the instrument executed by Deering, Ingraham, Preble and Jewett, of the *same date* with the deed of Preble and Jewett, the "intended wharf" included Deering's wharf. If they intended to grant, merely, a right of way, or passage across the wharf, it is not perceived why they should have conveyed a right to "pass upon the wharf intended to be built, and transact any business, forever." This language would have been entirely superfluous and unmeaning. They could not, by such conveyance, give any additional rights to the proprietors of the flats upon which the new part of the wharf, extending towards the channel, was to be built. If that language had any meaning and application to the thing granted, it must have been intended to apply to that part of the wharf, between their stores and the dock, which they had covenanted should remain open, as a free passage and way. The language of the proposals was, "the proprietors of Deering's wharf, so called, to keep the whole width open, from the upper store to the easterly side of Fish street, and so continue that width open the whole way, down to the end of said wharf, for a *passage way* forever." So far as we may judge, from the conduct of the parties, what they meant by their language, the words "passage way," as used in the proposals, seem to have been intended to embrace something more than a mere right of way; for immediately after the wharf was built, the "passage way" was occupied and managed as a wharf owned in common, by all the proprietors, for their common benefit, and continued to be so occupied and managed, until the conveyance by Clapp to Chase, February 27, 1847.

It would not be impossible, that Jewett and Preble should have used the words "passage way" in their deed, with the same meaning, which they had attached to the same words,

in the proposals signed by them and their associates. When the construction of a deed is doubtful, great weight is to be given to the construction put upon it by the parties. *Stone* v. *Clark*, 1 Metc. 378. The deed from Preble to Clapp of Aug. 12, 1799, described the estate conveyed as "a parcel of flats, whereupon a part of long wharf, in Portland, so called, is built." Clapp's deed to David T. Chase of Feb. 7, 1847, of the same estate, conveyed it, by the same description, "reserving however from said flats all conveyances which have heretofore been made to the proprietors of said Long wharf, to hold in common, and all rights of way which have been so conveyed." The deed from Jewett to Chase, of July 1, 1850, conveyed by similar description and with the same reservations. There was, therefore, a recognition, by the grantors of Chase, that the wharf was a part of Long wharf, and there was also a reservation of a common right, as having been previously conveyed to the proprietors of Long wharf, and it should be observed, that while Jewett, one of the grantors of Chase, derived his title from his ancestor, Joseph Jewett, Clapp, his other immediate grantor, appears to have owned the estate conveyed by him from Aug. 12, 1799, to Feb. 27, 1847.

By statutes of March 10, 1784, and March 15, 1821, and by R. S., c. 85, provisions were made for the better managing lands, wharves, &c., and other real estate lying in common, and conferring upon the proprietors of such lands and wharves, upon due preliminary proceedings, certain corporate powers, and as a part of the case at bar, there are certain copies, from the "Book of Records belonging to the proprietors of Portland Long wharf," which are to be used as the originals might be used. The defendants resist the plaintiff's right to recover, under claim of title in David T. Chase, whose title was derived from Preble, Jewett and Clapp, who were members of the corporation; and we think there can be no doubt, that the records of the proprietors' proceedings, while *they* were such members, are admissible, and no objection having been made to the legality of their

proceedings, it is to be presumed, they were conformable to the requirements of the statutes in force at the times of the transactions therein recorded.

By the records of the proprietors, it appears, that from the year 1793 to the time of the conveyance to Chase, in 1847, the whole wharf, including what was formerly Deering's wharf, constituted Long wharf, the west side of which, between the stores and the dock, during all that time, was occupied and managed as the common estate of the proprietors of Long wharf, with one wharfinger for the whole, and that the income was regularly divided among the several proprietors, according to their several interests therein, unless when expended for common repairs or improvements; and to the same effect is the testimony of Eliphalet Webster and of Joseph Deering, in the case.

The inevitable conclusion, from all the evidence presented, is, that it was the original intention and purpose of all the proprietors, including Jewett and Preble, to build a wharf, by the addition of a new part towards the channel, which was to be built upon flats owned in common by all the proprietors, and was to be divided into shares, and also, by an addition of a new part, on the west side of Deering's wharf, so that the whole wharf might be extended to the line of the dock, which was to be done at the expense of the owners of Deering's wharf; that the stores on Deering's wharf, and the east side of the wharf, should be and remain the property of the several owners thereof, as they had been before that time, and that the west side of the whole wharf, for use as a wharf and passage way, should be, and continue an estate in common, as was the dock adjacent; and that by the deeds and proceedings of the parties interested, as proprietors, they perfectly accomplished what they intended to do in the matter.

The action therefore is maintained, and a default must be entered.

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

MORRIS, *Adm'r, in Equity, versus* DAY, *Executrix.*

In cases in equity, the facts proved, the questions of law arising thereon, the decision of the same and the decree of the presiding Judge, must all be reported.

Although reference in the report may be made to the bill, answer and proofs, this Court cannot examine them to ascertain if the *facts* are correctly found by the jury or by the Court.

And no question of law, not arising out of the facts proved and reported, can be argued or decided by the Court of law.

Whether the decree of the presiding Judge shall be affirmed, or any different order made, must be determined from the facts proved and *reported.*

The intention of the mortgagee, however clearly expressed, without showing that he has performed the *acts* necessary to that purpose, will be ineffectual to establish a foreclosure.

To effect such foreclosure by taking peaceable and open possession in presence of two witnesses, the *certificate* by them signed and recorded, must contain all the facts essential to that purpose. Without showing an *entry* at a time certain for breach of the conditions of the mortgage, it will not avail.

And such witnesses cannot testify to any facts necessary to show a foreclosure, not found in their certificate.

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

BILL IN EQUITY.

The report made by the Judge is not necessary to an understanding of the case.

The bill was brought to redeem certain real estate from two mortgages. The defence was, that they had been foreclosed by an entry in the presence of two witnesses, and the premises had since remained in the possession of the mortgagees.

The certificate of the witnesses, Edmund Phillips and Gideon P. Skillen, was recorded in the Cumberland registry of deeds, on June 12, 1839, and after describing the real estate, the title and registration, it concluded thus:—"The condition of said mortgages having been broken, the said Day claims to foreclose the same. We, the subscribers, at the request of said Day, went with him on all the premises described in the mortgage deeds, on the sixteenth day of May, A. D., 1839, and saw him enter and take peaceable

possession of the premises. In testimony whereof, we have hereunto subscribed our names."

Willis and *Fessenden*, for the respondent.

Anderson and *Harmon*, for the complainant.

SHEPLEY, C. J. — The bill appears to have been filed by a former administrator of Alden Pierce, to redeem certain lands described in a mortgage made to the Canal bank and assigned to the defendant's testator, and lands conveyed in mortgage to him. The case is presented on a report of the presiding Judge, and a question is raised respecting the matters thus presented for consideration by the court of law.

By the Act approved on April 9, 1852, c. 246, § 14, the presiding Judge, when requested, is to report "the facts proved and the questions of law therein arising, and his decision of the same, and his decree upon the premises." Nothing can be thus properly presented, not authorized by the provisions of the statute. If, as in this case, the bill answer and proofs in writing be referred to, the court of law is not authorized to enter upon an examination of those proofs, to ascertain whether the facts were correctly found by the jury or by the Court; or to entertain and decide any question of law not arising out of the facts proved and reported; while it may modify the decree, or make any other order or decree, which the facts reported may require.

The report states, that the facts alleged in the bill were proved; and that the facts stated in the answer and proved, did not constitute a foreclosure. The answer appears to have been made "to the bill of complaint of William E. Morris, administrator *de bonis non*, of the goods and estate which were of Alden Pierce." The report does not state any facts respecting the plaintiff's right to prosecute the suit as administrator *de bonis non* of Pierce; and no question of law respecting it could arise on the facts proved and reported. The report is to contain not only the facts

proved but the questions of law therein arising, and his decision of the same.

Whether the decree was correctly made, or whether either is entitled to a different order or decree, must also be determined from the facts proved and reported.

The principal question arising on the facts reported, is, whether either of the mortgages had been foreclosed.

The testator appears to have intended to foreclose them by "taking peaceable and open possession in presence of two witnesses," as required by the provisions of the Act of 1821, c. 39, and to have a certificate thereof signed by the witnesses, and recorded according to the provisions of the additional Act approved on February 20, 1839.

An intention to foreclose cannot operate to effect it without a compliance with the provisions of the statute, which requires "when an entry for breach of the condition of a mortgage of real estate shall hereafter be made without judgment of law;" and "when such entry shall be made in presence of two witnesses, such witnesses shall sign a certificate specifying the fact of such entry, and the time thereof."

The entry must appear to have been made for breach of the condition of the mortgage, and the certificate signed by the witnesses must specify the fact of such entry; that is, that it was made for breach of the condition of the mortgage, and it must state the time when such entry was made.

The certificate presented in this case, states "the condition of said mortgages having been broken, the said Day claims to foreclose the same." It does not state that he made an entry for that purpose, or for breach of the conditions. He might claim to foreclose them without doing the acts necessary to effect it. The certificate then proceeds and states: "We the subscribers, at the request of said Day, went with him on all the premises described in said mortgage deeds, on the sixteenth day of May, A. D. 1839, and saw him enter and take peaceable possession of the premises." Here is no statement of an entry for breach of condition or to foreclose. All which is stated in the certificate

might have been legally done without any entry made for breach of conditions.

The two witnesses testify, that the entry was by Day declared to be made to foreclose the mortgages. Such proof not contained in the certificate by them signed, is insufficient and ineffectual to establish a foreclosure. The statute requires, that the proof of "such entry" should appear in the certificate, which is to be recorded in the registry of deeds, giving notice to all interested; and that unless it be so recorded, "such certificate shall not be effectual in law for the purpose of foreclosing such mortgage." It was evidently the intention of the statute to require, that the facts essential to operate as a foreclosure should appear in the record of the certificate; and to provide that the entry should not be effectual to foreclose without it.

The Court cannot rightfully attempt to carry into effect the intentions of a party to foreclose, however clearly they may be exhibited, when he fails to show that he has performed the acts required by the statute, to make such intentions effectual.

The decree of the presiding Judge is affirmed, and the case is remanded for further proceedings.

RICE, HATHAWAY and CUTTING, J. J., concurred.

DREW *versus* DREW.

Of the meaning of the term "outlawed."

At the expiration of six years from the time an unwitnessed note becomes due, the statute of limitation attaches by presumption of law.

To prevent the operation of the limitation bar, under § 28, c. 146, R. S., it must appear, that the promisor resided *without*, and had no home *within* the State.

The *residence* contemplated by that section is synonymous with *dwelling-place* or *home*.

An absence from the State by the maker of a note, though long continued, without evidence of an abandonment of his home within it, will not prevent the attachment of the statute of limitations.

ON FACTS AGREED.

ASSUMPSIT. The writ bears date on March 3, 1853, and contains two counts, one on a memorandum made by defendant, and the other for money had and received.

The defendant sold to plaintiff, on July 9, 1847, a promissory note of the following tenor: —

"North Yarmouth, Nov. 8, 1845. — One hundred and fifty-three days after date, I promise to pay Geo. E. Drew or order, the sum of two hundred forty-seven $\frac{41}{100}$ dollars. A. S. Haynes:" — and gave to him a memorandum in writing promising, that if said Haynes did not pay the amount of said note before it was outlawed, he would.

Haynes left his home in this State within a year after the note was given and has never returned. He went from this State to New York, where he remained until 1850, when, in company with about fifty others, he started, by the overland route, for California. One week after their departure the company was heard from, since which time, nothing has ever been heard of said Haynes, or any of the party he started with.

The case was submitted to the Court on these facts for a judgment according to law.

Simmons, for the defendant, relied in defence, upon the fact, that the maker of the note, within one year after it was made, left the State and has not returned; and that the statute of limitations does not attach whilst the promisor resides out of the State. R. S., c. 146, § 28.

Furthermore, that the death of Haynes could not be presumed. Greenl. on Ev., vol. 1, § 41; *Newman* v. *Jenkins*, 10 Pick. 515.

Barrows, for plaintiff.

1. The plaintiff is entitled to maintain this action upon the agreement. The Court will give such construction to the word "outlawed," as the subject matter of the contract and the situation of the parties indicate to have been the intent and understanding of the parties at the time. Chitty

on Contracts, pp. 74, 75, 79, 80, 81, 96, 97; *Patrick* v. *Grant*, 2 Shepl. 233; *Hawes* v. *Smith*, 12 Maine, 429.

2. But whatever the construction adopted, as it is apparent from the statement of facts that it is now no longer possible for the plaintiff to enforce payment against the maker by legal process, the note is, to all intents and purposes, "outlawed."

3. If no action is maintainable upon the agreement, and that is to be considered utterly futile according to the construction which the defendant now seeks to put upon it, then the money which the plaintiff paid to defendant for it, (the amount of the note,) is held contrary to equity and good conscience, and is recoverable under the count for money had and received. *Perkins* v. *Dunlap*, 5 Maine, 268; *Richards* v. *Allen*, 17 Maine, 296.

RICE, J. — Contracts should be construed according to the intention of the parties so far as practicable, without a violation of legal principles. When technical words, or terms of art are used, they should be construed according to their received technical meaning, unless it is manifest that they are used by the parties in a different sense.

The word *outlaw* has a distinct technical signification, and when used in that sense refers to persons, and not to things. Thus, an outlaw is one who is put out of the law; that is, deprived of its benefits and protection. In earlier times he was called a *friendlesman;* one who could not, by law, have a friend. An outlaw was said *caput genere lupinum*, by which it was meant, that any one might knock him on the head as a wolf, in case he would not surrender himself peaceably when taken. He forfeited every thing he had, whether it was in right or possession. All obligations and contracts were dissolved. 2 Reeves' Eng Law, 20. But in modern times the word has a much less stringent meaning, importing, however, the forfeiture of property and civil rights. Bur. L. D., Tit. Outlaw.

By the unlearned the word, "outlawed," is often used in a

different sense. By such it is applied to notes, bills, and other evidences of debt, which are supposed to have become invalid by lapse of time; or in other words, the term is used as tantamount to the legal language, "barred by the statute of limitations." Thus a barred note in popular phrase, is said to be *outlawed.*

It is obviously in this sense that the word outlawed, is used in the contract under consideration.

The note of Haynes, which is the subject of the contract, bears date Nov. 8, 1845, and was payable in one hundred and fifty-three days. It consequently fell due in April, 1846. If nothing intervened to prevent, that note would have been barred by the statute of limitations, or, in the language of the parties, would have been *outlawed,* in April, 1852. If so found, the liability of the defendant, then attached under his contract, and not otherwise.

The case finds, that Haynes left his home in this State within a year after the note was given, and has never since returned; that he went from this State to New York, where he remained until about four years ago, when, in company with some fifty others, he started by the overland route, for California. Since about one week after starting on that expedition, his friends have neither heard from him nor his company.

By § 28, c. 146, it is provided, that if after any cause of action shall have accrued, the person against whom it shall have accrued, shall be absent from, and reside without the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.

The object of this provision, obviously was, to prevent debtors, against whom the statute of limitations had begun to run, from departing from the State, and remaining abroad a sufficient length of time for the statute to run out, and thus enable them to return and interpose this statute as a defence in bar.

The case finds, that Haynes has been absent from the State, and has not returned to it, since the expiration of

the first year after the note was given. The important question to be determined is, whether he has *resided* without the State, within the meaning of the statute. This provision was designed for the benefit of the creditor, to afford him protection in case his debtor should, for a series of years, place himself beyond the jurisdiction of our judicial tribunals. The absence of the debtor must be something more than a transient departure from his home on business or pleasure, and a temporary sojourn out of the State. For such casual interruption of his continuous personal presence, § 3, of c. 115, makes provision for the protection of both debtor and creditor.

To reside, is to dwell permanently, or for a length of time; to have a settled abode for a time. Webster's Dict.

Inhabitancy and *residence*, do not mean precisely the same thing as domicil, when the latter term is applied to succession of personal estate, but they mean a fixed and permanent abode, a dwelling place for the time being, as contradistinguished from a mere temporary locality of existence. 8 Wend. 134.

In this statute, the word residence is synonymous with dwelling place, or home; and a man cannot have such a residence out of the State as will interrupt the running of the statute of limitations, at the same time that he has an established residence, or home, within the State.

At the expiration of six years from the maturity of the note against Haynes, the legal presumption is, in the absence of proof, that the note was barred by the statute of limitation.

The burden of repelling or overcoming this legal presumption is upon the defendant. The case finds that Haynes left his home, and has never returned. He went to New York, where he remained until about four years ago, and then started for California.

The language, "left his home," is neither indicative of an intention not to return, nor to reside away from home, but rather the reverse. Neither is the succeeding language, that

he went to New York and *remained*, &c., tantamount to saying, that he *resided* in New York. To reside in a given place, imports something more than merely remaining in that place. The casual lodger at a public inn, the sojourner and the wayfaring man, as well as the man who is held in duress against his will, each and all *remain* in the place where they may repose, for the time being, or within which they may be confined; yet such place of repose or confinement could, in no just sense, be called their residence or home.

So when Haynes left his home, it does not appear, that he intended to change or abandon it. He remained in New York, but it does not appear that he had an established residence there, or intended to make that State his home.

As has already been remarked, the burden is upon the defendant, to repel the legal presumption in favor of the hypothesis of the plaintiff, to wit, that the note had been barred by the statute. This he has failed to do. A default must therefore be entered.

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

HATHAWAY, J., concurred in the result only.

MERRILL *versus* SMITH.

The statute of 1847, c. 27, enacts, that a married woman may become the owner of real or personal property by bequest, demise, gift, *purchase* or distribution.

To become the owner by *purchase*, she must make it from her own property, or that of others, by their consent, for her use.

The *earnings* of a *feme covert* are the property of her husband.

And a *purchase*, made on the credit, or from the means of her husband, gives the wife no property in the article purchased.

So property, *purchased* by a *feme covert*, by the avails of her labor, belongs to her husband.

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

Merrill *v.* Smith.

TRESPASS, against the late sheriff, for an act of his deputy in attaching a sleigh.

It appeared in evidence, that defendant's deputy took the sleigh upon a legal precept against the husband of the plaintiff, and the question for the jury, was whether it belonged to her husband.

Testimony was introduced by the plaintiff tending to show, that she owned the sleigh, and by defendant, tending to show, that it was the property of her husband.

The jury were instructed, that if they were satisfied by the evidence, that the sleigh was purchased with property which the plaintiff acquired during coverture by her labor, that the sleigh thereby became the property of the husband, and was liable to be attached for his debts.

The jury returned a verdict for the defendant, and the plaintiff excepted.

C. W. Goddard, in support of the exceptions.

1. The statutes of March 22, 1844, c. 117, and of Aug. 2, 1847, c. 27, are entitled and intended "to secure to married women their rights in property," and such a construction should be given them, as the Legislature manifestly intended to effect that purpose, and should, for that reason, and from its evident intent and spirit, be construed to entitle married women to their own earnings.

2. But even if the *actual earnings* of a married woman, *as such,* may still be left within the reach of the husband and his creditors, yet, an article "*purchased*" with those earnings, or in the language of the Judge, an article "*purchased* by property which the plaintiff acquired during coverture by her labor," is certainly acquired "*by purchase,*" and is therefore within the language and purview of those statutes which qualify the word "*purchase,*" by no condition whatever.

3. The principle, asserted in the Judge's charge, would apply not only to property purchased by the plaintiff with her earnings, but to property purchased *with* such property, and so on through any number of mutations, and an indefi-

nite period of time, which would create inconvenience, and be contrary to the expressed intent of the statutes above cited.

Morrill and *Fessenden, contra.*

SHEPLEY, C. J. — The Act approved on August 2, 1847, c. 27, provides, that a married woman may become the owner of real or personal property by bequest, demise, gift, purchase, or distribution. The purchase intended, is one made from her own property, or that of others by their consent for her use. Property would not become hers merely because she made the purchase on the credit or from the means of her husband. She must be presumed in such cases to act in her proper relation to him and for him. The husband does not by that act or others in *pari materia* cease to be entitled to the services of the wife. What she earns by her personal labor becomes his and not her property.

The provision contained in the second section, if it shall appear that "it was purchased with the moneys or other property of the husband," it shall be held for the prior contracted debts of the husband, was intended to apply only to cases in which the money or property of the husband, admitted to be his and not claimed by the wife, has by his consent or gift been applied to purchase property for the wife.

In this case the instructions only denied "that property which the plaintiff acquired during coverture by her labor," would thereby become hers, so that it could be used by her for the purchase of other property in her own right.

Exceptions overruled.

RICE, HATHAWAY and CUTTING, J. J., concurred.

DAVIS *versus* HERRICK.

In this State, to protect her own property, a married woman may maintain an action in her own name.

And she may hold property without paying for it an adequate consideration, by direct or indirect conveyance from her husband, against his creditors *subsequent* to such conveyance.

If the conveyance was made to defraud *existing creditors*, whose debts were *subsequently* paid, the wife will hold the property against *subsequent creditors* of her husband.

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

TRESPASS, for pulling down and carrying away a barn.

The taking of the barn was admitted on the trial, and the defendant claimed title by purchase at an auction sale. It appeared that Joseph D. Davis, the husband of the plaintiff, became indebted to the defendant in September, 1851, on which debt judgment was obtained, and execution issued, upon which the barn was sold in due course of law.

Davis built the barn upon land not his own, by consent of the owner, and on April 1, 1850, he transferred it by bill of sale to the owner of the land, in payment of rent of the same, who on the same day conveyed the land and buildings to the plaintiff.

The defendant offered evidence to impeach the bill of sale as fraudulent; but the presiding Judge ruled, *that* the statute of August 2, 1847, c. 27, changed the common law principle, by which a sale which was fraudulent against existing creditors would be void against subsequent ones; and *that* although the sale of the barn from Raynes to the plaintiff was void as against them and prior creditors of the husband, it could not for that reason be impeached as fraudulent by the defendant, whose debt accrued subsequently to said sale, and he refused to receive the testimony offered.

The jury returned a verdict for plaintiff and the defendant excepted.

C. W. Goddard, for defendant.

1. Does the proviso in the first section of the Act of 1844, c. 117, and the substitution of the clause in the first

section of the Act of 1847, c. 27, cut off subsequent creditors from any proof whatever if fraudulent intentions and fraudulent acts, however gross and palpable, of whatever nature, in conveyances to married women?

Will this Court construe the Act of 1847, to remove all checks and barriers against fraud in conveyances to married women, so far as subsequent creditors of the husband are concerned?

Can the Legislature have intended to offer a *premium* to dishonesty and fraud in conveyances to married women, while they sanction a rigid scrutiny of similar conveyances to all other persons?

2. We understand the Act of 1847, simply to relieve conveyances to married women from that *legal presumption of fraud*, which both by common law and by the statute of 1844 attached to them, when coming directly or indirectly from the husband, even in the absence of any *evidence* of fraud, and to place such conveyances, so far as subsequent creditors should be concerned, on the same footing as other transfers, viz: without any *presumption of fraud*, but *yet open to impeachment.*

3. The Legislature could not have designed to repeal so well known a rule of the common law, and one so proper and necessary, by *inference and implication* merely, nor to legislate so dangerous a principle into our statutes by an *exception.*

J. Goodenow, for plaintiff.

SHEPLEY, C. J. — The action is trespass for pulling down and carrying away a barn, commenced by the wife of Joseph D. Davis. She may, by a statute of this State, maintain a suit to protect her own property.

A tract of land appears to have been conveyed by Edward Little to Joseph Raynes, a brother of the plaintiff, on May 24, 1837. The plaintiff's husband, by the permission of Raynes, built the barn on that land. He conveyed it by bill of sale to Raynes, on April 1, 1850, and Raynes

conveyed the land, and barn upon it, to the plaintiff on the same day. Her husband became indebted to the defendant afterward, in September, 1851; and he caused a sale of the barn to be duly made on an execution issued on a judgment founded upon that debt, and became the purchaser of it.

He offered testimony to prove the conveyance of it to the plaintiff, to have been fraudulent; and the testimony was excluded, because the defendant was a subsequent creditor of the husband, claiming title under him.

For the consideration of the question, thus presented, the building may be regarded as conveyed indirectly by the husband to his wife, through the intervention of Raynes, which is the most favorable aspect of the case for the defendant.

The second section of the Act of August 2, 1847, c. 27, provides, if it shall appear, that property was conveyed after marriage by the husband to his wife, "directly or indirectly, without adequate consideration, 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." This is equivalent to an enactment, that it shall be held only for prior contracted debts. A construction, which would subject it to the payment of other debts, must destroy the effect of the words "prior contracted." When an Act declares under what circumstances property shall be held for the payment of the debts of former owners, who have conveyed it, that of necessity, excludes all other circumstances.

The intention of the framers of the statute, appears to have been, to allow a husband to pay for property conveyed to his wife, with his own money or property, and to allow his wife to hold it, unless the creditors then existing of the husband, should thereby be defrauded. Any other construction might render all such conveyances ineffectual, if the husband should afterward contract debts and become insolvent. If such conveyances be made to defraud existing creditors, whose debts have been since paid, the property would not, under the provisions of the statute, while

it would by the common law, be subject to be taken for the payment of debts subsequently contracted. For the Act provides, that if conveyed "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;" and this excludes those subsequently contracted.

A motion has been made by the counsel for the plaintiff, that treble damages should be awarded, by virtue of the statute respecting malicious mischief; but the report of the case presents no facts authorizing it, and it provides, that judgment should be upon the verdict if the testimony was properly excluded. *Judgment on the verdict.*

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

CITY OF PORTLAND *versus* ROLFE.

§ 5, c. 211, of Acts of 1851, makes it the duty of the Mayor and Aldermen of a city to commence suits in behalf of the city against any persons guilty of violating any of the provisions of that Act, "on being informed of the same, and being furnished with proof of the fact."

Such facts, as authorized the commencement of the suit, are not required to be proved to the Court, before the suit can be prosecuted in the name of the city.

On a preliminary question to the Court, whether the action is rightfully prosecuted in the name of the city, the admission of illegal testimony furnishes no ground of exception, if there was sufficient legal proof to require the decision given.

ON EXCEPTIONS from the *former District Court*, EMERY, J.

DEBT, to recover one hundred dollars from the defendant, as a common seller, under c. 211, § 5, of the Acts of 1851.

At the term this action was entered, the appearance of plaintiffs' attorney was called for, and his authority, to bring the action in the name of plaintiffs, denied.

It was shown that the suit was commenced by direction of the Mayor, and approved by W. W. Thomas, one of the Aldermen.

Stephen Frothingham, called by the plaintiffs, testified that

he was acting as Alderman for the city and was present at a meeting of the Mayor and Aldermen, shortly after this law for the suppression of tippling shops went into operation, when the subject was talked over in the board. No vote was taken, but it was understood that the Mayor might take charge of all matters arising under the Act, and institute suits and prosecutions at his discretion, without consulting the board.

The plaintiffs' counsel also read a copy of the record of a vote of the Mayor and Aldermen, of March 22, 1852, which was after the commencement of this suit, approving of its commencement and directing the city Solicitor to appear and prosecute the same.

The evidence was objected to by the defendant, and the presiding Judge ruled, that the appearance and authority of plaintiffs' counsel was sufficiently proved and established.

A verdict was returned for plaintiffs, and the defendant excepted to the rulings.

Shepley & Dana, for defendant.

The suit was brought without authority, and not in conformity with the statute. It purports to proceed under the 5th § of the tippling Act of 1851.

But supposing the suit might be commenced, without examination by the city or town here was no statute commencement. Their action should have been a precedent action in this case. The fact that the Aldermen informally, and without a vote, told the Mayor he might execute the law as he saw fit, was no such action on the part of the city.

The Mayor, in directing the commencement of this suit, acted for himself alone. The city acted no more by him, than the town of Brighton did by Gibbs, in the case, 23 Maine, 420.

The suit having been brought without authority, it cannot be helped by any *ex post facto* recognition in approval on the part of the city.

The right of adoption of a *contract*, made for a principal by an agent, is a very different thing from the approval of a

bare act which would create a liability in a third party and subject him to damage. *Vide* Smith's Merc. Law. 138, 139.

It will be seen, that defendant denied from the first that the suit was properly commenced. It is no more proper for the city now to legalize the doings of an agent, and make out their case by proceedings subsequent, than for any other plaintiff to support his cause by title acquired after the commencement of his suit.

S. Fessenden, City Solicitor, submitted the case without argument.

SHEPLEY, C. J.—The exceptions have reference only to the authority to prosecute the suit in the name of the city. That was a preliminary question to be decided by the Court.

The testimony of Stephen Frothingham, stating a conversation in a meeting of the Mayor and Aldermen, was illegally received. "It was shown, that the writ was made by direction of the Mayor;" and while the suit was pending, it was, by a vote in a regular meeting of the Mayor and Aldermen, approved. It was made their duty, by the fifth section of the Act approved June 2, 1851, c. 211, to commence suits in behalf of the city, against any persons guilty of a violation of any of the provisions of that Act, "on being informed of the same and being furnished with proof of the fact." The purpose of this clause is to declare under what circumstances, that duty should be imposed upon them. It was not necessary that such a state of facts as would require them to commence the suit, should be proved to the Court before the suit could be prosecuted in the name of the city. There having been sufficient legal testimony presented to the Court to require it to decide, that the suit was legally authorized to be prosecuted, the decision was correct, and the defendant could not have been aggrieved by the reception of illegal testimony to prove to the Court, on a preliminary question, the same facts proved by legal testimony.

Exceptions overruled.

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

WILLIS *& al. versus* HOBSON.

One cannot make another his debtor, by paying his promissory note, without request express or implied.

An express man received the money to pay a note belonging to one of the banks in Boston, which money he otherwise disposed of; on the last day of grace, he called on the plaintiffs and requested them to pay the note for him, as he was short of funds, which was assented to, but from the lateness of the request, the payment could not be made that day; to protect the teller for delay of payment, the firm name of the express company, and the name of the plaintiffs were indorsed upon the note, and the next day it was paid by plaintiffs; — *Held*, that the plaintiffs could maintain no action upon the note against the maker.

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

ASSUMPSIT, against defendant, as maker of a promissory note, payable to the order of John Dow & Co., at the Grocer's Bank, Boston. On the back of the note was indorsed "John Dow & Co., waiving demand and notice," and underneath this indorsement the names of "Longley & Co."

The signatures were admitted to be genuine, and the note was read to the jury.

The defendant showed, by John Dow, that a few days before the note became due, he gave to Benjamin Longley, of Longley & Co's express, the money to pay the note in suit, with a memorandum where it might be found, and that he was never notified as indorser of the non-payment of the note.

It also appeared, by another witness, that soon after this note was paid at the bank, one of the plaintiffs said "we have paid a note for him," (meaning Benj. Longley,) or "had taken up a note for him."

It also appeared by the deposition of Benjamin Longley, objected to by plaintiffs, that he took the money of Dow to pay this note, and used it for other purposes, that on the last day of grace, just before the banks closed in Boston, he called on Willis, one of the plaintiffs, and told him he had a note to pay for John Dow, and wanted him to pay this note for him, as he was short of funds; that he agreed so to do, whereupon he notified the bank teller, who went to

plaintiff's office with him to receive the pay; that when they went in, the teller presented the note, and Willis said, "my check book is locked up in my safe now," or, "I cannot stop to get at my check book now," or words to that effect, and also said, "here, Longley, put your name on it," which was done; and Willis then put on the firm name of "Willis & Co." Willis then gave the note to the teller, saying, "call to-morrow, and I will give you a check for the note, it will be just as well."

It appeared also by his testimony, that he was, and had been for a long time, engaged in the express business, and it was a part of his business to receive money from persons in Portland to pay notes due from said persons in Boston, and that from numerous business transactions with the plaintiffs, they well knew the business in which he was engaged.

The deposition of the teller was also put in, when the cause was withdrawn from the jury and submitted to the full Court, to enter such judgment as the law and facts, elicited by the legal testimony in the case, should require.

Rand, or the defendant.

1. Longley is a competent witness whether regarded as an indorser or not. If an indorser, he stands indifferent. The indorsee is competent to prove subsequent facts. 2 Greenl. Ev. 169, § 207; 1 Greenl. Ev. 469, § 399; *Buck* v. *Appleton*, 14 Maine, 284.

2. But Longley, upon the testimony, does not occupy the position of an indorser.

3. The plaintiffs cannot claim as indorsers, the circumstances under which they put their name on the paper, and afterward received it, negative that position. They did not pay the note as parties, but as third persons, it was paid for B. Longley, at his request, and on his account and for no other person.

4. By the general commercial law, the doctrines and principles of payments for the honor of a party to commercial paper, does not apply to promissory notes, (only to

bills,) and here there was no protest, and by the general commercial law, to constitute a payment for the honor of a party, such payment must be made after the protest of the paper. Story on Prom. Notes, 556, § 453.

Willis & Fessenden, for the plaintiffs, claimed the right to sustain the action on two grounds. —

1. That they paid the note on the credit and for the honor of the maker.
2. On the ground that they were purchasers in the market.
3. The testimony of Longley was not admissible.

SHEPLEY, C. J. — The firm name of the plaintiffs and the firm name of Longley & Co., are proved to have been indorsed upon the note on the last day of grace, a few minutes before the banks in Boston were closed for that day. They appear to have been so indorsed, not because they were or had been holders of the note, to give it currency, but for the purpose of rendering themselves liable to pay the note to the bank, and to prevent its being protested for non-payment. It was on the following day paid by the plaintiffs to the bank, and delivered to them. It does not appear to have been transferred to them by the bank, but merely delivered to them by the receiving teller on payment, without any communication with the other officers of the bank. The teller would have had no authority to transfer or convey any property in the note from the bank to the plaintiffs. They could have thus acquired no property in it, but by being regular parties to the paper. They did not become indorsers in the usual course of business, or by the request of the maker, or any regular indorser; and they paid it without any request from any such party. When a person, not being a regular party to a note, pays it for the honor or credit of the maker, or any indorser, without request, he does not thereby acquire a right to repayment from any of the prior parties, for whose honor he may have paid it. Story on Notes, § 453. He can no more make another his debtor by the payment of a note without re-

quest, express or implied, than he could by the payment of any ordinary account.

The note in this case appears to have been paid to the bank, not only without any request or knowledge of the defendant, but, according to the testimony of Benjamin Longley, at his request, and upon the credit of the firm of Longley & Co.

When the plaintiffs agreed with him to pay it, the teller, as he states, was not present. There is no difference between his testimony and that of the teller in this respect; while there is some difference respecting what took place afterwards, when they both went to the plaintiffs' office, to have the note there paid. But there is nothing in either of their statements respecting that transaction, inconsistent with the testimony of Longley, that plaintiffs had before agreed to pay it on the credit of his firm. The impression, or understanding of the teller, being but an inference or opinion of his own, can have no weight.

The arrangement, by which the note became indorsed by the plaintiffs, appears to have been only a substitute for payment, to induce the teller on his own responsibility, and at his own personal risk, to wait for payment until the next day, because the plaintiffs' account book with the bank, was not of convenient access.

By a payment under such circumstances, the plaintiffs did not acquire any title to, or interest in the note.

Plaintiffs nonsuit.

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

INHABITANTS OF RAYMOND *versus* SAWYER, *Guardian.*

The creditor of a person under guardianship can maintain no action against the guardian.

A refusal to pay the just debts of his ward will constitute a breach of the guardian's *bond*, and the creditor may resort to a suit upon it, for indemnity.

ON FACTS AGREED.

Raymond *v.* Sawyer.

ASSUMPSIT, against defendant, as guardian of Cylena H. Dyke, an insane married woman, who was decreed by the Judge of Probate to be insane, on the application of the overseers of the poor of Raymond, in June, 1853. Most of the charges were for money paid for her support at the Insane Hospital, in 1849, and all of them before the appointment of defendant. The defendant was duly appointed her guardian. The supplies were admitted to be correctly charged, and that the said Cylena was in need thereof. No exception is taken to the form of the action. If, in the opinion of the Court, the guardian was liable for these charges, and the plaintiffs are entitled to recover, the defendant is to be defaulted; otherwise the plaintiffs to become nonsuit.

The case was submitted without argument, by —

Shepley & Dana, for plaintiffs.

Sawyer, pro se.

HOWARD, J. — As a part of the general policy of the law, which subjects the property of an owner to the payment of his debts, it is made the duty of guardians to pay all just debts due from their wards, out of their estates. R. S., c. 110, § § 7, 20; Act of 1853, c. 6. A refusal to comply with this duty will constitute a breach of the guardianship bond, and the creditor may resort to a suit upon it, for indemnity. But one cannot be sued in his capacity of guardian, so as to render the estate of his ward liable to be taken on execution; for the judgment in such case, would go against the defendant, and not against the goods and estate of his ward in his hands, as was held in *Thacher* v. *Dinsmore*, 5 Mass. 301; *Exparte Leighton*, 14 Mass. 207.

In the prosecution and defence of suits, the guardian who appears for his ward, does not become a party to the proceedings; and if judgment be rendered against the ward, it may be satisfied by his property. And it has been held, that a creditor may maintain an action against an insane person, who must be defended by his guardian, and if judgment be against such person, that it may be satisfied from his estate,

in the hands of his guardian. *Thacher* v. *Dinsmore*, before cited. So, in *Hutchins* v. *Dresser*, 26 Maine, 76, it was held, that the provision of the statute, c. 110, § 21, that a guardian may "demand, sue for, and receive all debts due" to the ward, cannot be construed to authorize the guardian to maintain a suit, in his own name, to recover them. In such cases, and in legal procedure generally, where guardianship intervenes, the law regards the ward, and not his guardian, as the party to the proceedings.

Plaintiff nonsuit.

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

MILLIKEN *& als. versus* LORING.

One of the partners may lawfully assign to a creditor thereof, a demand due to the partnership, *after its dissolution.*

If one summoned as trustee is notified, that the debt by him owing, has been assigned to a third person, and neglects to disclose such assignment, the trustee judgment and payment of it on a legal demand, furnish to him no protection against the claims of the assignee.

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

ASSUMPSIT, on an account annexed to the writ. The action was brought for the benefit of one Warren, plaintiffs' *assignee.*

Defendant was indebted to the plaintiffs as co-partners. After the company was dissolved, one of the plaintiffs assigned the demand in suit to a creditor of the firm, in payment of his debt. Subsequently, the defendant, in a suit against the plaintiffs, was summoned as their trustee. He was duly notified of the assignment, but was defaulted. An officer, with the execution, demanded the amount in his hands, within thirty days after judgment, and he subsequently paid it to the attorney in that suit, and the amount was indorsed upon the execution.

The case was submitted to the full Court.

Poor & Adams, for defendant.

The assignment to Warren is void, being made by one partner, after dissolution, without authority. One partner cannot thus "impose new obligations upon the firm, or vary the form or character of those already existing." 3 Kent's Com. 2, note; Collyer on Part. § § 118, 121, 545, 546; Story on Part. § § 458, 459.

One of the plaintiffs, by his assignment, attempted to make a *new contract* for the firm, which he had no power to do. *Perrin* v. *Keene*, 19 Maine, 355; *Bank* v. *Norton*, 1 Hill, 572; *Bell* v. *Morrison*, 1 Pet. 351.

Plaintiffs owned, as tenants in common, the money in defendant's hands, and one could not assign the portion belonging to the other without express authority. *Parker* v. *Macomber*, 18 Pick. 505; *Sanford* v. *Nichols*, 4 Johns. 224; *Canfield* v. *Hurd*, 6 Conn. 180.

It is not an assignment of Milliken & Co. and has no validity against attaching partnership creditors. One partner cannot sell his individual interest in a specific part of the partnership property. 5 Mason, 56; *Perrin* v. *Keene*, 19 Maine, 355; *Lovejoy* v. *Bowers*, 11 N. H. 404.

Butler, for plaintiff.

1. The assignment to plaintiff in interest, being made to pay a partnership debt, was valid, although made by one of the partners after dissolution. Story on Part. § § 325, 328; Collyer on Part. § 546; *Darling* v. *March*, 22 Maine, 184; 7 N. H. 568.

2. The assignment being valid, and due notice having been given to defendant, before he was called upon to disclose, he should have made a full disclosure, but neglecting so to do, he is not protected by the judgment in the trustee suit, and the payment was in his own wrong. Cushing on Trustee Process, § § 185, 290, 293.

3. The assignee, not being a party to that suit, is not concluded thereby and may avoid the same by plea and proof. *Andrews* v. *Herring*, 5 Mass. 210; *Hawes* v. *Waltham*, 18 Pick. 451.

HOWARD, J. — Upon the dissolution of a partnership, the authority to make new contracts ceases, and neither of the partners can make use of the estate, inconsistent with the settlement of the concerns of the partnership. But, as the association is held for past transactions, the connection subsists in a qualified sense, and each member has the same power as before the dissolution, to collect debts due to the partnership, and to liquidate and settle accounts, and to apply the partnership funds and effects to the payment of debts; and for that purpose the powers and duties of the partnership continue until the concerns of the association are closed up. Gow on Part. 253; Collyer on Part. § 546; Story on Part. § 328; *Darling* v. *March*, 22 Maine, 184; *Morse* v. *Bellows*, 7 N. H. 568. The powers are requisite to the fulfillment of the duties and obligations of the partnership.

A debt was due to Warren from the firm, before dissolution, and it was competent for either of the partners to pay it with partnership effects. If the creditor chose to take an account against the defendant, in lieu of money, in payment of his debt, we do not perceive any legal or equitable objection to that method of settling and paying his claim by one of the partners, in the name, and for the benefit of the partnership. The operation of the assignment was but an application of the effects of the partnership to the payment of a debt. The transaction violated no rule of law, and did not create any new obligation or contract, on the part of the partnership, or operate unfavorably to others; but would seem to facilitate the closing up the affairs of the partnership, and accomplishing the objects for which its qualified existence was prolonged. The law, in upholding the assignment, will lend its aid to the assignee, to collect the account in the name of the firm.

The plaintiff is not concluded by any examination of the trustee; and he has shown that the latter did not disclose the assignment, of which he had been notified, but suffered judgment to go against himself by default, and in his own

wrong. That judgment furnishes the defendant no protection against the claim of the plaintiff in interest. *Bachelder* v. *Merriman*, 34 Maine, 69; *Andrews* v. *Herring*, 5 Mass. 212; *Howes* v. *Waltham*, 18 Pick. 451.

Defendant defaulted.

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

HALL *versus* HOUGHTON.

A party, calling a witness who misstates a particular fact, is not precluded from showing by other competent evidence the truth of the fact, in contradiction to the testimony of his own witness.

The magistrate's certificate to a deposition is evidence only of such facts, as the statute requires him to certify.

Depositions taken without notice being given to the adverse party, as required by law, cannot be used in the trial of an action, except by consent of the parties.

Although the "adverse party" is present at the taking of the deposition, this fact is not evidence, that he had the *notice* required, or that he waived it.

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

TRESPASS, for an assault and battery, alleged in the writ to have been committed on Dec. 20, 1850.

The plaintiff's witnesses, stated the assault to have occurred in December, 1850. A deposition introduced by plaintiff, showed, that the assault he testified to, was in Dec. 1851, which evidence was objected to by defendant as irrelevant, but admitted by the Judge.

The plaintiff offered the deposition of one Robinson, which was objected to for the reason, that the caption did not state, that the "adverse party was notified to attend," although the magistrate certified, "that the defendant was present, and *did not object to the taking of said deposition.*" It was admitted by the Judge.

To these rulings the defendant excepted.

A verdict being returned for plaintiff, a motion was also

made to set it aside for various causes alleged, which it becomes unnecessary to specify, as the defendant relied upon his exceptions.

Gerry, for the defendant.

1. The deposition objected to as irrelevant, was clearly inadmissible. Although time is not material in an action of this kind, it is material, that the acts complained of, should have been committed, before the writ was issued. It will be said the time fixed was a mistake, who knows that, and who is authorized to say so, except the deponent himself?

2. The other deposition was also inadmissible. The requirements of the law were not observed. R. S., c. 133, § § 5, 6, 11 and 17. That the statute provision must be complied with, I cite, *Bradstreet* v. *Baldwin*, 11 Mass. 229; *Winoosky Turnpike Co.* v. *Ridley*, 8 Vt. 404; *Bell* v. *Morrison*, 1 Peters, 351; *Bachelder* v. *Merriman*, 34 Maine, 69; *Barnes* v. *Bell*, 1 Mass. 73; *Wells* v. *Fiske & al.* 3 Pick. 73.

The magistrate's certificate, that the defendant was present and did not object, &c., is extra official, and not to be regarded. 1 Greenl. Ev. 545.

J. C. Woodman, for the plaintiff.

1. The deposition of Robinson was rightfully admitted. In this State, where there is no notice in fact, but the party attends, it operates as a waiver of notice. *George* v. *Nichols*, 32 Maine, 179. So in other States. *Talbot* v. *Bradford*, 2 Bibb. 316; U. S. Dig. Vol. 2, page 219, § 291; *Kea* v. *Robinson*, 4 Ird. Eq. 427; *Vinal* v. *Burrill*, 16 Pick. 405. And the following cases collaterally support the same view. *Woodman* v. *Coolbroth*, 7 Greenl. 181; *Rowe* v. *Godfrey*, 16 Maine, 128; *Brown* v. *Foss*, 16 Maine, 257; *Scott* v. *Perkins*, 28 Maine, 22.

2. As to the other deposition, its admission was proper. A party may show, that his witness is mistaken, and the jury have a right so to presume, if satisfied from all the evidence. *Brown* v. *Osgood*, 25 Maine, 508; *Woodruff* v. *Westcott*, 12 Conn. 134.

HOWARD J. — The motion of the defendant, if not abandoned, requires no consideration, in the view of the case now taken.

The deposition of *Dean* was admissible in proof of an assault and battery, and it was competent for the plaintiff to prove that they were the same for which this suit is brought, although stated by the deponent to have been committed at a different time. A party calling a witness is not precluded from showing that he mistook and misstated a particular fact; and he may prove the truth of the fact by other competent evidence in contradiction to the testimony of the witness, whether his misstatement was innocent or willful. And there is no reason why a party should not be permitted to correct his witness as to a date, although he may have led the witness into a mistake of it, by his own interrogatory.

Depositions can be used of right, only when taken for the causes, and in the manner provided by statute; and no deposition taken as mentioned, and in cases referred to in the Revised Statutes, c. 133, § § 1, 2, of which class the case at bar is one, "shall be used in the trial of any such cause, except by consent of parties, unless the notice hereinafter mentioned shall have been duly given to the adverse party." § 3. It is required (§ 17,) that the magistrate, before whom the deposition is taken, shall certify, "whether the adverse party was notified to attend;" and "whether he attended or not."

In the caption to the deposition of *Robinson*, there is no certificate of the magistrate respecting notice to the adverse party, but it is certified that he was present, and did not object to the taking. As there is no evidence that he was notified, he might have been present for other purposes, and in the transaction of business inconsistent with taking the deposition; or he might not have been in a condition to know the fact of the taking, and may have been wholly ignorant of it; or, if then apprised of it, he may have been unable to attend to the taking personally, or by counsel.

His presence, merely, is not evidence of the notice required, or proof of a waiver of notice; and there is no evidence of a consent of parties that the deposition should be used at the trial; it was therefore inadmissible against the objection. For this cause the exceptions must be sustained.

The magistrate's certificate, it may be remarked, is evidence of those facts only, which he is required to state in the caption. He cannot extend his certificate to other facts to make them evidence, or to affect the case. The statement, then, by the magistrate, in the certificate, that the adverse party "did not object to the taking of said deposition," was extra-official and unauthorized, and cannot be received in evidence. 1 Phil. Ev. 382, 391; Cowen and Hill's Notes, 702, 741; 1. Greenl. Ev. § 498.

Exceptions sustained.

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

WALDRON *& als. versus* CHASE.

Where the owner of a large quantity of corn in bulk, sells a certain number of bushels therefrom and receives his pay, and the vendee takes away a part, the *property* in the part *sold*, vests in the *vendee*, although it is not measured or separated from the heap.

Such property left in charge of the vendor remains at the *risk* of the vendee.

Where the heap in which *such property* was left, was mostly destroyed by fire, the owner is not liable for any part of that saved, in an action of *assumpsit* by the vendee, without some evidence from which a promise may be implied.

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

ASSUMPSIT, to recover payment for a quantity of corn sold by the defendant to the plaintiffs, but not delivered. The writ was dated Jan. 3, 1853, and the general issue pleaded.

On Dec. 1, 1851, the plaintiffs bought corn of defendant and received a bill thereof as follows:—

"Messrs. A. P. & W. H. Waldron,

Bought of D. T. Chase

500 B. Y. Corn at 69,	$345	
63 days interest,	3	62
	$348	62

Received payment by note,

D. T. Chase."

The note had been paid. The plaintiffs were millers, and it appeared in evidence that it was the custom in Portland, where the parties lived, to sell from large quantities in bulk, for cash, and allow the purchasers when millers, to take the same away from day to day, as they wished to use it. It was never measured out or set aside, unless where a balance on hand was sold and a cargo closed.

Between Dec. 1, and 7, after the purchase of the corn, the plaintiffs caused to be measured, and received 276 bushels, and have never received any more of that bill, nor was it measured or set apart from the bulk.

On the night of Dec. 7, 1851, the defendant's store with most of the corn in bulk, being from 12 to 15000 bushels, was destroyed by fire, without any fault on the part of the defendant.

About 200 bushels out of the heap was saved.

It appeared, that another customer and miller, five or six days before the store was burnt, bought of defendant 100 bushels of corn, for cash, but took away only seventy-nine bushels. The defendant presented a bill, after the fire, of only the amount delivered, which was paid.

One witness, called by plaintiffs, stated, that he was requested by one of the plaintiffs to step into defendant's store, since the fire, that something was said by plaintiff about some corn, and defendant told him he owed him nothing, and ordered him out of the shop.

It did not clearly appear whether this last conversation was before or after the commencement of this suit.

The case was submitted to the full Court for a legal decision.

Willis & Fessenden, for the plaintiffs, argued the following points.

1. The corn was at the risk of the seller, until divided and set apart. 2 Kent, 495, 2d ed.; *Merrill* v. *Hunnewell*, 13 Pick. 213; *Scudder* v. *Worster*, not yet reported in Mass., but found in the Advertiser of Nov. 23, 1853.

2. The facts proved, establish a demand and refusal, if any such were necessary.

3. The whole testimony contradicts the idea of a special notice, that the corn was to be at the risk of the purchaser.

4. The plaintiffs were entitled to the whole of what was saved.

Shepley & Dana, for the defendant.

The question here is, at whose risk is the property sold, but not delivered? We say at the risk of the vendee. Ins. 3, 24, 3; *Wing* v. *Clark*, 24 Maine, 366; 3 Johns. 173.

The vesting of the property casts the risk of accident on the vendee. *Potter* v. *Conrad*, Meigs' R. 26; *Tarling* v. *Baxter*, 6 B. & C. 362; *Bloxam* v. *Saunders*, 4 B. & C. 940; *Brown* v. *Bellows*, 4 Pick. 179.

Where it is the intention of the parties to make an absolute and complete sale, although something remains to be done to ascertain the quantity, weight or measure, the property passes. *Riddle* v. *Varnum*, 20 Pick. 280; *Macomber* v. *Parker*, 13 Pick. 175; *Hinde* v. *Whitehouse*, 7 East, 558; *Damon* v. *Osborn*, 1 Pick. 476; *Whitehouse*, v. *Frost*, 12 East, 612.

The plaintiffs are not entitled to a proportion of what was saved, for they had made no demand for the delivery of the corn. *Buck* v. *Owen*, 5 T. R. 409.

To understand the apparent conflict in the decisions, it is only necessary to go back and see how the former decision arose. That the *risk* of a thing sold pertained to the buyer, first came from the civil law, and there delivery was not necessary to determine the question of risk. That principle of the civil law has been adopted into the common law.

The conflict arose because the statute of frauds required delivery on a contract in writing, the risk did not attach until the bargain and sale was complete.

The contract of bargain and sale is not complete so long as any thing remains to complete the sale, which is the principle on which the cases turn, and when the seller has nothing more to do the risk attaches to the vendee. The language cited from Kent, is not his language, but of an English case decided by Lord Ellenborough; but it was decided afterwards by the same Judge that on sale of a quantity of oil from a tun of oil, the risk attached to the vendee. When the property was in a state to be delivered, and the vendor had nothing more to do, the risk of the goods attached to the vendee. *Whitehouse* v. *Frost*, 12 East, 613.

Kent does not state the principle as set forth in the authorities he quotes. Where the price and quantity are fixed the sale is complete.

The case cited by the other side from a newspaper, if true, overrules many of the cases in Massachusetts, without any allusion to them.

A contract of sale may be complete although the vendee may not have an absolute right of possession. *Risk* depends on the right of *property* and not on the right of *possession*. This has been frequently overlooked and occasioned some confusion in the decisions.

SHEPLEY, C. J. — Is it contended by either counsel that the property may be in one and the risk in the other?

It is not.

Fessenden, in reply, said that Kent adopts the authority by him cited, and the principle is laid down, as contended for by the plaintiff, as plainly as language can make it.

SHEPLEY, C. J. — Did the property in this case pass or not?

Fessenden. — That is the question I was arguing. The questions often determined have been of property, rather than risk. The distinction in the two cases from East, is, that in the latter case cited, the property was in the hands

of a *bailee.* I contend the property, *not delivered,* did not *pass.* For that property the plaintiff could not maintain *replevin.*

HATHAWAY, J.—The defendant had, in his store, some fifteen thousand bushels of corn, in bulk, of which he sold to the plaintiffs five hundred bushels, Dec. 1, 1851, and received his pay. The plaintiffs were millers, and for their own convenience and without charge for storage, left the corn in the defendant's store and took, as they wanted to use it, between the first and seventh of December, two hundred and seventy-six bushels. On the seventh of December the defendant's store and most of the corn in it was destroyed by fire, and the plaintiffs bring this action to recover *payment* for the balance of the five hundred bushels. The action is by the vendees against the vendor, and one question presented is, whether or not, as between them, the property in the whole five hundred bushels passed to the vendees by the sale.

The plaintiffs contend that, although they had paid for the whole, yet they had received only two hundred and seventy-six bushels, and that, until they had actually received the whole, or it had been measured out to them and separated from the mass, what remained in the store was not legally delivered, and was at the risk of the vendor.

There is an apparent conflict of the authorities upon this subject, arising, perhaps, more from a difference of the facts in the cases, in which the question has been presented, or from a difference in the forms of actions, by which parties have sought to vindicate their rights, than from any real difference of opinion concerning the law.

In this case the contract of sale was complete. The corn was paid for, and a part of it taken by the plaintiffs, who had the right to take the residue, when convenient for them, in the ordinary course of their business. Nothing more was necessary to be done on the part of the vendor, and, both upon principle, and according to the law as adduced from

the authorities cited by counsel in the case, the property passed to the vendees, and was at their risk. 2 Black. Com. 447, 448; *Damon* v. *Osborn*, 1 Pick. 476; *Riddle* v. *Varnum*, 20 Pick. 280.

But the plaintiffs claim that, as a portion of the corn was saved from the fire, they are entitled to recover *payment* for that. This is an action of assumpsit, and the case finds no evidence of an express promise to pay the plaintiffs for the corn saved, nor does it furnish any proofs from which a promise can be implied, and a nonsuit must be entered.

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

GOODING *versus* MORGAN.

If one, with a full knowledge of all the facts, or with the means of knowledge, voluntarily pays money under a claim of right, he can maintain no action to recover it back.

A *negotiable* note given for an account operates as payment.

And when a *negotiable* note is given for an account which had previously been paid, through mistake and without a knowledge of such previous payment, an action accrues immediately to recover back such second payment.

Nor would this right of action be lost by a voluntary payment of the *note*, after the party had learned the facts of its being a double payment.

But no action can be maintained to recover back the money paid to discharge *such note*.

In a writ containing only the money counts, the proofs are limited to the bill of particulars.

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

ASSUMPSIT. The writ contained the money counts only. The plaintiff filed the following specification. — "The plaintiff claims $125, which was paid by him to defendant, in full of a note for that sum, dated Dec. 13, 1851, given by plaintiff to defendant, and payable in May following, under a mistake of the fact, that said sum had been previously paid by plaintiff to defendant on account. B. Freeman, plaintiff's attorney, March 31, 1853." A copy of this spe-

cification was served on the defendant's attorneys on the day of its date.

The parties had had dealings together as part owners of the schooner "Tremont," built in 1847.

The plaintiff introduced the note referred to in his specification, also a copper bill of Hammond & Nash, against said schooner and owners, of $182,06, in the spring of 1847, which was paid to them by defendant on Jan. 13, 1849, as appeared by their receipt on the bill, and the same bill purported to be receipted as paid to the defendant by plaintiff, on the day of the date of the note aforesaid.

The plaintiff also introduced a receipt of the defendant, of the following tenor. —"March 2, 1848. Received of Joseph Gooding one hundred and eighty-two dollars and six cents, in full for a bill of copper which I paid Messrs. Hammond & Nash, for schooner Tremont, and also one hundred and sixty-four dollars and fifty-seven cents, for the income of schooner Tremont. "Pitman Morgan."

He also introduced testimony tending to show, that at the time the note was given, the defendant brought the copper bill to plaintiff and claimed it to be due, that he finally took the note of $125, but agreed to give it up if the plaintiff could find the receipt, the plaintiff denying that he owed it, and that much search was made for the receipt at about the time the note was given, but could not then be found.

The defendant introduced testimony, tending to show, that the note was given on a settlement of the matters pertaining to the schooner, and that the copper bill was not receipted by defendant until the note was paid, and then at the instigation of the plaintiff.

The counsel for defendant requested the presiding Judge to instruct the jury: — 1. *That*, if the plaintiff paid the note with a full knowledge of all the facts, it was a voluntary payment, and he is not entitled to recover back the money so paid.

2. *That*, upon the state of facts as testified to by the witnesses of the plaintiff, he is not entitled to recover.

The Judge declined to give the requested instructions, but said to them, *that* it was incumbent on the plaintiff to prove, that the note was given for the account of 1848, which it appeared had been previously paid ; that if the note was given with an agreement, that if the receipt of 1848 was found, the note should be given up; the plaintiff would have a right to pay the note, if the defendant required payment, and bring an action to recover back the money, although he had found the receipt before he paid the note, and did not claim to set it off against the note, and notwithstanding the note was over due and in the hands of Morgan when he paid it.

A verdict was returned for plaintiff, and exceptions taken by defendant.

Shepley & Dana, in support of the exceptions.

The instructions requested should have been given. They are fully sustained by the decisions. *Forbes* v. *Appleton,* 5 Cush. 115; *Preston* v. *Boston,* 12 Pick. 7; *Brown* v. *McKinally,* 1 Esp. 279; *Marriott* v. *Hampton,* 2 Esp. 546; *Benson* v. *Munroe,* 7 Cush. 128.

The instructions given are in direct opposition to the cases cited, and are erroneous.

Plaintiff's excuse for having given the note is not *mistake,* but negligence.

The fact was simply, that the defendant said he would pay the money if convinced it had been previously paid. And the case shows, that plaintiff did not try to convince him or show him any receipt.

B. Freeman, for plaintiff.

SHEPLEY, C. J. — To entitle the plaintiff to recover by the instructions given, the jury would be obliged to find, that an account due from plaintiff to defendant had been paid before the plaintiff gave to the defendant a negotiable note on account of it. If they so found, the plaintiff would, by the instructions, be entitled to recover, although he had discov-

ered the error and the means of proving it, before he paid the note, then over due and in possession of the defendant.

The law is regarded as settled in this State, if one with a full knowledge of all the facts, or with the means of knowledge, voluntarily pays money under a claim of right, that he cannot recover it back. By the law, as administered in England and in many of the United States, the money paid by the plaintiff could not, under any aspect, under which the case could be viewed, be recovered back. But by the law, as administered in this and some other of the States, the negotiable note operated as payment of the account in full or in part; and if that account was thereby paid a second time, under a mistake and without a knowledge, that it had been previously paid, a right of action immediately accrued to the plaintiff, to recover back the amount so paid a second time. This right of action would not be destroyed by a voluntary payment of the note, after a knowledge of the double payment had been obtained. This is, what distinguishes the cases of *Dole* v. *Hayden*, 1 Greenl. 152, and of *Whitcomb* v. *Williams*, 4 Pick. 228, from the cases cited by defendant's counsel.

When the note was paid, it appears to have been paid with a full knowledge of all the facts, and the money paid for that purpose cannot be recovered back. The defendant's promise to deliver it up, if the receipt was found, only constituted an additional ground of defence. It is only by adhering strictly to the distinction between a payment made on the account, by giving the note, and a payment made months afterward, to pay the note, that the action can be maintained. The plaintiff cannot be permitted for one purpose to allege those two payments to be in substance the same, and for another purpose to allege them to be substantially different. The amount to be recovered back might be substantially different by the interest, that might have accrued upon the note.

The first requested instruction should therefore have been given. More especially when it appears, that the declara-

tion contained the money counts only; and that a bill of particulars was filed, claiming only to recover back the money paid to pay the note.

Such specification is not required to be exact in form. It must truly state the ground of claim, the gist of the action. It limits the proof, and restricts the right of recovery to that claim. *Parker* v. *Emery*, 28 Maine, 492; *Babcock* v. *Thompson*, 3 Pick. 446; *Smith* v. *Kirby*, 10 Met. 150; *Brown* v. *Williams*, 4 Wend. 360; *Starkweather* v. *Kittle*, 17 Wend. 20.

According to the terms of the report, the verdict must be set aside. *Verdict set aside and new trial granted.*

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

BROWN *versus* LUNT *& ux.*

By the R. S., c. 91, before a deed can be recorded, it must be acknowledged before a justice of the peace, and his certificate of that fact indorsed thereon.

Without this pre-requisite, the *record* of it is unauthorized, and is *not notice* of a conveyance of the land.

But such *certificate*, if made by a justice of the peace *de facto*, merely, is a sufficient authorization for recording the deed.

Of what constitutes a justice of the peace *de facto*.

The official acts of *such justice*, within the jurisdiction of a justice of the peace *de jure*, are valid, as they affect third parties, and cannot be inquired into collaterally.

Thus a deed duly recorded, bearing the certificate of a justice of the peace *de facto* that it was acknowledged, is valid as a conveyance, both to the parties and the public, although at the *time* of such certificate his commission had expired.

A conveyance made to a married woman, in consideration of her promissory notes, has no validity as to the creditors of the grantor; but if such notes are indorsed by her husband, the deed is valid.

And *such consideration* cannot be impeached, although the indorsement of the notes was *after* the conveyance, if made in pursuance of an agreement when the deed was executed.

Additional considerations, when not inconsistent with that expressed in the deed, are provable by parol.

A trust, though secret, is not conclusive evidence of fraud, as to the creditors of either the grantor or grantee. It is open to explanation.

Brown *v.* Lunt.

Although a party cannot be compelled to execute a *parol* trust, he may do it voluntarily, and his creditors cannot object.

And when a deed, executed in part fulfillment of a parol trust, and in part for a valuable consideration, good upon its face, is attempted to be impeached, parol evidence is admissible to show the real consideration on which it was executed.

Quere, if the Act of 1854, c. 68, can operate retrospectively.

All the proceedings in the levy of an execution have reference to the *time when the land was taken.*

And interest on the debt of the judgment creditor can only be computed to that time.

A levy of the debt including the interest on the execution to the time of its completion, which was not till two days *after* the land was taken, cannot be upheld.

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

Writ of Entry demanding a part of the Lunt farm, (so called,) in Westbrook.

The demandant claimed title to the premises by virtue of an attachment, made on May 9, 1851, and a subsequent levy in favor of one Baxter against Abraham W. Whitmore; and by a deed of the same from Baxter to himself.

That judgment was recovered on April 24, 1852, for debt $264,75, and costs $20,63. The levy was completed on May 22, 1852, and the return of the officer on the execution stated, that the land was taken on May 20, the fees of levy were taxed at $15,89, the sum levied being $302,74.

In defence, the tenants put in a deed from Peter Lunt, one of the defendants, to said Whitmore, dated March 1, 1843, conveying the entire farm, and a deed from said Whitmore to Mary S., the wife of said Peter, dated April 3, 1851, of the same farm, and recorded the same day. This deed to Mary, purported to have been acknowledged before Samuel Fessenden, as a justice of the peace. [It also bore another certificate of acknowledgment, before L. Dean a justice of the peace, of Sept. 22, 1853, and was again recorded.]

The demandant called said Fessenden as a witness, who testified, that a year or two before he took the acknowledgment of this deed, his last commission as a justice of the

peace had expired, as he had since ascertained; that he did not know the fact at the time, but acted inadvertently; that he had acted as such justice since 1809, under commissions from Massachusetts and Maine; that he had constantly and frequently acted as such justice, after his last commission had expired, until after he took the acknowledgment, believing that he was a justice of the peace.

He also testified that when the deed was made, Peter Lunt agreed to indorse the notes given by his wife to Whitmore, and it was his impression that he indorsed them at that time.

Plaintiff also called the said Whitmore, who married a daughter of Peter Lunt, and who stated that the consideration of his deed to Mary was her two notes of $1000 each, payable to herself or order, and by her indorsed and delivered to him; that her husband agreed to indorse them at that time, and he thought it was then done, but was not certain. For their security he took a mortgage at the same time, and had since disposed of the notes. A day or two after they were given, he offered them for discount, and they were indorsed by Peter Lunt, but he recollected of no interview with Lunt after they were given and the time of such offer.

The mortgage appeared to be to secure $3000, and Whitmore further testified that the farm at the time of his conveyance was worth from $10 to $12,000; that the $2000, was all he then had against the estate; that he took conveyances of the farm from Lunt and several persons at different times; these conveyances were taken under an agreement with Lunt, that he should take a deed from Lunt of the farm, pay off the incumbrances, and hold it as security. He did relieve Lunt of his embarrassments. It was at that time of much greater value than he paid or expected to pay for it.

He further testified, that when he made the deed to Mrs. Lunt, he was a merchant in good standing, but that in April or May of that year he stopped payment in consequence of the failure of another person; that Mrs. Lunt knew nothing of his situation in business, and that she first proposed that

he should make the conveyance to her; it was not made to affect his creditors or keep his property out of their way. There was some misunderstanding between Lunt and him as to the amount of his claim, but they finally agreed upon $2000 as enough to cover it; the reason why the mortgage was made to secure $3000, was that he wished to obtain a loan of $1000, but no note was ever signed or delivered to him therefor.

The mortgage deed was put into the case by defendant, and also another mortgage from the tenants to Whitmore, to secure $2000, dated Oct. 17, 1851, describing the two $1000, notes of the date of April 3, 1851, as secured thereby.

Demandant also offered a disclosure made by Whitmore, as a poor debtor, on June 15, 1853, for the purpose of showing that he therein stated that the notes of Mrs. Lunt were not indorsed, on the day they were made, by Peter Lunt.

It was also admitted that the tenants had continued to occupy the farm since the conveyance of 1843.

The case was then taken from the jury, by consent of parties, and submitted, upon so much of the testimony as may be legal, to the full Court, with authority to make such inferences, in matters of fact, as a jury might, and render such judgment as the law and rights of the parties may require.

Fessenden & Deblois, Willis & Fessenden, and *Shepley & Dana,* for tenants.

Fessenden & Deblois, presented an argument in writing upon the point raised, that there was legal fraud.

G. F. Shepley and *W. P. Fessenden,* argued the defence orally to the Court.

Rand, for the demandant, maintained the following positions :—

1. The deed of April 3, 1851, from Whitmore to Mary S. Lunt, was of no effect *as against creditors* of Whitmore, because it was not duly recorded. It was not duly acknowledged; S. Fessenden was not a justice of the peace. R. S., c. 91, § § 17, 24, 26.

The registry was illegal, and no rights were obtained under it. 17 Maine, 418; 23 Pick. 80.

There is no pretence of actual notice to us. 29 Maine, 140; 32 Maine, 287.

S. Fessenden was not a *justice de facto*. 5 Wend. 231; 17 Conn. 585; 4 Denio, 168; 3 Camp. 432.

2. The Act of March 31, 1854, is unconstitutional, as it destroys vested rights, and operates retrospectively. 2 Greenl. 275.

3. The deed above referred to is *without consideration* and void as to creditors. The notes of married women are void, and furnish no consideration. 34 Maine, 566.

4. Parol evidence is not admissible to prove any trust or secret agreement. R. S., c. 91, § § 31, 32; 13 Mass. 443; 3 Pick. 205; 19 Pick. 235; 2 Met. 104.

5. A secret trust cannot be executed to the injury of creditors.

HOWARD, J. — These parties derive their respective titles from Whitmore; his title, acquired from Peter Lunt, in 1843, is not in controversy. The demandant claims under an attachment, by a creditor of Whitmore, on May 9, 1851, and a levy of execution in May, 1852. The tenants hold under a deed from Whitmore to Mrs. Lunt, one of the tenants, and the wife of the other, dated, and purporting to have been executed on April 3, 1851. The validity of their title though prior in date to the attachment, is assailed upon the ground, that the deed to Mrs. Lunt, was not so executed and recorded as to pass the estate, and stand against the subsequently acquired title of the demandant; and, that if, duly executed and recorded, yet that it was without consideration, and void as against the creditors of Whitmore. The tenants, in turn, contend, that the levy through which the demandant claims, was defective and void.

The objection taken to the execution of the deed to Mrs. Lunt, is, that the certificate of acknowledgment, was not

made by a person authorized to make it, or to take the acknowledgment of deeds, and that it was, therefore, inoperative, and did not authorize the deed to be recorded. R. S., c. 91, § § 1, 17, 24, 26. The conclusion will follow if the objection be sustained. For such a record would not afford constructive notice to the attaching creditor, and his title would take precedence. *DeWitt* v. *Moulton*, 17 Maine, 418. Since actual notice to him, of the prior conveyance is not proved, nor can it be fairly presumed from the evidence reported.

It appears, that the magistrate who made the certificate, was not in commission at the time. Being called as a witness, by the demandant, at the trial, he testified, "that he had no doubt that the commission which he held as a justice of the peace, had expired before he took the acknowledgment of that deed." And on cross-examination he testified, "that he had acted as a justice of the peace ever since the year 1809, by commissions under Massachusetts and Maine; that a year or two before he took the acknowledgment of this deed, his last commission had expired, as he had since ascertained; that he did not know the fact at the time, acted inadvertently; that he had constantly and frequently acted as a justice of the peace, after his commission expired, until after he took the acknowledgment, believing that he was a justice of the peace; and that the parties to the deed well knew that he so acted."

It is plain, that he was not then a justice of the peace *de jure*. Was he such *de facto*, and can his acts in question be sustained?

"An officer *de facto*, is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *Parker* v. *Kett*, 1 Ld. Raym. 658; *The King* v. *The Corporation of Bedford Level*, 6 East, 368. Or one who actually performs the duties of an office, with apparent right, and under claim and color of an appointment, or election. He is not an officer *de jure* because not in all respects qualified and authorized to exer-

cise the office; nor an usurper who presumes to act officially, without any just pretence or color of right. A mere claim to be a public officer, and exercising the office, will not constitute one an officer *de facto;* there must be, at least, a fair color of right; or an acquiescence by the public in his official acts so long that he may be presumed to act as an officer by right of appointment or election. *The King* v. *Lisle,* 2 Str. 1090; *Wilcox* v. *Smith,* 5 Wend. 231; *Plymouth* v. *Painter,* 17 Conn. 588; *Baird* v. *The Bank of Washington* 11 Serg. & Rawle, 411.

The distinction between officers *de facto,* acting *colore officii,* and officers *de jure,* has been recognized in England from an early period, and seems to have been applied to officers of every grade, from the King to the lowest incumbent of office. In statute of Edw. 4, c. 1, Henry, 4, 5, and 6, were styled "late Kings of England successively, in *dede* and *not of ryght.*" And in charters granted by King Edw. 4, he describes the line of Lancaster, as "*nuper de facto, et non de jure, reges Angliæ.*" Henry 6, was regarded as King *de facto,* although he had been declared an usurper by Act of Parliament; and treasons against him were punishable as capital offences, during the reign of his successor. 1 Bla. Com. 204, 371; 1 Hale, P. C. 60, 61; Foster, 397, 398.

The same distinction has been made in the Courts of England, in respect to the office of an Abbot, (L'Abbe De Fontein's) Year Book, 9 Henry 6, 33; of a Bishop, and of a Steward of a manor, *Harris* v. *Jays,* Cro. Eliz. 699; *Parker* v. *Kett,* 1 Ld. Raym. 660; of a mayor, *Knight* v. *The Corporation of Wells,* Lutw. 580; *The King* v. *Lisle,* 2 Str. 1090; of a deputy collector of customs, *Leach* v. *Howell,* Cro. Eliz. 533; of a Registrar of a corporation, *The King* v. *The Corporation of Bedford Level,* 6 East, 368; and of a justice of the peace, who had not taken the oath of office, before assuming its duties, *Proprietors of Margate Pier* v. *Haunam,* 3 B. & A. 266; and his acts were held valid, although he had not complied with the require-

ments of the statute, (Geo. 2, c. 20,) in taking the oath of qualification; on the ground that the interest of the public at large, required that the acts done should be sustained, ABBOTT, C. J., remarking, that "many persons, acting as justices of the peace in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons, are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known.

The same distinction is equally well known in this country, and has been applied in numerous cases, and to a great variety of offices, where persons have claimed to act *colore officii*, though not qualified according to the requirements of law, and where their acts, as officers *de facto*, have been upheld. It is familiar doctrine in the Courts of our own State, and is sustained by the cases following. *Fowler* v. *Bebee*, 9 Mass. 231; *Nason* v. *Dillingham*, 15 Mass. 170; *Bucknam* v. *Ruggles*, 15 Mass. 180; *Commonwealth* v. *Kirby*, 2 Cush. 577; *Plymouth* v. *Painter*, 17 Conn. 585, where it was held that a grand juror, though legally disqualified by a refusal to take the requisite oath, might be regarded as an officer *de facto*. *Smith* v. *State*, 19 Conn. 493; *The People* v. *Collins*, 7 Johns. 549; *McInstry* v. *Tanner*, 9 Johns. 135; *Trustees of Vernon Society* v. *Hills*, 6 Cow. 23; *Wilcox* v. *Smith*, 5 Wend. 231; *The People* v. *Bartlett & als.* 6 Wend. 422, in which case it was held that the trustees of a village, holding over beyond the term for which they were elected, by their own neglect, were liable to be ousted on *quo warranto;* but that they were officers *de facto;* that their acts for certain purposes were valid, and that their title to the office could not be inquired into collaterally. *The People* v. *White*, 24 Wend. 527; *The People* v. *Covert*, 1 Hill, 674; *The People* v. *Stevens*, 5 Hill, 616, 630, 631; *The People* v. *Hopson*, 1 Denio, 574; *Greenleaf* v. *Low*, 4 Denio, 168; *McGregor* v. *Balch*, 14

Vermont, 428; *Moore* v. *Graves*, 3 N. H. 408; *Tucker* v. *Aiken*, 7 N. H. 113, where the rule was held to be applicable to town officers; *Cocke* v. *Halsey*, 16 Peters, 81; *Allen* v. *McKeen*, 1 Sumner, 312.

Without further reference to cases, it will be found that the distinction stated is fully sustained by those already cited; and that it applies to all public officers, judicial or ministerial, whether claiming by election or appointment; and whether holding under a defective title within the term, or in possession, and exercising the office under color of right, beyond the term affixed to it by law. Though at the expiration of his commission, an officer may be disqualified from acting officially, yet it may not be so plain and obvious as to deprive him of an apparent right to exercise the office. Others are not required to ascertain at their peril, whether he is legally qualified, before yielding to his authority, or calling upon him to perform official acts, proper and necessary to be done. They are not obliged to demand or test his authority, or to ascertain the date or duration of his commission; nor is there a necessity upon him, ordinarily, to proclaim or exhibit the tenure or character of his official authority. An under steward, holding over after the death of the chief steward, having a colorable right, was held to be so far rightfully in place and power, until the death of his principal was known, that his acts were regarded as those of an officer *de facto*. 6 East, 369, before cited, where L'd ELLENBOROUGH refers to one of the earliest cases, (*Knowles* v. *Luce*, Moore, 109,—112,) to be found in the books, to the point under consideration. *Crew* v. *Vernon*, 3 Cro. Car. 97, 98.

In this case, as it appears by the report, the magistrate whose official character and authority is in question, had been an acting justice of the peace, "constantly and frequently," for forty years successively, under commission, and qualified as we must understand; and was well known, as such officer, to the parties to the deed, and consequently, from the nature of his official acts and duties, was well known to the public.

He was not an intruder, and did not usurp the office; but was in by appointment, and acting with color of title, though holding over the time limited by his commission, and without legal authority. He had been admitted to the legal possession and enjoyment of the office, by taking the requisite oath of qualification, as seems to be conceded. 1 Str. 538; *Rex* v. *Ellis*, 9 East, 252, note. The acts in question were within the jurisdiction of a justice of the peace, and among the ordinary duties of such officers. It does not appear that his official character had ever been questioned. And, while it must be admitted that there may be cases, in which it might be difficult to determine whether a person exercised a particular office by color of right, or as a mere usurper, yet this, in our opinion, is not one of that character. Here the evidence justifies and requires the conclusion that the magistrate appeared to have had a right, and colorable title to the office which he assumed to exercise, when he took the acknowledgment, and made, upon the deed, the certificate in question. He being in reputed authority, as a magistrate of long standing, third persons requiring his official services, were not bound to ascertain whether, or not, he had a commission in force; nor are they chargeable with notice of the date or termination of his commission. It is not reasonable to suppose, that he would put the parties, or the public, on the inquiry into his official authority, so long as he was exercising the office, "believing that he was a justice of the peace," as he testified. The case shows, that neither the magistrate, nor the parties to the deed, nor the public, by fair presumption, knew or supposed, that his commission had expired. He had been duly accredited by the government, and was assuming to act in his official capacity, as of right, and with, at least, a colorable right; and the public, and third persons, might well regard him as continuing in authority, until it became apparent, that his official character was lost or changed. He must be regarded, therefore, as a justice of the peace *de facto*, when he took and certified the acknowledgment of the deed to Mrs. Lunt.

"The law is too well settled to be discussed," as stated by Chancelor KENT, in *People* v. *Collins*, and shown by the authorities cited, that the acts of an officer *de facto*, done by virtue of his office, are as valid, so far as the rights of the public and third persons who have an interest in the acts, are concerned, as if he were an officer *de jure;* and it is as well settled, that neither his title to the office, nor his official acts, can be indirectly called in question, in a suit to which he is not a party. His office and authority may be valid as to others, though invalid as to himself. These doctrines are held to be founded in public policy and convenience, and necessary to the maintenance of the supremacy and execution of the laws, and for the protection and security of individual rights. Hence the law favors the official acts of those in reputed authority; and the rights of those claiming title or interest through their proceedings. 16 Vin. Abr. 114, [Officer and Offices, G. 3, G. 4.]

The certificate of acknowledgment of the deed to Mrs. Lunt, having been made by a justice of the peace *de facto*, was valid, as to the parties to the deed and the public; and it authorized the registry of the instrument upon the public records of deeds. Such registry would constitute public, legal notice to all persons, of the conveyance.

But it is urged, that the conveyance was without consideration, and void as to the creditors of Whitmore. The deed is good upon its face, but the demandant relies upon the testimony of Whitmore, whom he called as a witness, to support this objection. The tenants rely upon the testimony of the same witness, as furnishing evidence to meet the objection, and repel all presumptions of fraud.

The notes of the grantee, for two thousand dollars, she being a married woman, would, of themselves simply, furnish no consideration for the conveyance; but being indorsed by the husband, in pursuance of his agreement at the time, his liability was secured upon the notes, and they thereby constitute a valuable consideration. Whether he indorsed at the time, as the evidence tends very strongly to show, or

"within a day or two after they were given," in fulfillment of his agreement made at the time, would make no difference in this case, as to his liability, or the validity of the consideration furnished.

The estate, or farm, as it is called, was proved and admitted to be of much greater value than the amount paid or secured by the notes. But the tenants proved by the plaintiff's witness, Whitmore, on cross-examination, that there were additional and other considerations than those named in his deed, for the conveyance; such as that he took the conveyance from Peter Lunt, who was his father-in-law, in 1843, to remove the incumbrances then upon it, in order to relieve the grantor from embarrassments, and that he held the farm by agreement as security; that there was some misunderstanding between him and Lunt, as to the amount of his claim in 1851, but that they finally agreed upon two thousand dollars, as an amount sufficient to cover his claims, and that upon receiving the notes before mentioned, for that sum, he conveyed the premises to Mrs. Lunt, and that the tenants had continued to occupy the farm since the conveyance in 1843.

It was competent for the tenants to aver and prove additional considerations not expressed in the deed, and not inconsistent with that expressed. The cases cited are full to this point. *Tyler* v. *Carleton*, 7 Maine, 175, and the cases there referred to; *Emmons* v. *Littlefield*, 13 Maine, 233; *McCrea* v. *Purmort* 16 Wend. 665; *Wallis* v. *Wallis*, 4 Mass. 135; *Quarles* v. *Quarles*, 4 Mass. 682.

But it is contended that, as all trusts, in this State, concerning lands, except those which arise or result by implication of law, must be created and manifested by writing, parol evidence was not admissible to prove any supposed trust, or secret agreement between Peter Lunt and Whitmore. R. S., c. 91, § § 31, 32. A party might not be compelled to execute any such trust, nor could it be enforced, unless manifested and created, as required by statute. Yet a parol trust may exist, and may be executed voluntarily, and the

existence of such a trust may be established, and ordinarily must be proved by parol evidence.

One may, if he will, do that which the law will not compel him to do, and those whose rights or interests are not thereby affected injuriously have no cause to complain. Here the conveyance was not in trust for the debtor, but in execution, in part, at least, of a trust reposed in him by his grantor. That trust, though secret, would not be conclusive evidence of fraud, against the creditors of the grantor, and still less, as to creditors of the grantee.

The burden of proof is on him who alleges the want of consideration, or fraud, in a conveyance good upon its face. Here a valuable consideration is shown by the testimony offered by the demandant, and the evidence does not establish fraud in the reconveyance of the farm to the wife of the grantor of the debtor. But, on the contrary, the debtor, when called as a witness by the demandant, testified, "I was a merchant in this city, (Portland,) in 1851, in good standing when I made the deed to Mrs. Lunt; I stopped payment some time in April or May, 1851; neither Mr. nor Mrs. Lunt knew any thing of my situation in business matters; Mrs. Lunt first proposed that I should convey to her; that conveyance was not made to affect my creditors, or keep my property out of their way." This testimony was not contradicted, nor assailed, excepting by a disclosure of the witness, offered to show that he had therein stated, that the notes referred to were not indorsed by Peter Lunt on the day they were made; and it stands alone and uncontrolled by any facts or evidence in the case.

The case, *Smith* v. *Lane*, 3 Pick. 205, was regarded as one where the conveyance was fraudulent, and apparently was not very fully considered; and it does not appear to have been subsequently regarded as authority to the full extent, in more recent decisions by the same Court. *Cutler* v. *Dickinson*, 8 Pick. 386; *Oriental Bank* v. *Haskins*, 3 Met. 332. In *Flint* v. *Sheldon*, 13 Mass. the tenant undertook to prove by parol a secret trust, to control and

defeat his own deed, but the evidence was rejected. *Somes* v. *Brewer*, 2 Pick. 184, is different from this in the facts and principles involved. In *Parkman* v. *Welch*, 19 Pick. 231, 236, the conveyance was held to be clearly fraudulent and void in law.

In the case at bar, we cannot conclude from the evidence, that the conveyance under which the tenants hold, was either voluntary or fraudulent. Roberts, Statute of Frauds, 15, 66, 72, 73.

The statute of 1854, c. 68, making valid the acknowledgment of deeds, in certain cases, is supposed to have reference to this case; but its construction is not required at this time, as it cannot be material to the result of our deliberations.

The objection to the levy involves a question of practical importance, that may frequently arise, and its consideration at this time may be appropriate. The levy was completed on May 22, 1852. The officer returns, "By virtue of this execution, on the 20th inst. I took the parcel of real estate described in the above certificate of the appraisers, and on the 22nd inst. I extended this execution thereon in manner following," &c. The R. S., c. 94, § § 1, 2, provide that certain descriptions of real estate of a debtor may be "*taken in execution* for his debts." In § 4, the manner of selecting appraisers, their qualification and duties are described. In § 5, it is provided that, "after the officer *has taken land in execution*, and given notice to the debtor thereof, and allowed him a reasonable specified time, within which to appoint an appraiser, as mentioned in the preceding section, he shall then proceed, without unnecessary delay, to have the estate appraised, and the levy completed; *and it shall be considered as made when the land is taken in execution;* and the subsequent proceedings and return shall be valid, though made and done after the return day, or after the removal or other disability of the officer." He is required to state in his return on the execution certain

facts, and among them, and *first*, "the time when the land *was taken in execution.*" (§ 24.)

As all subsequent proceedings are thus made by statute to relate to the time when the land is *taken in execution*, the amount for which the creditor can take the debtor's land by levy of execution, must be the amount only that is due and collectable at that time. Interest upon the judgment should not be reckoned and included beyond that time, as the officer can *take in execution* land of the debtor only for his debt then due. Subsequently accruing interest could not, in any just sense, be regarded as then due, or as forming a part of the debt then existing.

It had been decided, before the enactment of the Revised Statutes, that the whole proceedings of the seizure of land on execution, and completing the extent, have relation to the day of the seizure. *Heywood* v *Hildreth*, 9 Mass. 393; *Brown* v. *Maine Bank*, 11 Mass. 133; *Waterhouse* v. *Waite*, 11 Mass. 207; *Cushing* v. *Arnold*, 9 Met. 26. But in *Allen* v. *The Portland Stage Company*, 8 Maine, 207, it was held that the levy of an execution on real estate could not be considered as commenced until the appraisers were sworn. In *Eveleth* v *Little*, 16 Maine, 374, in equity, it appeared that the appraisers were selected and sworn on April 11, but that the appraisement was made, the extent completed and seizin given at an adjournment of the proceedings on the twenty-ninth of the same month; and the Court held that the time for redemption did not expire until a year from the completion of the levy. The statute then in force, (1821, c. 60, § 30,) authorized a redemption by the "debtor, his heirs or assigns, executors or administrators, within the space of one year next following the extending execution thereon." But the Revised Statutes furnish the rule for this case, and as it appears that the sum for which the debtor's land was appraised and set off on execution, included interest on the judgment, to the time when the extent was completed, and for two days after the land was "*taken in execu-*

tion," the levy is invalid. It falls within the decision in *Glidden* v *Chase,* 35 Maine, 90.

Demandant nonsuit.

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

MOORE, *Pet'r for Partition, versus* RICHARDSON *& als.*

By the statute of 1821, c. 60, § 1, a reversionary interest was made liable to attachment on mesne process, and to be taken on execution for the debts of the owner.

Under that law, the reversion of a *feme covert* was liable to be levied on for debts of her contracting *before* her coverture.

Where the return upon an execution, issued upon a judgment, recovered against a husband and wife, for the debt of the wife before her marriage, describes the real property levied on, as "the property of said W. & A. (the judgment debtors,) being her right of inheritance;" such levy embraces the husband's freehold and the wife's reversion, and is a valid transfer of her land.

ON FACTS AGREED.

PETITION FOR PARTITION.

The petitioner is a widow. Her father, many years since, died seized of the estate described in the petition, *one eighth* of which she was entitled to by inheritance, and which she now claims by her petition.

The petitioner, after her marriage, was sued by the respondents, for a debt she owed before, and judgment was recovered against her and her husband, in June, 1838. The execution issued thereon was satisfied by a levy on six-eighths of one seventh of the premises, describing it "as the property of the within named William E. Moore and Agnes Moore, wife of said William E., being her right of inheritance," and setting out the boundaries; the whole being in common and undivided.

The respondents have ever since occupied the land so levied on.

The case was submitted for a judgment according to law.

Fessenden & Deblois, for petitioner.

To one fifty-sixth of the estate described, the title of the petitioner is not disputed. But we claim one-eighth, and that the levy, by which her title is attempted to be divested, is void. In support of this view, the counsel argued thus:

1. By the domestic relation of husband and wife, the husband is absolutely bound to pay and discharge the debts of his wife, contracted before coverture, and this too, without regard to his having received from his wife on marriage any thing or nothing, by way of property. Reeve's Dom. Rel. 67, 68, 69, 70, 71.

2. In the real estate of his wife, the husband takes during their joint lives, at least, the usufruct and life estate, and the wife is left only with a reversion. Co. Lit. 351; 2 Black. Com. 433; *Barber* v. *Root,* 10 Mass. 261.

3. Such estate of the husband in the real property of his wife is liable to the satisfaction of his debts, and may be levied on for that purpose. *Babb & ux* v. *Perley,* 1 Maine, 8; *Litchfield* v. *Cudworth,* 15 Pick. 29; *Chapman* v. *Gray,* 15 Mass. 444; *McKeen* v. *Gammon,* 33 Maine, 191.

4. That the relation aforesaid of husband and wife, as to the property of the wife, deprives her of all means of paying her debts, and compels a creditor of the wife, before marriage, to resort to the husband and his property for the satisfaction of such debts.

5. It would seem to follow, that the levy in this case, should have been upon the husband's right to the rents and profits of the wife's real estate, or in other words, upon his life estate, and that if this was not sufficient, the estate of the wife was beyond the reach of the creditor, during the coverture, and her liability also suspended, and the attempt to levy on her inheritance, was a mere void act.

6. The title acquired by the petitioner, does not enure to the benefit of the creditor. *Freeman & al.* v. *Thayer & al.* 29 Maine, 369.

Shepley & Dana, for the respondents.

It is clear, that before the petitioner's marriage, her share

in the premises could have been taken for the same debt on which judgment was rendered against her and her husband, and the property in fact levied on.

Why then should coverture deprive creditors of their rights, and oblige them to wait until it is removed. The object of the common law was, not to deprive a creditor of his remedy against a *feme covert* and her property, but to make the husband also liable for her debts. To this extent, that part of Reeves, cited, goes, and shows the intention was to have a remedy against both.

The fact, that the judgment is rendered against husband *and* wife, makes apparent the inconsistency of the fourth proposition of the counsel on the other side. If that proposition were a true statement of the law, all the creditor could do, during coverture, would be to hold the husband alone.

It is contended, however, that although the debt here was jointly due from the husband and wife, yet, as he had an interest in her real estate, the creditor should have regarded it, and taken that alone.

But this division of the right to the wife's property, as between her and her husband, is only a distinction made by law, as to themselves, their rights and the rights of the creditors of the husband. That *they* should only be allowed to take his interest, is only just; but that the creditor of both, should only take the interest of *one*, is a very different thing. There is no reason why such a division of rights should be regarded, when the hardship it was intended to avoid does not exist. If the entire estate is owned by the husband and wife, who are in law one person, and that entire estate is only sufficient to pay a debt they justly owe, what reason is there or what policy, against satisfying that claim with that estate? Its being divided into divers proportions, or interests between them, does not make the estate larger, or any the less liable for their joint debt; and to say, that in a case like the one at bar, the creditor should have been content with taking the life interest of the

husband in part satisfaction of the execution, and should leave the wife's interest until her death, or the death of the husband, (if tenant by the curtesy,) is to subject the creditor to delay without any possible advantage to the wife.

But this whole matter has been adjudicated and settled in the case of *Fox* v. *Hatch*, 14 Vermont, 340.

The statute of 1821, c. 60, § 1, provides that reversions and estates of that nature may be levied on, and § 27, of the same chapter, declares that in cases of tenants in common (as was petitioner and other heirs of Mackie) the levy shall be valid to convey all the debtor had. The right of inheritance was all the petitioner had. A portion, (six-sevenths,) of this was levied on. If it *was* in fact, as between herself and her husband divided into two estates, the levy would convey *her* right, and if that was encumbered with the life estate of the husband, it was a mistake beneficial to them, rather than to the plaintiffs in that suit. The petitioner here suffered no damage, and she cannot now set up as a defence, that her husband had a life interest in the estate.

HATHAWAY, J. — The petitioner, the widow of William Moore, prays partition of certain real estate of which her father, Andrew Mackie, died seized, and of which she claims one eighth as her inheritance. When the petitioner married William Moore she was in debt, and a suit was instituted against her and her husband, and prosecuted to final judgment, and execution thereon levied upon a portion of her inheritance, July 27, 1838, for satisfaction of her debt contracted before coverture. There is no question made between the parties, that if the levy was not effectual to transfer the estate levied upon, to the judgment creditor, she is entitled to one eighth; and if it was effectual for that purpose, she is entitled to but one fifty-sixth.

By virtue of their marriage, Moore acquired a life estate in his wife's land; the reversion was hers. By statute of 1821, c. 60, § 1, it is provided, that "all rights in equity of

redeeming lands mortgaged, *reversions or the remainder* shall be liable to attachment upon mesne process, and to be taken by execution upon judgment recovered for the payment of the just debts of the mortgager or the owner." And such is the law in Massachusetts. *Williams* v. *Amory*, 14 Mass. 20; *Atkins* v. *Bean & als.* 14 Mass. 404. And it has been well decided in Vermont, that the wife's land might be taken in execution, in satisfaction of her debts contracted before marriage. *Fox* v. *Hatch*, 14 Verm. 340, cited in argument. The description in the levy, of the land levied upon, as "the property of the said William and Agnes, being her right of inheritance," is broad enough to embrace the husband's freehold and the wife's reversion.

The levy was a valid transfer of the land levied upon, and the petitioner is entitled to one fifty-sixth part of the premises only, and partition is ordered accordingly.

The respondents are entitled to costs by the statute.

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

DOCKRAY *versus* DUNN.

A negotiable note given by defendant, for which he received one of the same amount, is made upon a good consideration, and its payment cannot be avoided, though it came into the hands of the plaintiff after its maturity.

The presentment of a note at the place where it is made payable on a day certain, is not a prerequisite to the maintenance of an action thereon.

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

ASSUMPSIT, on a note payable to order of Longley & Co., at the Suffolk Bank, in one month after date.

The defence was, that it was an accommodation note, and that it was never presented at the Suffolk Bank.

One of the payees testified, that the only consideration for the note in suit, was one given by them to defendant for the same amount, on the same time; and that defendant let him have it as an accommodation note, for which he had

never paid him any thing. When the note was due the defendant furnished him with funds to pay it, and he called at the bank, but it was not there, and he appropriated the funds to some other purpose. The note, before it was due, was by him negotiated to one Jewett, as *collateral security.*

The defendant offered to prove that the note came into the hands of plaintiff when it was over due, but the presiding Judge ruled that the testimony in the case, and that offered, would not constitute a defence, and the defendant was defaulted. If the ruling was wrong, the default is to be taken off, and the action to stand for trial.

Shepley & Dana, for defendant.

Willis & Fessenden, for plaintiff.

CUTTING, J. — The note produced and read to the jury made a *prima facie* case for the plaintiff.

The defendant then offered in evidence the deposition of Benjamin Longley, a member of the firm of Longley & Co., the payees and indorsers of the note. This testimony, if admissible, and that rejected, if admitted, do not constitute a defence. The consideration for the note was another of like amount and date, signed by the witness, and payable to the defendant, and which of the parties was most accommodated at *that* time, does not appear. The note, soon after its execution, was indorsed to Luther Jewett, as collateral security for a preëxisting debt, and by him transferred to the plaintiff after its maturity. The note never was presented at the Suffolk Bank, when and where payable, and where the witness, with funds furnished by the defendant, called to pay it.

Upon this evidence, it is contended, in argument, that the note was an accommodation note; and it is true that the witness so swears, but the facts disclosed show it to be otherwise. An exchange of notes may have been accommodating, but such a transaction constitutes none of the elements of accommodation paper in the mercantile sense of that term. A mutual independant promise, in writing, is

a good consideration to uphold the contract of each, and it may be enforced, even by the original party, or discharged by way of set-off, when duly filed.

It is further contended, that the defendant is discharged, by reason of the note not having been presented for payment at the Suffolk Bank. It has been otherwise settled in this State, in *Bacon* v. *Dyer*, 12 Maine, 19, re-affirmed in *McKenney* v. *Whipple*, 21 Maine, 98, and in *Gammon* v. *Everett*, 25 Maine, 66.

According to the agreement of the parties the default is to stand.

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

CUMBERLAND MARINE RAILWAY *versus* CITY OF PORTLAND.

The Act incorporating the Cumberland Marine Railway authorized the company to hold personal and real estate, and required that the *whole property* should be divided into shares, and that such *shares* should be considered in all respects as *personal estate*. — *Held*, that under the provisions of R. S., c. 14, § 51, and laws of 1845, c. 159, § 10, the *real estate* belonging to the company is liable, *as such*, to taxation.

ON FACTS AGREED.

ASSUMPSIT for money had and received.

The writ was dated Nov. 22, 1845.

The plaintiff corporation was incorporated in 1834, and by the third section of the Act, it was provided "that the whole property of said corporation shall be divided into shares of such number as the corporation shall hereafter direct, and said shares shall be considered in all respects as personal estate."

It was authorized to hold personal and real estate.

In 1836, certain real estate in Portland was conveyed by deed to the said company, of which they took possession, and have continued to hold the same, and on which taxes were assessed to the company by the city of Portland, for the years 1843, 1844, and 1845.

The taxes were rightfully assessed if said estate was liable to assessment as real estate.

These taxes were discharged, Nov. 15, 1845, under protest, to save a forfeiture of the estate taxed; and to recover back the money so paid, this action was instituted.

W. P. Fessenden, for defendants.

The property was taxable as real estate. R. S., c. 14, § 51. The case in 21 Maine, 533, is not therefore sound law. The statute then in force was overlooked. Stat. 1838, c. 313.

Shepley & Dana, for plaintiffs.

RICE, J. — This is an action to recover back money paid for taxes assessed by defendants on plaintiff corporation, in the years 1843, '4 and '5. Said taxes were paid under protest, to prevent a forfeiture of the land taxed.

It is admitted that the taxes thus paid were legally assessed to said company if the estate was liable to assessment as real estate.

Section 3 of the charter of said company provides, that the whole property of said corporation shall be divided into shares of such number as the corporation shall hereafter direct; and said shares shall be considered in all respects as personal estate.

Section 51 of c. 14, R. S., provides, that the assessors of any town or plantation, in assessing any taxes, may, at their election, assess improved lands to the tenants in possession of the same, or the owners thereof, whether residing in the State or not, and all real estate, or all such as is usually denominated real, but which is made personal by statute, may be taxed to the tenant in possession, or to the owner, whether living in the State or not. A similar provision existed in the laws of 1838, c. 313.

The plaintiff, to show the illegality of the assessments in question, relies upon the decision of this Court in the case of the *Bangor and Penobscot R. R. Co.* v. *Harris*, 21 Maine, 533.

The charter of that corporation contains a provision similar in its terms to the section which has been cited from the charter of the plaintiff corporation.

The case referred to was decided without argument. The late C. J. WHITMAN, in giving the opinion of the Court in that case, remarks, "the property in the railroad being thus converted by statute into personal estate, was no longer subject to taxation, otherwise than as personal estate, unless the Legislature should think fit, by tax Act or otherwise, specifically to prescribe. And we are not aware that in 1840, when the tax in question was imposed, any such provision was in existence." The statute of 1838 undoubtedly escaped the observation of the Court.

The tax Act of 1845, c. 159, § 10, second branch, provides, that all machinery employed in any branch of manufacture, and all goods manufactured or unmanufactured, belonging to any corporation, and all real estate belonging to any corporation, shall be assessed to such corporation in the town or other place where such real estate or machinery and goods are situated or employed; and in assessing the stockholders for their shares in any such corporation, their proportional part of the value of such machinery, goods and real estate, shall be deducted from the value of such shares.

This statute not only required the real estate described to be assessed to the plaintiff corporation, but makes provision by which it shall not be twice taxed.

The taxes in this case appear to have been legally assessed. *Plaintiffs nonsuit.*

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

INHABITANTS OF BRUNSWICK, *Appellants from a decree of the County Commissioners.*

The authority of the Court over appeals from the judgment of County Commissioners, under c. 28 of the Acts of 1847, is limited to the appointment of a committee, and action upon their report.

In such cases, objections to the constitutional existence of the County Commissioners, or to their proceedings from which the appeal was taken, cannot be entertained.

The report of such committee can only be impeached for error, fraud or gross partiality.

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

The facts of the case are stated in the opinion of the Court.

To the report of the committee appointed by the Supreme Court, the appellants filed the following objections:—

1. Because by the terms of the report in said case, it does not appear, that said proposed road, was adjudged to be of common convenience and necessity.

2. Because on the face of said report, it appears, that said road is not a road leading from town to town.

3. Because it appears by said report, that said road is located over lands, to the proprietors of which, the Commissioners have neither awarded any damage, nor found that they did not sustain any, making no adjudication respecting the same.

4. Because the entire proceedings in said case, are irregular, null and void, and ought not to be the foundation of a judgment of this Court, inasmuch as the County Commissioners being judicial officers, are not appointed by the Govenor, with the advice and consent of the council, in conformity with the requirements of the constitution of this State.

These objections were overruled and the report ordered to be accepted. The appellants filed exceptions.

Barrows, for the appellants, urged the objections taken at *Nisi Prius*. To support the first, he cited R. S., c. 25, Art. 1, § 3; 2 Mass. 171; 6 Mass. 491.

In support of the second he cited c. 25, R. S., Art. 1, § 1; *Pettengill, Pet.*, 21 Maine, 377.

For the third, § 3, of same c., R. S.

In support of the fourth objection, Const. of Maine, Art.

5, part 1, § 8; *Kennebec Toll Bridge, Petr's*, 11 Maine, 263; Stat. of 1847, c. 28, § 4; *Rutland* v. *County Commissioners*, 20 Pick. 79.

Anderson & Harmon, for the original petitioners, contended that it was questionable whether this is a matter open to exceptions. *Clapp* v. *Hanson*, 15 Maine, 345.

The remedy, if any needed, must be obtained by *certiorari*. R. S., c. 28, § 2; *Dow* v. *True*, 19 Maine, 46.

And that the appeal from the Commissioners to this Court is not such as vacates the judgment of the County Commissioners. It only suspends the proceedings. Laws of Maine, 1847, c. 28, § 2.

A. P. Deane, County Att'y, for the county, to the first of appellants' objections, cited *Cushing* v. *Gray*, 23 Maine, 9.

To the second, R. S., c. 25, § 3; *Parsonsfield* v. *Lord*, 23 Maine, 511; 19 Maine, 338; 26 Maine, 353.

To the third, the same authorities.

To the fourth, R. S., c. 99, § 1, and Laws of 1831, c. 500, § 1; *Goodwin* v. *Inhabitants of Hallowell*, 12 Maine, 276, and 29 Maine, 196.

That exceptions do not lie to such cases, he cited 29 Maine, 288; *County Commissioners* v. *Spofford*, 30 Maine, 456.

CUTTING, J. — Robert Pennell and 118 others petitioned the Court of County Commissioners to lay out a road, leading more direct than the old route, from Brunswick to Harpswell Neck. The Commissioners, at their December term, A. D. 1853, after the necessary preliminary proceedings, located the road and caused the same to be recorded, and from their decision the appellants, having entered their appearance and considering themselves aggrieved, appealed to this Court, who, at the January term, A. D. 1854, appointed a special committee to revise the doings of the Commissioners. This committee, at the April term following, made their report, confirming the judgment of the Commissioners, to the ac-

ceptance of which objection was made. The report was accepted, to which ruling exceptions were taken.

Prior to the statute of April 17, 1841, the Court of County Commissioners exercised exclusive jurisdiction in the location, alteration or discontinuance of highways leading from town to town, and from their decision no appeal could be taken, but the remedy for the aggrieved party, if any, was by a petition to this Court for a writ of *certiorari* to quash the proceedings. By that statute an appeal lay to this Court, who were "vested with appellate jurisdiction, with full power to revise, affirm, modify or annul any decision or adjudication, brought before them by such appeal, as justice to the parties or the public good may require." This statute was repealed by that of March 14, 1842, which in substance was a reënactment of the former Act with certain restrictions and limitations and conditions respecting costs.

By the provisions of those Acts, on an appeal, it became necessary for this Court, in order to ascertain what "justice to the parties or the public good might require," personally to view the route, as the Commissioners were required to do and had before done; for the reason, that an appeal to a Court, having an appellate jurisdiction, vacates the proceedings in the lower and requires the superior Court to commence *de novo*. To perform such services this Court could rarely find sufficient time or opportunity.

On February 29, 1844, the Act of 1842 was repealed, saving, however, all appeals under its provisions; and thus terminated a law, the practical operation of which was to transfer all the business of the Court of County Commissioners to this Court. The County Commissioners were then again restored to their former final jurisdiction, which they continued to exercise until August 2, 1847, when another statute was passed, granting appeals from their decision to the (then) District Courts, whose jurisdiction in that particular has since been transmitted to this Court. By the 3d § of this Act this Court are now authorized, on appeal, "to appoint a special committee of three disinterested per-

sons, who, after giving such notice as the Court shall order, and being duly sworn, *shall proceed to view the route named in the original petition;* and after a hearing of the parties and their evidence, shall report at the next term, whether in their opinion the judgment of the County Commissioners shall be, in whole or in part, affirmed or reversed." To this committee are delegated certain powers, and over their acts this Court have no other control than that of the acceptance or rejection of their report, which, like the report of referees, appointed by Court, cannot be impeached except for error, fraud or gross partiality, of which in this case there is no pretence.

It will be perceived that the statute of 1847 varies from the former statutes, in *suspending* instead of vacating the proceedings of the Commissioners, for when an appeal is taken "thereupon all proceedings shall be *stayed* in said Court of County Commissioners, until a decision shall be had in said District Court." § 2. And when had, judgment shall be entered accordingly and forthwith certified to the Court of County Commissioners. And "if such judgment shall be wholly against the location, alteration or discontinuance in question, no further proceedings shall be had thereon by the County Commissioners; but if otherwise, then the County Commissioners shall proceed to lay out, alter, or discontinue such highway in whole or in part, as the judgment may be." § 4. This Act no where authorizes the committee to decide abstruse questions of law, such as the constitutional existence of the Court of County Commissioners, but "*to view the route named in the original petition.*" Neither does it authorize this Court, on an appeal, to do otherwise, than to appoint the committee, act upon their report, and upon its acceptance, to enter judgment and forthwith certify the same to the Commissioners, who, in their subsequent proceedings, are to be controlled by such judgment. *Exceptions overruled.*

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

STATE OF MAINE *versus* INHABITANTS OF GORHAM.

The provisions of the common law and of the statute of 22 Henry VIII, as to the parties required to keep in repair highways and bridges, have been superseded by R. S., c. 25, § 57.

Since the enactment of that statute, the obligation of towns to keep in proper repair their highways and bridges, is absolute and unqualified; and for neglect of this duty, they are liable to *indictment.*

By § 16, c. 81, R. S., every rail road corporation shall maintain and keep in repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike, road, canal, highway or other way.

Structures for the passage of travelers, erected over a rail road where it crosses an established highway, fall under the designation of bridges, as that term is used in our statutes.

For the want of proper repair of *such bridges and their abutments,* so constructed by a rail road company, being a part of the *highway* which the *town* is bound to maintain, they are liable to an indictment.

But towns may compel the party bound to maintain such bridges, to make any reasonable repairs, by the writ of *mandamus,* or if they have been obliged to make expenditures thereon, may reimburse themselves by an action on the *case.*

ON FACTS AGREED.

INDICTMENT.

The York and Cumberland Rail Road Company, in pursuance of their charter, laid out and built their road across one of the highways which the defendants were bound to keep in repair.

Over their rail road, the company built a bridge, where the highway formerly was, with abutments.

The indictment was for the neglect of defendants in keeping this bridge and abutments in a fit state of repair.

If the Court shall be of opinion, that the indictment will lie, the case is to stand for trial, otherwise a *nolle prosequi* is to be entered.

J. Pierce, jr., for defendants.

This indictment ought not to be sustained:—

1. Because the York & Cumberland Rail Road Co., are bound to keep in repair the bridge complained of, and are liable to prosecution for any public or private injuries caus-

ed by its want of repair. R. S., c. 81, § § 16, 24; Act of incorporation of said company, § § 1, 8, 9; *Inhabitants of Cambridge & Somerville* v. *The Charlestown Branch R. R. Co.*, 7 Metc. 70; Bacon's Abr., ("Indictment,") vol. 3, p. 549; 1 Hawkins' P. C. 210; 4 Black. Com. 218; *The Queen* v. *Birmingham & Gloucester R. R. Co.*, 9 Carr. & Payne, 469.

2. Because the defendants are not bound to keep said bridge in repair. That duty is imposed upon the Rail Road Co. English statute on repair of bridges, 22 Hen. VIII, c. 5; Coke's 2d Inst. pp. 700, 701; Dane's Abr. c. 79, art. 11, § 12; Mass. stat., March 5, 1787, on repairs of highways & bridges; Stat. of Maine, 1821, c. 118; R. S., c. 25, § 57; Magna Charta, (9 Hen. III.,) c. 15; Russell on Crimes, c. 30, § 4; *Case on repair of bridges*, 13 Coke, 33; *The Queen* v. *Sir John Bucknall*, 2 Lord Raymond, 804; *The Queen* v. *Inhabitants of the county of Wilts*, 1 Salk. 359 and 358; *Case of Langfort Bridge*, Cro. Car. 365; *Howe* v. *Starkweather*, 17 Mass. 240; *Norwich* v. *Commissioners, &c.*, 13 Pick. 60; *Inhabitants of Webster* v. *Larned*, 6 Metc. 522.

But even without the Act making it the duty of the rail road company, there is no liability imposed on the town by statute or by common law, to keep this bridge in repair, it being, (I.) not a bridge, but a viaduct:—

It being, (II.) not a bridge properly part of the highway, either by location, prescription, or voluntary adoption;—nor such a bridge as is intended in the statute connexion, or as existed at the time of framing the 57th § of c. 25 of the Revised Statutes;—and not a bridge of utility to the highway, but solely of advantage to the rail road company. *Parker* v. *Boston and Maine Rail Road Co.* 3 Cush. 108; *Todd* v. *Rome*, 2 Greenl. 55; *Rowell* v. *Montville*, 4 Greenl. 270; *Estes* v. *Troy*, 5 Greenl. 368; *The State* v. *Strong*, 25 Maine, 297; Rolle's Abr. p. 368, pl. 2; *Perley* v. *Chandler*, 6 Mass. 453; *The King* v. *Inhabitants of West Riding of Yorkshire*, 5 Burr. 2594; *Same* v. *Kerrison*, 3 M. & S. 526; Broom's Law Maxims, p. 554,—"*Qui sentit commo-*

dum sentire debet et onus. Dygert v. *Schenck,* 23 Wend. 446; *Sawyer* v. *The Inhabitants of Northfield,* 7 Cush. 496, 497, 498; *The King* v. *Corp. of Stratford on Avon,* 14 East, 343.

Evans, Attorney General, for the State, contended, that but little light could be shed on our statute in relation to highways, by the decisions of England or of other States. What have the statutes of England in relation to bridges to do with it? None of them, either ancient or modern, can possibly aid in the decision of this question. This is not a *bridge,* it is a *highway.* We have no obligation to build bridges, only as a part of highways. All of the defendants' illustrations were from cases not pertaining to highways. The late case, cited from New York, was not in relation to a highway. Where an individual builds a bridge over a highway, it is for his own accommodation. This bridge was not built for the rail road accommodation, but for the public. Their tract did not require it.

The law referred to by the defendants, is no doubt good, but it has no application to this case.

The decisions in Massachusetts are made under a different statute. There is a condition in their statute which is not found in ours. The obligation on the part of the rail road to keep in repair such bridges, is there held to be such "other provision" as is required by their law.

Here the statute obligation upon towns, to keep their highways in repair, is absolute, and for such expenses and damages as they incur at rail road crossings, the company is responsible to them.

RICE, J. — This is an indictment for a defective highway and bridge, situated in the town of Gorham, and is based upon the provisions of § 57, c. 25, R. S.

Section 16, of c. 81, R. S., provides, that "every rail road corporation shall maintain and keep in repair, all bridges, with their abutments, which said corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike road, canal, highway, or other way."

This provision it is contended, to that extent exonerates towns from the general liability for defects in the highways within their limits, imposed upon them by the provisions of § 57, c. 25, and that, for that reason, the defendants are not liable in this prosecution.

This presents a question of much importance, both to towns and to the public generally. By the introduction of rail roads into our State, and from the mode in which they are necessarily constructed, the cases in which it has been found necessary to cross streets and public highways, under circumstances which have required, for the accommodation of the public travel upon such ways, the construction of bridges, similar to the one which is now the subject of complaint, are very numerous, and the rapid extension of rail roads, within the limits of the State, will multiply those cases almost indefinitely.

At common law, the obligation to maintain and repair bridges and highways originated, generally, in prescription, or by reason of the tenure by which lands or other property or privileges were held. *Prima facie*, the liability to repair public bridges was upon the counties, but they could relieve themselves by showing that the liability in particular cases was by prescription or otherwise upon other parties.

By the statute of 22 Henry VIII, entitled, "For bridges and highways," which Lord COKE says was in affirmance of the common law, the modes of determining who are liable to maintain bridges, and to provide means for their repair, were distinctly provided. As the provisions of this early statute have been very much relied upon in the argument, it may not be inappropriate to make such extracts therefrom as will fully show its objects, and the scope of its general provisions.

The first section of that statute provides that, "justices of the peace in every shire, &c., shall have power and authority, to inquire, hear and determine in the King's general sessions of the peace, of all manner of annoyances of bridges broken in the highways, to the damage of the King's

leige people, and to make such process and pains upon every presentment afore them, for the reformation of the same, against such as owen to be charged for the making or amending of such bridges, as the king's justices of his bench use commonly to do, &c.

"II. And when in any parts of this realm it cannot be known and proved what hundred, riding, wapentake, city, borough, town or parish, nor what person certain, or body politic, ought of right to make such bridges decayed, by reason whereof such decayed bridges, for lack of knowledge of such as owen to make them, for most part lie long without amendment, to the great annoyance of the king's subjects.

"III. For the remedy thereof, be it enacted, &c., *that in every such case*, the said bridges if they be without city or town corporate, shall be made by the inhabitants of the shire or riding, within which the said bridge decayed shall happen to be." This section then proceeds to provide for the repair of bridges in cities, towns corporate, &c.

The fourth section then makes provision for the "speedy reformation" and amending of bridges in "every case where it cannot be known and proved what persons, lands, tenements and bodies politic owen to make and repair" them.

It will be observed, that this statute does not impose upon counties the duty, absolutely, of repairing the public bridges. But to remedy an existing evil, arising from the inability to prove what party ought, of right, to repair such decayed bridges, by reason of which they "for most part lie long without amendment," it was provided, that when that fact could not be proved, the liability should rest upon the county, for the very satisfactory reason, given by Lord Coke, "because it is for the common good and ease of the whole county."

On examination of the English Reports, it will be found, that this *prima facie*, but contingent liability, of counties to repair public bridges, existing both at common law, and by the statute of 22 Henry VIII, is recognized in all the

cases. In no case which has fallen under our observation, has that liability been treated as unqualified and absolute. Thus it was held in *Regina* v. *Inhabitants of Wilts*, 1 Salk. 359, that the county was liable, because they failed to show, as they attempted, that the liability to repair was upon the village of Laycock.

In *Rex* v. *Inhabitants of Nottingham*, 2 Lev. 112, the county failed in a similar attempt, and for that reason were charged on their *prima facie* liability. In *The King* v. *Inhabitants of Kent*, 13 East, 220, the defendants were exonerated by showing that the Medway Navigation Company were liable by the provisions of their charter to repair the bridge in question.

In the case of *The King* v. *The Mayor and Aldermen of Stratford on Avon*, 14 East, 349, the defendants were held liable because they were bound to repair by immemorial usage.

The mere fact, however, that a private individual built a bridge in the highway, did not, necessarily, charge him with its repair and maintenance, but if it become useful to the county in general, the county shall repair it. 5 Barrow, 2594; 2 East, 342; 2 M. & S. 513.

There is still another class of cases in which it is supposed that both by the common law and under the statute of Henry VIII, counties are exonerated from their liability to repair bridges in the public highways. The leading case, relied upon as authority, is cited in Rolle's Ab. 368, where the principle is thus stated; "If a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects use to go over it as over a common bridge, this bridge ought to be repaired by him who has the mill and not by the county, because he erected it for his own benefit."

This case, which is very frequently cited, was much discussed in the case, *The King* v. *Inhabitants of Kent*, 2 M. & S. 513. L'd ELLENBOROUGH, in that case, caused search to be made for the original record of that case, which was

found and is published in a note to the case then under consideration. The record begins with a commission to inquire who ought to repair the bridges and causeway between *Stratford Bow* and *Ham Stratford.* This commission subsequently found that the bridges, &c. were built by Queen Matilda, and that she purchased certain lands, rents, meadows, and a certain water mill, &c., which she gave to the Abbess of Barking on condition that she and her successors should repair and sustain the said bridges and causeway, when it should be necessary, forever. L'd ELLENBOROUGH, after examining the record, remarks, "thus it appears that the real question was an obligation to repair, by reason of the tenure of certain lands, and that no such question as supposed by L'd Rolle, that is, of legal obligation resulting from the building of the bridge by the mill owner for his benefit, was ever directly or indirectly decided, or could properly be argued."

There are, however, incidental facts stated in the record, from which the abstract in Rolle was probably deduced.

From a review of the English authorities, it most clearly appears, that neither the common law nor the statute of Henry VIII., imposed upon counties an unqualified liability to repair public bridges; but if, in any of the modes which have been referred to, the liability to repair could be fixed upon other parties, counties were exonerated, otherwise they were liable.

In New York the same doctrine seems to obtain. Several cases have been cited in which corporations and individuals have been held liable for damages occasioned by defects in bridges constructed by them, for their own benefit, and from which the public derived no advantage whatever.

The case of *Hencock* v. *Sherman,* 14 Wend. 58, was an action against the defendant as a stockholder in the Buffalo Hydraulic Association, for injury to a horse, received in passing over a bridge, built by the association over a canal.

By their charter, their members were rendered individu-

ally liable, for *demands* against the association. It was on this provision in the charter that the plaintiff claimed to charge the defendant. The Court held, that the word *demand*, referred to debts against the company, and did not include such claim for damages. But in giving their opinion, the Court say, "if the writ had been against the corporation, we should have held them responsible. The act of cutting the canal and building the bridge was theirs. It was authorized, and of course lawful. The obligation attached to them to repair upon the common law principle." Though this is rather an *obiter dictum* than a decision, yet the point discussed was so distinctly before the Court, that the opinion expressed is entitled to much consideration.

The case of *Dygert* v. *Schenck*, 23 Wend. 446, was for an injury to plaintiff's horse, occasioned by falling through a bridge over a race-way to defendant's mill. It appeared, that in 1826, the defendant dug a race-way, across a public road, to conduct water to his mill, and built the bridge across said race-way, which ever after that time, was used as a part of the road, by the public. The defendant was held liable, and the case in 1 Rolle's Abr. 368, above cited, was relied upon, as being sound law, and directly in point.

In this case, the Court maintain the doctrine that a proprietor of land, over which a public way is located, may use the soil for any purpose not inconsistent with the safety and convenience of travelers. And for that purpose may cut drains or watercourses across such public ways. But in all cases, where the whole benefit accrues to the individual, and none to the public, the liability to maintain such bridges, rests upon the party making the watercourse. The same doctrine, as to the right of an individual to cut watercourses across public ways, on his own land, is asserted in *Perley* v. *Chandler*, 6 Mass. 454.

In Massachusetts, the Act of March 5, 1787, provides, that "all highways, town ways, causeways and bridges, lying and being within the bounds of any town, shall be kept in repair and amended from time to time, that the same may be safe

and convenient for travelers with their horses, teams, carts and carriages, at all seasons of the year, at the proper charge and expense of the inhabitants of such town, (*when other sufficient provision is not made therefor,*") *&c.* Our statute of 1821, c. 118, § 13, is a literal transcript of the above, which is substantially the same provision as is found in the Province Laws, c. 23, § 1, *Ancient Charters*, 267–8, and which is retained in the Revised Statutes of Massachusetts.

In these several statutes, it will be observed, that the liability of towns is not made absolute, but is qualified. Thus, in Ancient Charters, the qualification is, "when it is not otherwise settled." In the Acts of '87, '21, and the R. S., of Mass., the language is, "when other sufficient provision is not made therefor," thereby, as in the statute, 22 Henry VIII., and at common law, recognizing the principle, that instances may occur in which other parties may be liable to maintain bridges across public highways. The case of *Sawyer* v. *The Inhabitants of Northfield*, 7 Cush. 490, turned upon this point. The defect for which the plaintiff sought to recover damages against the town, was in the bridge, in the town of Northfield, erected on a public highway, over and across a deep cut made by the Connecticut river rail road company, for the use of their road. This bridge was built by the rail road company. The Court say, that by § 1, c. 25, R. S., it is provided, that all highways, town ways, causeways and bridges, within the bounds of any town, shall be kept in repair, at the expense of such town, when other sufficient provision is not made therefor. This makes a qualified, and not a general liability. If there be a turnpike, or bridge corporation bound, either by general law, or by the terms of its charter, to maintain and repair a highway or bridge, then, by the terms of the statute, towns are not liable. It is not to be regarded as a special exemption from the performance of a duty; it forms a case where the liability of towns does not attach. The Court being of opinion that there was sufficient provision made

by law for the expense of keeping said bridge in repair, the town was not held liable.

The cases cited in New York and Massachusetts, were actions brought by individuals, for damages sustained. Whether, in case indictments had been found against the towns or counties within which those defective bridges were located, for such defects, they would not have been held liable in the first instance, may not be wholly free from doubt. But whatever may be the effect of the common law or statute provisions in force in those States, we think there can be no doubt of the effect of existing statute provisions in this State. The statute of 1821 has been materially modified by the R. S. § 57, c. 25, reads as follows :—

"All highways, town ways, causeways and bridges, laid out or being within the bounds of any town or plantation, such as is described in § 43, c. 25, shall be duly opened and kept in repair, and amended from time to time, that the same may be safe and convenient for travelers and their horses, teams, carts and carriages; and in default thereof, such town or plantation shall, on presentment of the grand jury for the county in which such town or plantation is, and on conviction thereof, be liable to pay such reasonable fine, as the court having jurisdiction thereof may order."

The qualifying words in the statute of 1821, "where other sufficient provision is not made therefor," are omitted, and no equivalent terms inserted; and the liability to indictment for defects is made absolute and unqualified, thus changing, not only the earlier statutes of this State and Massachusetts, but also the statute of 22 Henry VIII., and the common law.

Such important changes could not have been the result of inadvertence, because the qualifying terms of the old statutes are not only omitted, but positive terms are added, by which the liability to indictment is distinctly provided against towns.

Substantial reasons may be suggested for this change. The safety and convenience of those who travel upon our public ways have ever been primary objects in the estima-

tion of the Legislature. The introduction of rail roads, and the frequency with which they cross public ways, as well under bridges as at grade, has greatly increased the hazards of ordinary traveling. It is important that the most certain, prompt and efficient means should be provided against these new and increasing causes of inconvenience and danger to travelers. Towns have the general supervision of highways. By holding them primarily responsible, a very much more convenient and certain remedy is afforded the public, than could be had against private individuals or corporations. Against towns the remedy is simple, speedy and certain; against other corporations or individuals there would be uncertainty as to the existence of the liability, and in many instances, still greater uncertainty as to the pecuniary responsibilities of the parties.

Nor does this statute discharge rail road corporations, or other parties, who by statute, or in any other way, are required to maintain and repair bridges or highways, from their liability to do so, nor leave towns without remedy. They may compel rail road corporations to keep such bridges as the law requires them to maintain, in repair, by mandamus. *Cambridge & Somerville* v. *Charlestown Branch R. R. Co.* 7 Met. 70; *Rex* v. *Birmingham & Gloucester R. R. Co.* 9 Car. & P. 469. Or by indictment. *Rex* v. *Inhabitants of Oxfordshire,* 16 East, 223. Or if money be expended by the town in necessary repairs, by action on the case.

But it is contended that these structures are not bridges, within the meaning of the statute. That the term bridge can only be appropriately applied to structures erected over such waters as fall within the description, *flumen vel cursus aquæ,* &c. Such may have been the original meaning of the word. But modern usage has given it a more enlarged signification. Worcester thus defines the word bridge, "a pathway erected over a river, canal, road, &c. in order that a passage may be made from one side to the other." It is in

this enlarged sense that the word is used in the Revised Statutes, as well as in common language.

The statute of 22 Henry VIII. was confined to "annoyances of bridges broken in the highways." The provisions of § 57, c. 25, should undoubtedly be restricted to those bridges existing in ways, upon which the public have the right to travel, and within that limitation, under our statute, we think towns are primarily liable for defects, not only in the highways, but in bridges, constructed in the manner and under the circumstances under which this bridge was erected.

According to the agreement of the parties the case is to stand for trial.

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

SMITH *versus* POOR.

Of the proofs required to support an action on the money counts.

When a person draws an order in favor of another, it is a presumption of law, that the consideration for it was paid or secured at the time the order was drawn.

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

ASSUMPSIT. The writ contained the common money counts, with a specification of the claims intended to be proved, and was tried under the general issue.

The plaintiff offered in evidence, an order of the following tenor:—

"Portland, June 29, 1850.

"To Treasurer of P. Gas L. Co. Please debit to my account under contract, two hundred dollars, and credit same to J. A. Poor's subscription of stock, and oblige

"F. O. J. Smith."

He also called the Treasurer of the Gas Co., who testified, that on the blotter or "journal" of the books of the company, under date of June 29, 1850, was this entry, "F. O. J. Smith Dr. to cash paid his order to John A. Poor,

on account of his contract with P. Gas L. Co., $200, "also "Cash Dr. to capital. John A. Poor, received of him on account of his two shares in full, on his order for the amount, in his favor of F. O. J. Smith, $200."

On the cash book was this entry, under the same date, "by F. O. J. Smith, paid order in favor of J. A. Poor, $200."

The witness also produced the original subscription book, in which it appeared that the defendant subscribed for two shares, and in the stock Leger he was credited on the day of the date of said order, "by stock, 2 shares, $200."

The treasurer also testified that he could not say that the order produced by plaintiff was the one he gave up to him on settlement as a voucher, but he had made search on his files, for one corresponding with this, but could find none.

The plaintiff rested his case, and on motion of the defendant, the presiding Judge ordered a nonsuit to be entered, and the plaintiff excepted.

Smith, in support of the exceptions.

The evidence is full, that the defendant was indebted to the Gas Company for two shares of the stock, for which he had subscribed to pay $200, and that the plaintiff paid that sum, by the order produced on trial.

It is a well established principle of law, that when the act done is beneficial to the other party, his subsequent assent will be sufficient evidence, from which the jury may find a previous request, and he will be bound accordingly. 2 Greenl. Ev. § 107.

So, where one has, with the assent and knowledge of another, paid a debt due from the latter to a third person, such assent is equivalent to an express promise by the debtor to the paying party, upon which an action of assumpsit will lie. *Emerson* v. *Baylies,* 19 Pick. 57.

Again. It is not necessary for the plaintiff to prove an *express* assent of the defendant, in order to enable the jury to find a previous request; they may *infer* it from his

knowledge of the plaintiff's acts, and his silent *acquiescence*. 2 Greenl. Ev. § 114, and cases there cited.

So, where no *express* order, or request has been given, it will, ordinarily, be sufficient for the plaintiff to show that he has paid money for the defendant, for a *reasonable cause*, and not *officiously*. 2 Greenl. Ev. § 114, and cases cited.

So, where one advances money for another's benefit, with his consent, the law implies a promise by the latter to reimburse the money so paid, and assumpsit lies to recover it. *Packard* v. *Leinow*, 12 Mass. 11.

And, *finally*, positive evidence is not necessary that the defendant has received money belonging to the plaintiff; but where, from the facts proved, it is a fair presumption that he has received it, the action is maintainable. *Tuttle* v. *Mayo*, 7 Johns. 132.

A count for money paid to B, by A, at request and for the use of C, is supported by proof of the sale of a bond by A to B, and that B credited C with the amount. *Jones* v. *Cook*, 3 Devereaux, 112, cited in U. S. Dig. vol. 1, p. 284, § 392.

The case thus finding that the plaintiff has paid this money for the use of the defendant, for a reasonable cause; that the defendant is in the enjoyment of the benefits of the payment; and the law implying therefrom a promise by the defendant to repay it, we say, the burthen of proof is and ought to be upon the defendant, to show that he has repaid it.

It is more reasonable, that the defendant should be held to this proof, as the case does not find that the order, which passed between the plaintiff and Gas Company, was ever in the defendant's possession.

Barnes, contra.

CUTTING, J. — Assuming as proved all the plaintiff contends for — *that* the Portland Gas Light Company was legally organized — *that* the plaintiff drew the order in favor of the defendant — *that* it was charged to the drawer and

credited to the drawee on the books of the company in payment of his subscription for two shares; still the plaintiff fails to sustain his declaration, on either of the money counts, for various reasons. He proves no privity of contract, either expressed or implied; there is no evidence, that the defendant ever knew or consented to any of the proceedings, or that he has since availed himself of the credit by any use or disposition of the shares. It does not appear, that the defendant was under any legal obligation to pay for his stock, or that any assessment could be collected, otherwise, than provided by statute for selling at public auction the shares of delinquent subscribers, which course, perhaps, under the circumstances, the defendant might have preferred to have been taken, and certainly he had an illustrious example, as disclosed, in the case of *New Bedford and Bridgewater Turnpike Corporation* v. *John Q. Adams*, 8 Mass. 138.

Another objection to the plaintiff's recovery is, the legal presumption, that when the order was drawn, it was given for an adequate consideration, paid or secured at the time, to remove which the burthen is on him. *Townsend, Ex'r,* v. *Derby*, 3 Met. 363. *Exceptions overruled and the nonsuit confirmed.*

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

JOSE *& al. versus* BAKER.

An accepted unnegotiable order on a third person, given by a debtor to his creditor for a *precedent* debt, is no defence to an action on such indebtment, although the debtor has the original bill receipted as paid by such order.

Payment of a *precedent debt*, by such an order, can only be proved by a special agreement to that effect.

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

ASSUMPSIT, for goods sold and delivered, amounting to $42,69, on May 16, 1851. The writ also contained the common counts and a specification, that under them, the plaintiffs would prove an order of this tenor:—

"Mr. A. B. Baker, Please pay Messrs. Poor & Jose, $42,69, in goods, and charge the same to my account.

"Feb. 7, 1852, "Josiah Baker."

Which order was accepted by A. B. Baker on the day of its date.

The sale and delivery of the goods were admitted, and under the common counts the plaintiff introduced the above order.

It also appeared, that at the date of the order, the plaintiffs had a running account with said A. B. Baker, and subsequently to its date, took up goods to the amount of six dollars at his store.

On March 30, 1852, said A. B. Baker failed in business, and immediately afterwards refused, upon demand made, to pay the order.

The defendant introduced an account identical with the one annexed to the writ, at the bottom of which was written:

"Feb. 7, 1852. Received payment by order on A. B. Baker. "Poor & Jose."

It also appeared, that A. B. Baker, upon acceptance of the order, credited its amount to the plaintiffs, and charged it to the defendant.

After these facts were proved, the case was taken from the jury, and submitted to the decision of the full Court, with authority for them to enter a nonsuit or default, as the law upon the facts and admissions in the case, might require.

O'Donnell, for the defendant.

Shepley & Dana, for the plaintiffs.

SHEPLEY, C. J. — Under what circumstances a note, bill of exchange, or order of a third person, received by a creditor from his debtor, will operate as payment, has been recently considered by the Superior Court in the city of New York. The law as there held, appears to be founded upon the authority of previously decided cases, and to commend itself to the judgment.

Such paper there never operates as a satisfaction of a

precedent debt, "even when a receipt is given by the creditor acknowledging the bill or note to have been received by him as payment in full;" unless it be expressly shown, that such at the time was the agreement of the parties.

But when the seller of goods, at the time of sale accepts such paper of a third person, not indorsed by the debtor, and gives a receipt for it as a payment in part or in full of the price, the presumption of law is, that such payment was meant to be absolute, and that the purchaser was to be wholly discharged. *St. John* v. *Purdy*, 1 Sand. 9; *Noel* v. *Murray*, 1 Duer, 385.

The only difference between the law as administered in England and in that State, and as received in this State, consists in the effect here given to negotiable paper. The paper received by the plaintiffs in this case was not negotiable.

It appears that the account sued was for goods sold and delivered on May 16, 1851. The order was drawn by the defendant on A. B. Baker, and accepted on February 7, 1852, and it was receipted for by the plaintiffs, as received in payment of that precedent debt; but it could not by law so operate without proof of a special agreement to that effect, of which the case finds none.

The facts, that there was an open account between the plaintiffs and A. B. Baker, and that goods were received of him on account after that time, do not afford any satisfactory proof, that such goods were received on account of that order.

The rights of the parties cannot be affected by the entries made by A. B. Baker on his books.

Defendant defaulted.

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

STATE OF MAINE *versus* NEAL.

Of *express* and *implied* malice.

In an indictment for a felonious assault with intent of his malice aforethought to kill and murder, to sustain a conviction of the party charged, the evidence must be such that if *death had ensued*, he would have been guilty of *murder*.

The *intent* charged must be specifically proved.

INDICTMENT, for a felonious assault.

The defendant was convicted, and moved to set the verdict aside as being against evidence and the weight of evidence.

The indictment and the testimony are set forth in the opinion of the Court.

Neal, for the prisoner, maintained, that the evidence on the trial did not authorize the finding of the jury; that, 1st, it should appear from all the circumstances that the *intention* of murder existed in order to uphold the verdict. *Regina* v. *Cruse and Mary his wife*, 8 Carr. & Payne, 541, (34 C. L. 522); *Regina* v. *Jones*, 9 Carr. & Payne, 258, (38 C. L. 109); Roscoe's Crim. Ev. 775 and 784.

2. The intent must be proved as laid; malice is an essential ingredient. Roscoe's Crim. Ev. 784 and 785; *Mytton's case*, 1 East, P. C. 411 and 412; 1 Russ. on Cr. 385; 1 East, P. C. 400.

3. There is a distinction between an assault with intent to kill, and an assault with intent to murder, which if observed in this case, the defendant could not have been convicted of the indictment. *State* v. *Parmelee*, 9 Conn. 259; *State* v. *Nichols*, 8 Conn. 496.

4. The intent must be alleged and proved, because it is prescribed by statute. *People* v. *Enoch*, 73 Wend. 173; *People* v. *Allen*, 5 Denio, 76; *Commonwealth* v. *Tuck*, 20 Pick. 362; *King* v. *Phillips*, 6 East, 473.

Deane, County Att'y, cited 4 Dallas, 176; also 9 Cush. 108.

CUTTING, J. — The defendant was indicted on the 29th § of the R. S., c. 154, which provides, that "if any person, being armed with a dangerous weapon, shall assault another, with intent to murder, kill, maim, rob, steal, or to commit arson or burglary, he shall be punished by imprisonment in the State prison, not more than twenty years."

The indictment consisted of two counts. The first stated, that the defendant, "with force and arms in and upon the body of one Mark E. Jose, wickedly, violently and feloniously, did make an assault, he, the said James Neal, being then and there armed with a dangerous weapon, to wit, a certain pistol loaded with gunpowder, which he, the said James Neal, then and there had and held in his right hand, with intent him, the said Mark E. Jose, then and there feloniously, wilfully and of his malice aforethought to kill and murder."

The second count was similar to the first, with the further allegation, that the pistol was loaded with gunpowder "and a leaden ball."

The defendant was convicted on both counts, and, after verdict, moved in arrest of judgment and for a new trial, because the verdict is against evidence, the weight of evidence and the instructions of the presiding Judge.

The instructions have not been presented and we are to consider the motion only in reference to the first two causes assigned.

The indictment substantially charges an assault with the intent to murder, containing all the special averments necessary to constitute that crime; such as, wickedly, feloniously and of *his malice aforethought.* So, that the question presented is, had death ensued from the assault of the defendant, would he, from the evidence, have been guilty of murder? If otherwise, he was wrongfully convicted and a new trial should be granted.

Murder, by statute, is defined to be, the unlawful killing of any human being, with malice aforethought, either express or implied.

The common law definition of *express* malice is, when one

with a sedate and liberal mind, and formed design, does kill another, which formed design is evidenced by external circumstances, discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. 1 Hale, 451; 4 Bl. Com. 199; 1 Russ. on Crim. 482.

Malice is *implied* by law from any deliberate, cruel act, committed by one person against another, suddenly, without any, or without a considerable provocation. And all homicide is, as a general rule, presumed to be malicious, until the contrary appears from circumstances of alleviation, to be made out by the prisoner, unless they arise out of the evidence produced against him. 1 Russ. on Crim. 183, and authorities there cited.

But this presumption is founded on the rule, that every person is presumed to contemplate the ordinary and natural consequences of his own acts, and is applicable to cases where death actually ensues; for if otherwise, then the presumption must be otherwise; and if no consequences follow the act, the presumption must be, that no consequences were intended or contemplated.

It is not pretended, that the evidence produced at the trial proved *express* malice, according to the definition of that term. Did it prove any acts or circumstances from which malice aforethought might be *implied?*

Where an indictment is preferred for an assault with an attempt to commit murder, it seems that the attempt *as laid,* must be fully established, in order to support the indictment. 1 Russ. on Crim. 719; 1 East, P. C. 411.

The *intent* charged, which forms the gist of the offence, must be specifically proved. Whar. Crim. Law, 316; 3 Greenl. Ev. § § 13, 17.

And this brings us to the consideration of the testimony, as bearing upon the defendant's malicious intention to commit murder, when controlled by the rules of law, and explained by the circumstances of alleviation, already referred to. Up to within a few minutes of the assault, there does

not appear to have subsisted between the defendant and Mr. Jose, feelings other than friendly. The possession of the pistol is accounted for and seems, at this time, to have been accidental. The defendant's object in visiting the Elm House was to see an acquaintance, for whom he first made inquiries of the clerk, and subsequently of Mr. Jose; a dispute arose, which led to loud words and harsh epithets, introductory to the general melee, which terminated in the attempt forcibly to eject the defendant from the house, his resistance and discharge of the pistol. Here a sudden quarrel had arisen, "and it must be observed, (to use the words of a learned commentator,) with regard to sudden rencounters, that when they are begun, the blood too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard; therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence."

Such are the circumstances of alleviation arising out of the evidence produced for and against the defendant, which in our opinion are sufficient to repel the presumption of previous malice, and although the assault may have been highly aggravated, and may subject the perpetrator to a severe penalty, still the evidence does not disclose a sufficient degree of turpitude to prove the crime charged.

The 29th § embraces seven separate and distinct offences, each differing in degree and calling for a penalty more or less severe, according to the crime charged, to be inflicted on the guilty. An assault with intent to murder, is an offence more heinous, than an assault with intent to kill, since it discloses greater depravity; and since the Court in pronouncing sentence look principally to the record, it becomes all important that the record should speak the truth.

Motion sustained, verdict set aside, and a new trial granted.

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

MOULTON *versus* LIBBEY.

Of the grant from Charles 1st, to Sir Ferdinando Georges, of the Province of Maine.

Of the effect of the Colonial ordinance of 1641, upon the rights of riparian proprietors in the flats between high and low water mark.

Of the *jus publicum* and *jus privatum* in the shores, creeks and arms of the sea.

Of the claim by individuals to dig clams by *usage*.

Of the statutes of Maine regulating the taking of clams.

By the common law the people have the right of fishing in the sea, or creeks or arms thereof, as a public *common piscary*, and may not be restrained, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath acquired a propriety exclusive of that common liberty.

The shores of the sea and navigable rivers, within the flux and re-flux of the tide, belong *prima facie* to the king, and may belong to a subject.

But the *jus privatum* of the owner, or proprietor, is charged with, and subject to the *jus publicum*, which belongs to the king's subjects.

Whatever right the king had by royal prerogative in the shores of the sea or navigable rivers, he held as a *jus publicum*, in trust for the benefit of the people, for the purpose of *navigation* and of *fishery*.

The grant from Charles 1st, to Ferdinando Georges of the Province of Maine, without the proviso, would not necessarily be construed as impairing the *common* right of piscary.

But if any doubt might arise as to the legal construction of this grant, in its effect upon the *common* right of fisheries, without the proviso or saving clause, there can be none when that is considered as a part of that instrument. The *common right* of fishing in the sea and creeks of the Province is expressly saved by the proviso or saving clause.

Nor is that saving clause *restricted* to the taking of such fish as may be and usually are dried upon the shore. The words "and drying of their fish and drying of their nets ashore," confer an *additional right* to what his subjects had by the *common law*.

Although by the colonial ordinance of 1641, the riparian proprietor acquired a title to the flats adjoining, not exceeding one hundred rods between high and low water mark, yet, he can acquire no *exclusive* right to the fisheries upon them, by such ownership.

The common right of *fishing* is in subordination to the right of *navigation*, and any wharves or buildings upon flats consistent with the latter, will be allowed by the former.

The general term "piscaria" includes all fisheries without any regard to their distinctive character, or to the method of taking the fish.

Shell fisheries, including the digging of clams, are embraced in the *common* right of the people to fish in the sea, creeks and arms thereof.

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One accustomed to dig clams for sixty years in certain flats subject to the flux and reflux of the tide, cannot set up such acts as evidence of an *exclusive right* within such limits.

The State, as representing the people, have the right to regulate the common rights and privileges of fishing.

The R. S., c. 61, is such a regulation, and is designed for the protection and furtherance of the enjoyment of the *common* right, and is therefore valid.

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

Debt, to recover the penalty prescribed in § 4, of R. S., c. 61.

"If any person shall take or otherwise wilfully destroy any oysters or other shell-fish, or obstruct their growth in their beds, in any of the waters of this State, except as provided in the two following sections, he shall forfeit to the person suing therefor, not less than one dollar, nor more than two dollars, for each bushel thereof including the shell-fish so taken or destroyed."

Section 5, enacts that "the selectmen of the town, or assessors of the plantation, wherein such oysters or other shell-fish may be found, may, in writing, authorize any persons to take the same at such times and in such quantities, and for such uses, as they shall think proper, and shall express in their permits; and any inhabitants of such town or plantation, or native Indian within this State, may take the same without any permit, for the consumption of himself or family; provided, that no person, without such permit, shall be allowed to take oysters, for any purpose, in the months of June, July or August."

Section 6. "Any fisherman may, without such permit, take any shell-fish suitable for bait necessary for his use, and in a quantity, not exceeding seven bushels, including the shells, at any one time."

The defendant pleaded the general issue, and filed a brief statement, setting up title derived from the grant of Charles I., King of England; and also justified the taking, on the ground that he and those under whom he claimed, had been accustomed there to take clams for a period of sixty years.

The taking of the clams, viz: twenty-five bushels, from

their beds where they had been accustomed to grow and be from time immemorial, on the flats, and between high and low water mark, but not more than one hundred rods from high water mark, was admitted; and further, that they were not taken for any purpose authorized by the statute above cited; and that it was without the authority or permit of the selectmen of Scarborough.

The defendant introduced a copy of the record of an instrument entitled on the record "a Charter of the Province of Maine," from Charles I., King of England, &c., to Sir Ferdinando Georges; and a copy of an instrument from said Georges to Thomas Cammack, conveying the premises, all which were recorded in York county, in 1640.

It was admitted that the premises described in the writ were embraced in the instrument to Cammack, the defendant setting up the title which Cammack had.

The grant to Georges, his heirs and assigns, was by metes and bounds, from the entrance of Piscataqua harbor, northeastward one hundred and twenty miles, and all the islands and flats lying within five leagues of the main, along the coast, "with all and singular, the soils and grounds thereof, as well dry as covered with water, and all waters, ports, havens and creeks of the sea; together with the fishing of what kinds soever, as well pearls as fish, as whales, sturgeons, or any other either in the sea or rivers, * * * * saving always to all our subjects of our kingdom of England, liberty of fishing as well in the sea as in the creeks of the same Province and premises aforesaid, and drying of their fish, and drying of their netts ashore of the said Province and any of the premises."

The case was thereupon withdrawn from the jury, and it was agreed that if the full Court shall be of opinion, that the facts set up in defence would not establish one, then the defendant is to be defaulted for $25, as damages, and legal costs. But if the facts stated would constitute a defence, then the case is to be submitted to a jury to determine the matters set forth in the brief statement.

Clifford and *E. L. Cummings*, in the opening argument for plaintiff, assumed the following positions, to support which they cited numerous authorities, a large part of which are necessarily omitted.

1. The right of the plaintiff to recover is admitted, unless the matters set up in justification constitute a defence. R. S., c. 61, § § 4, 5, 6.

2. It is well established by repeated decisions, that clams are shell-fish, and therefore are embraced within the prohibitions of the 4th section of this Act. *Parker* v. *Cutler Mill-Dam Co.*, 20 Maine, 353; 2 Dane's Abr. c. 68, art. 2, § 14, p. 693; *Bagot* v. *Orr*, 2 Bos. & Pul. 472; *Martin* v. *Waddell*, 16 Pet. 367; *Weston* v. *Sampson*, 8 Cushing.

3. It ever has been, and still is the established doctrine of the common law, that the liberty of fishing in the sea, or in the creeks and arms thereof, belongs as of common right, to the people of England, as a public common of piscary, and of this right they cannot lawfully be deprived, even by the grant of the king. *Mayor of Oxford* v. *Richardson*, 4 Term R. 437; *Bagot* v. *Orr*, 2 Bos. & Pul. 472; 2 Greenl. Cruise, p. 57 to 59, title 27, Franchise; 3 Kent's Com., 4th ed. p. 417; *Parker* v. *Cutler Mill-Dam Co.*, 20 Maine, 353.

4. It is clearly settled that the people of England cannot be deprived of that right by any grant of the king since Magna Carta. *Warren* v. *Matthews*, 1 Salk. 347; *Same case*, 6 Mod. 73; 16 Vin. Abr. title "Piscary," p. 354; 2 Blk. Com. pp. 39 and 417; *Att'y Gen.* v. *Burridge*, 10 Price, 350; *Blundell* v. *Cateroll*, 5 Barn. & Ald. 268; *Duke of Somerset* v. *Fogwell*, 5 Barn. & Cres. 875, (12 C. L. 395;) *Martin* v. *Waddell*, 16 Pet. 367; 2 Greenl. Cruise, p. 56, note 2; *Weston* v. *Sampson*, 8 Cush.

5. The charter from the king to Sir Ferdinando Georges, is not a deed conveying private property, to be interpreted by the rules applicable to cases of that description. It was an instrument upon which were to be founded the institutions of a great political community, and in that light it

should be regarded and construed. *Martin* v. *Waddell,* 16 Pet. on page 411.

6. The object of this charter appears on its face. It was made for the purpose of enabling the said Georges to establish a colony upon this part of our continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which said Georges, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution. And the people who were to plant the colony, and form the political body over which he was to rule, subject to the crown of England, were to enjoy and possess all the rights and privileges appertaining to the people of the mother country. *Martin* v. *Waddell,* 16 Pet. on page 412.

7. The territory granted by King Charles to Georges was held by the king, not as private property, but in his public and regal character, as the representative of the nation, and in trust for the nation, and Georges only held in the same character, in lieu of and in place of the king, as the political trustee of the people of the colony. *Johnson* v. *McIntosh,* 8 Wheaton, 595; *Martin* v. *Waddell,* 16 Pet. on page 412.

8. The charter of Georges never had any validity; and if it had, it became void long prior to the revolution, by the permanent establishment over the territory in question, of the authority and jurisdiction of Massachusetts. The controversy which preceded that event, was a political rather than a legal one, and was ultimately terminated in favor of Massachusetts. In this decision all parties concerned, both king and people, ever after acquiesced. Such being the facts, the rule of law is, that the judiciary follows the final determination of the question by the political department of the government. *Foster & al.* v. *Nielson,* 2 Pet. 253; *Pollard's heirs* v. *Kibbee,* 14 Pet. 353; *Pollard's lessee* v. *Files,* 2 How. 592.

9. When the revolution took place, the people of each

State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. *Pollard* v. *Hagan*, 3 How. 212; *Carson* v. *Blazer & als.* 2 Binney, 475.

10. The doctrine of the common law in regard to the soil between high and low water mark, was changed by the ordinance of 1641. *Gerrish* v. *Proprietors of Union Wharf*, 26 Maine, 384; Ancient Charters, p. 148; *Moore* v. *Griffin*, 22 Maine, 350.

11. No change was made as to the rights of fishing or of navigation, but, on the contrary, these were in express terms ratified and confirmed to be of common right. *Weston* v. *Sampson*, 8 Cush.; *Drake* v. *Curtis*, 1 Cush. 413.

12. It being established that the right of fishing is a public right, common to all the citizens of the State, it follows, as a necessary consequence, that the regulation of the right is vested in the Legislature. *Peables* v. *Hannaford*, 20 Maine, 106; *Commonwealth* v. *Chapin*, 5 Pick. 199; *Nickerson* v. *Brackett*, 10 Mass. 212; *Cottrill & al.* v. *Myrick*, 12 Maine, 222; 3 Kent's Com. (4th ed.) 413; Angell on Tide Waters, 152, 153; *Commonwealth* v. *Alger*, 7 Cush. 53, 81 and 82; *Weston* v. *Sampson* 8 Cush.

13. The justification set up by the defendant is insufficient to constitute a defence.

I. It is not a prescription. 2 Greenl. Cruise, title 31, p. 218; 2 Greenl. Cruise, title 27, p. 56; Angell on Tide Waters, pp. 25 and 26, note 3, and p. 135; *Arundel* v. *McCulloch*, 10 Mass. 70; *Melville* v. *Whiting*, 10 Pick. 295; *Perley* v. *Langley*, 7 N. H., 233; *Delaware & Maryland R. R. Co.* v. *Stump*, 8 Gill & Johns. 479.

II. It is not a custom. *Cullom* v. *Binbury*, 5 Iredell, 118; *Medford* v. *Pratt*, 4 Pick. 222; *Fitzwalter's case*, 1 Mod. 105; Holt, 323; *Ward* v. *Cresswell*, Willes, 268; *Grimsted* v. *Marlow*, 4 Term R. 717; *Drake* v. *Curtis*, 1 Cush. 215.

14. No one can prescribe against a statute, nor can a custom be supported against an Act of the Legislature. *Griflin* v. *Wood*, Cro. Eliz. 85; *King* v. *Major*, 4 Term R. 670; *Master of St. Cross Hospital* v. *Lord Howard*, 6 Term R. 38; 2 Greenl. Cruise, title 31, "Prescription," p. 223.

15. The right of taking shell-fish, except on the terms prescribed by the Legislature, has been prohibited by statute, at least since May 1, 1765. Repealed Act, Colony Laws, May 1, 1765; Mass. Laws, vol. 1, p. 726; Smith's Laws of Maine, March 19, 1821; R. S., c. 61; Prov. Stat. 23 George III., c. 5, (1749.)

S. Fessenden, & W. P. Fessenden, for defendant.

Whatever this grant may be construed to convey, the first question is, had the king power to convey in manner he has undertaken. 5 Comyn's Dig. title Navigation, A, p. 102. For the definition of Sea, vid. 2 Roll. 169, L, 20.

The king has the property *tam aquæ quam soli* and all profit in the sea and navigable rivers. Cal. 17; Dav. 56, 57. So the property of the soil in navigable rivers which have the flux and reflux of the sea belongs to the king. 1 Siderfin, 148, 149. *Ball* v. *Herbert*, 3 Term R. 253.

The soil between high and low water mark is part of the county, and may be within a manor. 5 Bacon, title Prerogative, B, p. 494.

Such soil it would seem that the lord of manor might take and hold by grant or prescription.

A subject by grant or prescription may have the water and soil of navigable rivers, as the city of London has the soil and property of the Thames by grant. R. Dav. 56, b.

From this case I infer, 1st, that the Legislature has the power to grant the soil of a navigable river.

2. That a grant of the soil of such stream in connection with the land, will not necessarily grant the exclusive use of the water or the fish swimming therein.

3. That the Legislature has the power to grant with the soil a several fishery in the same. But as this is in dero-

gation of common right, it will not pass without express words of grant. By the express terms of our grant the right to all the fishings with a single exception, which does not touch the taking of clams, is conveyed to us. And this being done, no Legislature has a constitutional right to take it away from us. In *Rogers* v. *Jones*, 1 Wend. 237, the opinion of Mr. Justice WOODWORTH is especially commended to the attention of the Court. In *Carter* v. *Murat*, 4 Burrows, 2162, the same ground is fully sustained.

The case of *Cottrill* v. *Myrick*, 12 Maine, 222, decides that such streams as the Damariscotta river are subject to the control of the Legislature so far as to appropriate the fish therein by a grant of an exclusive right to all the fish in the towns of Newcastle and Nobleborough for their emolument; it would seem to follow that the granting power would have a right to appropriate a fishery in an arm of the sea, or creek, by grant to an individual.

If the grant to Georges was in trust, it must be an implied trust. There are no words in the conveyance which would show a trust. It is said to be implied from the objects of the grant. If land covered by water and the fisheries, were conveyed in trust, why not the land covered by wood? Was there any difference in the terms of the grant between land covered with water and land covered with wood. Both are conveyed by the same terms, and if one is in trust, so is the other.

If the second proposition taken by plaintiff were conceded, that clams are shell-fish, and that there might be such a thing as a clam fishery, the question returns, did not that species of fishing pass by the grant to the extent of its boundaries? In any grant ever made was a right to clams ever contemplated to be exempted? *Bagot* v. *Orr*, 2 Bos. & Pull. 472.

As late as 1825, in *Brown* v. *Stratton*, 4 Barn. & Cress. 485, (10 Com. Law, 384,) the position that the king may convey to a subject, since Magna Carta, the lands and fisheries of every description, between high and low water mark,

is most clearly recognized and settled. Also the king may grant land covered by the sea. *Low* v. *Gavat*, 3 Barn. & Adol. 967, (23 C. L. 203.)

The case of *Parker* v. *Cutler Mill-Dam Cor.*, 7 Shepl. 353, appears to imply that an appropriation of a clam fishery to private use might be made. Vide Greenl. Cruise, title 27, Franchise, § 3; 3 Kent's Com. 416; 4 Mass. 522; *Guild* v. *James*, 6 Cow. 369; Angell on Tide Waters, c. 5, 7; 17 Johns. 195.

If the position taken by plaintiff is true, that since the passage of Magna Carta, the king of England is only trustee of all his subjects of this right, then the government here, which is the successor of the king in such trust, is only the trustee of all the people here, and has no more right to alienate or grant the same to individuals or corporations than the king had in England.

Therefore, the granting to the town of Scarborough the right to control the taking of clams, &c. is against common right and inoperative.

The Colonial ordinance of 1641 is a part of our law. 25 Maine, 64. The owner of upland to which flats adjoin, may sell the upland without the flats, or the flats without the upland. 6 Mass. 435.

Does the Act of this State in relation to the owner of those flats destroy his common right of fishery? We contend it cannot have this operation and is for this reason void.

So a man by grant or prescription may have a free fishery in navigable waters. Callis, 26; Com. Dig. vol 5, p. 290, title Piscary. By a grant of a separate fishery, the grantee should have the soil. 2 Black. Com. 39. A several fishery is presumed to comprehend the soil till the contrary appears. 5 Burr. 2814.

The several kinds of fishery are clearly set forth in note 181, 3d Coke, lib. 2, cap. 11, 122, a.

To meet the objection to our claim to a several fishery in the clams found and growing in our soil, supposing them to be included in the generic term of fish, we rely upon the

cases cited. The reservation in the grant applies only to such fish as are taken in *nets*. The privilege is confined to taking such fish as are *dried*. Clams are never dried. Drying their *nets*. Clams are never taken in nets. The right therefore, reserved to the public to fish, is not *co-extensive* with that of Sir Ferdinando Georges and his heirs. A clam fishery, or a right to dig and take clams, was never contemplated in the reservation clause.

We say again that the reservation clearly shows an intent to grant to Georges all other kinds not reserved. "*Exceptio probat regulam.*"

A construction, such as is contended for, would be subversive of the rights of the owner of the soil. He could not build a wharf on his own land over a clam bed. If he have clams grown on his own soil, and there can be such a fishery as a clam fishery, then the owner of the soil is the owner of a several clam fishery; and if the king had the power to grant the soil in a creek or arm of the sea, where the tide ebbs and flows, then such a fishery is ours.

We would refer the Court, with great reliance, to the opinion of Mr. Justice THOMPSON, in the case of *Martin* v. *Waddell*, 16 Pet. 367, as supporting the positions we take upon the facts in this case.

1. The grant to Georges was within the power of the king to make, and was well made.

2. The grant does by proper and apt words convey the land or territory in the grant described, including the land covered by the water of the sea, with all its creeks and inlets.

3. The grant to Georges conveys a right to a several fishery in all the waters covering the land conveyed, and to the extent of the land conveyed, as well the waters of the sea as of the arms of the sea, as the creeks, and inlets, and the rivers where the tide does not flow, with the exception in the deed.

4. That the clam fishery, if it may be so denominated,

passed to the grantee by the terms of the grant, fully and completely, as much as the soil, and as a part thereof.

5. The saving clause has no relation to the clam fishery.

It is a new idea that a person owning lands bounded by the sea, has no right of the clam beds on his flats, where those flats do not extend one hundred rods from high water mark. Who owns the muscle beds on the flats in Back Cove? They are shell-fish, and very profitable as manure. Have all the people a right to come on to those flats, and remove the clams and muscle beds bordering on the uplands? If a man cultivate a bed of clams, are they liable to be taken by the public? The owners of the muscle beds on the flats scattered along our border do not understand that they are liable to be taken by any one who may desire.

It is apprehended that by our Court the right to appropriate and grant, and regulate the fisheries in navigable waters, as those not navigable, is established upon authority. *Fuller* v. *Spear*, 14 Maine, 417.

That such fishery is a common right, see *Peck* v. *Lockwood*, 5 Day, 22. By that case the digging of shell-fish is a common right. And it then admits that the proprietor of the land may acquire an exclusive right to fish thereon. I cite also 6 Cowen, 369; 3 Cains, 318; 2 Johns. 185; 10 Johns. 236.

Granting that the same construction is to be placed on this charter as on that under consideration in *Martin* v. *Waddell*, there is nothing to show an intention to disconnect the prerogative rights from the power of government granted, and that consequently the right of fishing remains a common right, we say —

1. The defendant does not claim an exclusive right, or rather that such a claim is not necessary to his defence. He claims and possesses a right to fish which cannot be restricted, limited or modified, because it is a grant by the sovereign which he was competent to make.

In the case of *Martin* v. *Waddell*, the original plaintiff claimed, and was endeavoring to enforce an *exclusive* right.

It was held that his grantor possessed no such rights, having *surrendered* them.

In this case the question is whether Georges, being the proprietor, could make a valid grant of a "right in common" to enjoy these royalties so as to preclude him as proprietor from all power to limit or restrict his grant. If Georges could not restrict his grant to Cammack, neither could the king limit or restrict his grant to Georges, and the original charter remains subject only to the limitations incorporated in it.

The rights there granted are uncontrollable by the grantor. It was a contract not at variance with the public right nor with any legal principle. It bound the hands of the grantor.

This question, in this aspect of it, is of a right in common, free from any restriction by government. The questions discussed in the cases cited by plaintiff are of *exclusive rights.*

2. It is enough in answer to the 8th point raised by plaintiff, to say that grants are not affected by political changes. They remain unimpaired.

3. On the principles assumed by plaintiff in his 3d and 4th points, he has no title. The plaintiff in error, in *Martin* v. *Waddell,* claimed an exclusive right under a law of New Jersey, which undertook to parcel out "exclusive fishing rights." The case failed for want of title.

The sections of c. 61, R. S., under which this action is brought, are of a similar character. The Legislature attempts to grant to Scarborough in effect an *exclusive right,* inasmuch as it restrains all persons from taking fish beyond a certain quantity, unless under a permit from the selectmen. The selectmen are not bound to give permits. They may do so. The statute therefore takes away the common right of fishing from individuals, even on their own land, and confers the *exclusive* right upon others. So far as this applies to waters more than one hundred rods from high water mark, it is void on the principles assumed by plaintiff.

So far as it applies to land owned by individuals between high and low water mark, it is void on the general ground, that, by the principles of universal law, no government can transfer the property of one man to another.

4. The soil of the place where the clams were taken was in the defendant. If by no other title, by the ordinance of 1641, as the owner of the upland. The clams are the growth of his soil. The rights of the public under the ordinance are of navigation only. That right we may terminate by occupation.

The Act then gives no ground of action against the defendant.

1. Because he holds under a grant of title valid and legal and at variance with no common right.

2. Because the Act on which plaintiff relies is an exercise of power not conferred on the Legislature.

The closing argument for plaintiff was furnished by *Clifford & Appleton*, in which the points assumed in the opening were sustained at great length, and the defendant's positions controverted.

SHEPLEY, C. J. — The plaintiff's right to recover is, by the report, made to depend upon the sufficiency of the defence to prevent it. If the Court is "of opinion, that the facts set up in defence would not constitute a defence, then the defendant is to be defaulted."

The facts presented in defence are, an attested copy of a "charter of the Province of Mayne," from Charles, king of England to Sir Ferdinando Georges, bearing date on the third day of April, in the fifteenth year of his reign. And an attested copy of a conveyance from Georges to Thomas Cammack of fifteen hundred acres of land described made on March 15, 1640. An admission, that the premises described in the declaration, where the clams were taken, were included in the conveyance to Cammack; and that the defendant may have the same title to them, which Cammack had.

The other ground of defence is derived from a long established custom of taking clams by the owners of the premises.

The defendant's right to take the clams is, therefore, made to rest upon the basis of title, and upon that of a long established usage.

Assuming that the defendant has acquired all the title, which Georges could convey, a question might be made, whether he could thereby acquire any title to the flats land between high and low water mark. It is not deemed to be important to consider such a question, for by the ordinance of 1641, which has been received as conferring title in this State, the defendant would acquire title to the premises.

The question therefore presented by this branch of the defence is, whether the defendant by becoming owner of the flats acquired any exclusive right to the fisheries upon them in the tide waters.

By the common law, as presented from its earliest time to the present in elementary treatises and judicial decisions without any dissent, the people have "a liberty of fishing in the sea or creeks or arms thereof as a public common piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath acquired a propriety exclusive of that common liberty."

The shores of the sea and navigable rivers, within the flux and reflux of the tide, belong *prima facie* to the king, and may belong to a subject. "The *jus privatum* of the owner or proprietor is charged with, and subject to that *jus publicum* which belongs to the king's subjects." Hale, De Jure Maris, c. 6; De Portibus Maris, c. 7. Whatever right the king had by his royal prerogative in the shores of the sea and of navigable rivers, he held as a *jus publicum* in trust for the benefit of the people for the purposes of navigation and of fishery. These positions have been approved in judicial decisions too numerous to be mentioned.

They are not known to have been denied by any respectable authority.

The title of the defendant to impair this common right of fishery and to assert an exclusive right may be more conveniently considered as derived in the first place from Georges, and in the second place, from the ordinance of 1641.

The grant from the king to Georges, is of "all and singular the soils and grounds thereof, as well dry as covered with waters," "together with the fishing of what kind soever as well pearls as fish, as whales, sturgeons, or any other, either in the sea or in rivers."

If this grant were considered without the saving clause hereafter to be noticed, it might not be difficult to ascertain its true construction. The grant of fishing is as extensive in the sea as in the rivers. The idea of an exclusive grant to fish in any part of the sea, that must destroy the common right, cannot be received. If it be alleged, that the grant should be permitted to operate upon the shores, where by law it might; it is to be observed, that the whole language of the grant is to be considered for the purpose of ascertaining its true construction. That it is apparent from an examination of the whole instrument to have been the intention to transfer from the king to Georges within the bounds of the territory granted the same rights, which the king had either by the *jus privatum* or *jus publicum*. The *jus publicum* he held in trust for the common benefit of the subject. There is no indication of an intention to violate that trust by its transfer to another; and his grantee would take subject to it.

"The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected." Hale, *De Jure Maris*.

"The king had the right of soil in the shore in general; but the public had the right of way over it, and the king's grantee can only have it subject to the same right." Opin-

ion of Mr. Justice BEST, in case of *Blundell* v. *Catterall*, 5 B. & A. 268.

In the case respecting the fishery of the Banne, it appeared, that the king had the fishery as parcel of the ancient inheritance of the crown, that he granted the territory, where the fishery was, with "*omnia castra messuagia*," &c., "*piscaris, piscationes, aquas*," &c.; and it was held, that the fishery of the Banne did not pass by the grant of the land and the general grant of all piscaries. That general words in a grant by the king would not pass such a special royalty. Davis, 55. This case and the construction was approved by the opinion in the case of *Somerset* v. *Tazwell*, 5 B. & C. 875.

If such language must be so construed as not to convey a private fishery, which the king might lawfully convey, much less should it be construed in this conveyance so as to impair rights, which he held in trust and could not convey discharged of it without a violation of duty. "And it has been frequently held, that the king takes this right of soil in trust for the public, so far as the fishery is concerned, and although the king may grant away this right of soil to another, yet his grantee will take it subject to the same trust; and by such grant, however comprehensive in its terms, the public, that is the king's subjects, cannot be deprived of their common right." *Weston* v. *Sampson*, 8 Cush. 352. In the construction of a grant made to the Duke of York, of a character very similar to that of the grant to Georges, the opinion states, "if the right of common fishery for the common people stated by Hale, in the passage before quoted was intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms, and would not have been left for inference from ambiguous language." *Martin* v. *Waddell*, 16 Peters, 367. Mr. Justice THOMPSON in his dissenting opinion in that case, says, "the sovereign power itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well ordered

society make a direct and absolute grant of the waters of the State divesting all the citizens of a common right. It would be a grievance, which never could be long borne by a free people." If so, no grant of the sovereign power capable of any other should receive a construction, that would destroy or impair any right held in trust for the common benefit of the people.

If however there may be doubt respecting the legal construction of the grant to Georges, when considered without the saving clause, there can be none, when that is noticed as part of the instrument. That clause contains these words — "Saving always to all subjects of our kingdom of England liberty of fishing as well in the sea as in the creeks of said province and premises aforesaid, and drying of their fish and drying their nets ashore of the said province and the premises, any thing to the contrary thereof notwithstanding." The common right of fishery is thus clearly reserved and preserved for the king's subjects.

It is insisted, that although the liberty of fishing in the creeks as well as in the sea may be saved, yet that liberty is restricted to the taking of such fish as may be and are usually dried on the shore. This construction is inadmissible, both upon general rules, and upon the use of the language. By general rules a construction, which would allow a grant of the king to diminish a common right, is to be rejected, unless it be so clearly and fully expressed as to be incapable of any other reasonable construction. The language respecting the drying of fish and of nets according to its literal and grammatical construction does not restrict the liberty to take all kinds of fish. It saves to his subjects other and further rights than they had by the common law, those of drying their fish and nets "ashore." This saving of additional rights to them exhibits a general intention not only to preserve to them their common right of fishery, but to afford unusual facilities for its exercise.

The third position presented by the counsel for the defendant asserts, "that the grant to Georges conveys a right

to a several fishery in all the waters covering the land conveyed."

A several fishery is an exclusive one. No other person can lawfully fish within its bounds. A construction of the grant, which would make it convey such a fishery, would not only destroy the whole effect of the saving clause, but it would exclude all the people from fisheries of every description in the sea and tide waters within the bounds of the territory.

It will not be necessary to offer any examination of the ordinance, or any argument to prove that a title to the shore acquired by it does not destroy the common right of navigation or of fishery. Its construction with reference to the rights of fishery was considered in the case of *Parker* v. *The Cutler Mill-dam Co.* 20 Maine, 353, and no error in it has yet been perceived. If needing support, it may be found in the opinion of the Court in the case of *Weston* v. *Sampson*, 8 Cush. 347, in which it is said, "It is quite certain, we think, that the mere fact that the *jus privatum* or right of soil was vested in an individual owner does not necessarily exclude the existence of a *jus publicum* or right of fishery in the public." If the title vested in the owner does not necessarily exclude the common right of fishery, that cannot be affected by a title to the soil merely; and the ordinance does not attempt to impart any exclusive right of fishery to such owner.

The defendant therefore fails to show that he has acquired either under the grant to Georges or under the ordinance, any right of fishing in the premises inconsistent with the common right of all the people.

If this be so, his counsel insists that the common right of fishery does not include the fishery of clams, which are taken out of the soil.

In all the treatises respecting that common right, the general term "*piscaria*," or its equivalent, is used as including all fisheries, without any regard to their distinctive character, or to the method of taking the fish. There are many

kinds of fishery recognized in them, and in judicial decisions; but the general term is uniformly used not with reference to any one of them, unless that one be particularly named, but as including them all. The fact that the soil between high and low water mark may be dug up or disturbed to take oysters and clams, would have no tendency to prove that they were not included in the general term, for the king held his title to that soil as a *jus publicum* for the common benefit, and the digging upon it in the exercise of a common right would occasion no injury. That shell-fisheries have ever been regarded as a part of the public fisheries of England, is further shown by the fact that they have been regulated as such by statutes, in which they are denominated fisheries. The oyster fisheries, by 2 George II., c. 19; 31 George III., c. 51. Lobster fisheries, by 9 George II., c. 33. In like manner have the salmon fishery, the herring fishery, the pilchard fishery, and other fisheries been regulated.

The case of *Bagott* v. *Orr*, 2 B. & P. 472, was trespass for taking and carrying away shell-fish and shells in certain closes. The special plea of the defendant alleged that the closes were certain rocks and sands of the sea within the flux and reflux of the tides, that in them every subject had of right the liberty of taking shell-fish and shells. The replication traversed that right. The report states that "the Court were of opinion, that if the plaintiff had it in his power to abridge the common right of the subject to take sea-fish, he should have replied that matter specially, and that not having done so, the defendant must succeed upon his plea, as far as related to the taking of the fish; but observed that as no authority had been cited to support his claim to take shells, they should pause before they established a general right of that kind."

Although no judgment appears to have been rendered, the opinion of the Court respecting the rights of the parties, appears to have been fully and clearly stated. Kent, in his commentaries, refers to the case as so deciding, but in notes

in the different editions he says, it may be considered as overruled, or as shaken by the case of *Blundell* v. *Catterall*, 5 B. & A. 268; 3 Kent, 417. This remark is regarded as erroneous.

The question presented in the case of *Blundell* v. *Catterall*, was, whether the king's subjects had a common right to cross the sea shore with bathing machines to bathe. The decision was against it.

It seems a little extraordinary that a decision denying such a right should be regarded as affecting an opinion that a common right to take shell-fish upon the seashore did exist. Mr. Justice BAYLEY did not regard the two cases as in conflict. He says "the case of *Bagott* v. *Orr* seems to me to conclude nothing on the right in question." After making other remaks upon it, he says, "the claim therefore in that case was very different from the present; it was a claim for something serving to the sustenance of man, not a matter of recreation only; a claim to take, when left by the water, what every subject had an undoubted right to have taken, while they remained in the water; and upon that claim there was no regular judgment. But it would by no means follow because all the king's subjects have a right to fish up fish on theshore, that they have therefore a right to pass over the sea shore for the purpose of bathing." The case was noticed by Mr. Justice BEST, with approbation. The case of *Bagott* v. *Orr* must, therefore, still be regarded as the deliberate and unshaken opinion of the Court, after a full and learned argument by distinguished counsel upon the right now in question.

The case of *Seymour* v. *Lord Courtenay*, 5 Burr. 2814, appears to have been referred to by Mr. Justice THOMPSON, in his opinion in the case of *Martin* v. *Waddell*, as unfavorable to such a conclusion.

The action was trespass for disturbing the plaintiff's several fishery, claimed by a grant from Lord Clifford, with the exception of an oystery, and a reservation of a right to take fish for his own table. The question was, whether the

exception and reservation destroyed the several fishery. Lord Mansfield, as reported, says, "Here Lord Clifford being the general owner demised to the plaintiffs, reserving a particular species of fishery, viz. the oystery, which in its nature is to be exercised in a particular mode." An oystery is here regarded as a "particular species of fishing," and of course included in the common right of fishery. The case, so far as it has any bearing on the present question, is clearly favorable to the common right, and not opposed to it. For oysters as well as clams are often taken out of the soil by digging.

Mr. Justice THOMPSON referred also to the case of *Rogers* v. *Allen*, 1 Camp. 308, for the same purpose. That was an action of trespass for breaking and entering the several oyster fishery of the plaintiff. The special plea of the defendant alleged that the locus was in a navigable river, and arm of the sea; that all the king's subjects had a right there to fish and dredge for oysters. The plaintiffs did not deny that common right, but in their replication prescribed for a several fishery as appurtenant to the manor of Burnham, and attempted to prove it as existing "in very early times." The defendants attempted to disprove the existence of a several fishery, by showing that all persons who chose, had been accustomed to fish there for all sorts of floating fish. In reply to this, among other remarks, Mr. Justice HEATH said, "part of a fishery may be abandoned and another part of more value may be preserved." In the whole case the fishery for oysters is treated as included and as governed by the laws respecting the common right of fishing, unless withdrawn by a prescription for a several fishery, which may as well be applied to a salmon as to an oyster fishery. The case is therefore favorable to the common right as including shell-fish."

No case has been cited or noticed in the English books in which shell-fish have not been regarded as included in the *communis piscaria* of the kingdom. They are so regarded

and spoken of in the opinion of the Court in the case of *Martin* v. *Waddell.*

In the case of *Weston* v. *Sampson,* the question whether shell-fish including clams constituted a part of the common fisheries was very fully considered, and the decision was that they did. This Court may therefore well rest upon its former decision to the same effect, in the case of *Parker* v. *The Cutler Mill-dam Company,* until further light is obtained.

It is with some surprise that an intimation has been noticed that the case of *Moore* v. *Griffin,* 22 Maine, 350, may in principle be opposed to it. The only question in that case having any relation to the subject was whether "the right to take muscle bed manure" from the shore of tide waters was common to every inhabitant of the town. The idea that "muscle bed manure" could constitute any part of a common fishery was not then and cannot now be entertained.

It is insisted in argument, that if a common fishery, by which the soil may be disturbed, can be established, the owner of the shore will be deprived of all right to erect a wharf, or to make improvements upon his own land.

The common right of fishing has always been held and enjoyed in subordination to the right of navigation. Any erection which can be admitted by the latter will not be prevented by the former right.

The remaining ground of defence is, "that he and those under whom he claimed have been accustomed to take clams for a period of sixty years last past, at their free will and pleasure, from the flats described in the plaintiff's declaration."

Such a taking would prove nothing more than a lawful exercise of their common right to do so until they had been precluded by some statute regulation of that common right. Since that time it might amount to a continued violation of a public statute. Every other citizen might before any

statute regulation lawfully conduct in like manner. No legal defence would be presented by the proof proposed.

Objection is made in defence to the validity of the statute enacted for the regulation of the common right. The right of the plaintiff to have judgment is not by the report made to depend upon such a question. It may be desirable for the purpose of quieting litigation to express an opinion upon it.

That the State as representing the people has the right to regulate such common rights and privileges has been repeatedly declared by judicial decisions.

If those rights are to be regulated, it may be necessary to place the exercise of them under the superintendence and care of some persons to make them as valuable or useful as possible, as well as for their preservation. The law may designate persons holding particular official positions, as well as others for that purpose, and may prescribe their duties. The fifth section of the Act does not deprive any citizen of the right to take clams "for the consumption of himself or family." Or any fisherman of the right to take them for bait for his own use, not exceeding a certain quantity at one time. Those not needed for such uses are not to be taken without a permit from the selectmen or assessors. If they could be taken by all without any limitation of the quantity and for the purpose of sale for profit, the result might be, that they would soon be so much diminished or destroyed, that none desirable would be left for the common use for food or for bait. Such control of them may be rather for their protection, and in furtherance of the enjoyment of the common right. If the agents of the law abuse their trust, they may be discharged, and others may be employed. *Defendant defaulted.*

HOWARD, RICE and CUTTING, J. J., concurred.

A *dissenting* opinion was drawn up by HATHAWAY, J.

HATHAWAY, J. — Debt to recover a penalty for taking clams, in violation of c. 61 of the Revised Statutes, which provides as follows : —

"Section 4. If any person shall take or otherwise wilfully destroy any oysters or other shell-fish, or obstruct their growth in their beds in any of the waters of this State, except as provided in the two following sections, he shall forfeit to the person sueing therefor not less than one dollar nor more than two dollars for each bushel thereof, including the shells so taken and destroyed. Section 5. The selectmen of the town or the assessors of the plantation, wherein such oysters or other shell-fish may be found, may, in writing, authorize any persons to take the same at such times as they shall think proper, and shall express in their permits; and any inhabitant of such town or plantation, or native Indian within this State, may take the same without any permit for the consumption of himself or family, provided, that no person, without such permit shall be allowed to take oysters for any purpose, in the month of June, July or August. Sect. 6. Any fisherman may, without such permit, take any shell-fish suitable for bait, necessary for his use, and in quantity, not exceeding seven bushels including the shells, at any one time."

The case finds, that the defendant took the clams from their beds where they had been accustomed to grow, &c., on the flats between high and low water mark, and within one hundred rods of high water mark. The defendant justifies under claim of title to the land, from which they were taken, by deed from the council of Plymouth, New England, to Thomas Cammack, dated November 1, 1631, and confirmation thereof by Sir Ferdinando Georges by deed of March 15, 1640, recorded September 24, 1670, and the charter of Charles, King of England, to Georges, which appears to have been duly recorded in 1636.

By the report of the case, the defendant is to be considered as legally holding Cammack's title. The charter to Georges was similar to those granted by Charles II. to the

Duke of York, in 1664 and 1674, and, adopting the language of TANEY, C. J., in *Martin & al.* v. *Waddell*, 16 Peters, 367, "The right of the king to make this grant with all its prerogatives and powers of government cannot at this day be questioned." And besides, it is familiar law that a person holding title, by deed recorded, is *prima facia* the owner of the land which his deed purports to convey. The legal presumption is, that seizin follows the title, and that they are coincident, and the case furnishes no evidence of possession or title in the plaintiff adverse to the defendant. The question presented, therefore, is simply concerning the right of a person owning lands bounded by the sea, or by a navigable river, to dig and take clams on his flats lying between high and low water mark, or within one hundred rods of high water mark, where the sea ebbs further.

"An exclusive right of fishing in a public river is a royal franchise, and is considered as such in all countries where the feudal polity has prevailed, though the making such grants, and by that means appropriating what seems unnatural to restrain, *the use of running water*, was prohibited by King John's great charter." 2 Black. Com. 39, 417; 4 Black. Com. 424.

King Charles seems to have regarded this prohibition, and the rights of his subjects as protected by it, for although the grant of the fisheries to Georges was quite universal in its scope, yet it was made subject to a specific limitation, "saving always to all our subjects of our kingdom of England, liberty of fishing, as well in the sea as in the creeks of the Province and any the premises." By the common law of England, the title to the land or property in the soil under the sea, and over which the tide waters ebbed and flowed, including the flats on the seashore, lying between high and low water mark, was in the king as the representative of the sovereign power of the country, but this right of property was held by the king in trust for public uses, the principal of which were for fishing and navigation, and these were common to all his subjects. Such being the

common law, the proprietor, of land, bounded by the sea, or by a river where the tide ebbed and flowed, held title to the soil only to high water mark. The right of the public to fish in tide waters was coëxtensive with the king's ownership of the soil over which the waters flowed and ebbed, for the right of property in the sea was *prima facie* vested in the king, as the representative of the public, and he had no other legal tenure in the rights of fishery and navigation, than belonged to him in the character of protector of public and common rights. Angell on Tide Waters, 33.

"Piscarial rights of whatever nature, and in whatever manner acquired, are always subservient to the rights of the public, that is, to the rights of navigation." Angell, 93 to 95. And whether for the purpose of increasing the facilities for commerce and navigation, or for the encouragement of individual enterprise among the inhabitants living on the seacoast, or for both purposes.

The colonists of Massachusetts passed a law, commonly called the Ordinance of 1641, (Ancient Charters, c. 63, of Colony Laws,) by which it was enacted, "Sect. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows, within the precincts of the town, where they dwell, unless the freemen of the same town, or the general court have otherwise appropriated them, provided, that no town shall appropriate to any particular person or persons, any great pond containing more than ten acres of land, and that *no man shall come upon another's propriety*, without their leave, otherwise than as hereafter expressed. *The which clearly to determine*, Sect. 3, It is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, *the proprietor of the land adjoining, shall have propriety* to the low water mark, where 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 any sea, creeks or coves to other men's houses or lands." This Act, which is the common law of Massachusetts and Maine, made a very essential change in the common law of England, as applicable to the colony. It gave to the riparian proprietor, bounded by tide waters, the fee of the soil to low water mark, not exceeding one hundred rods, where the tide ebbed further, instead of limiting his boundary at high water mark, as the law had been before. It divested the sovereign of the ownership of the soil, between high and low water mark, and vested it in the riparian proprietor, subject *only* to the express reservations specified in the Act.

The Act clearly established that the owner of the adjoining upland should have "propriety" to the low water mark, not however exceeding one hundred rods from high water mark, where the tide ebbs further. It established or confirmed the right of free fishing and fowling in tide waters, *subject to the proviso*, that no man should "come upon another's propriety without their leave," excepting *only*, that such proprietor should not have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves to other men's houses or lands." The language of the colonial law is plain, and the rights of the proprietor of the soil, and of the public under its provisions, seem to be entirely free from complication or uncertainty. There is no doubt of the right of the government to regulate the fisheries, both in navigable *waters* and in those which are not navigable.

If the government had not such power, the migratory fish, such as salmon, shad and alewives, &c., which can be perpetuated only by allowing them to ascend the streams and deposite their spawn in the ponds and head waters of the interior, according to their nature, might soon become extinct. That right is too well established by a long course of salutary legislation to be questioned. But clams grow in their beds, between high and low water mark, and are dug therefrom, when the ground is uncovered with water;

they are attached to the soil, and are part of it, and it was competent for the colonial government to grant the soil to the riparian proprietors.

The constructions of the ordinance by the courts of Massachusetts, prior to the compilation of Dane's Abridgment, were carefully collected by the learned author of that work, vol. 2, c. 68; and the subject was very thoroughly considered in *Commonwealth* v. *Alger*, 7 Cush. 53; and all the authorities touching the questions of its construction and effect, examined, and the conclusions to which the Court arrived in that case were expressed in their opinion delivered by SHAW, C. J. "That it was an authoritative declaration of owners having a full right of property, and power of disposal annexing additional land to that previously granted to hold in fee, subject to a reserved easement, and if not strictly a grant it partook of most of the characteristics of a grant and could not be revoked by the power that gave it. That the ordinance made no alteration in the use of places there described *while they were covered with water*," but that the riparian proprietor was "restricted from such a use of the property granted as would impair the public right of passing over the water in boats and other vessels through any sea, creeks or coves to other men's houses or lands, and could lawfully erect nothing upon the flats which would obstruct or hinder such passage over the water, so as to constitute a public nuisance." See also *Low* v. *Knowlton*, and *Gerrish* v. *Proprietors of Union Wharf*, 26 Maine, 128 and 384.

The ordinance of 1641 is our common law, and it should be observed that the decisions of the courts principally relied upon by the plaintiff as authority, and also the doctrines of the elementary writers, are based upon the common law of England, and can, therefore, have no effect as authority when conflicting with the provisions of the Colonial law.

The counsel for the plaintiff, however, relies upon the case of *Parker* v. *The Cutler Mill-dam Company*, 20 Maine,

353, and *Weston & al.* v. *Sampson & al.*, 8 Cush. 347, as conclusive in his behalf. The case of *Parker* v. *The Cutler Mill-dam Company* does not decide that a person can be lawfully prevented from digging clams on his own flats; nor does it decide that the common right of fishing in this State extends to the taking of shell-fish on the shore of a navigable river, when the tide is out.

The language of the present Chief Justice, delivering the opinion of the Court in that case, was in these words:—"In *Bagott* v. *Orr*, 2 B. & P., 472, this right was decided to extend to the taking of shell-fish, on the shore of a navigable river," and Angell, on Tide Waters, also, p. 24, said "the Court, in case of *Bagott* v. *Orr*, expressly recognized the doctrine that it is a right common to every subject to take shell-fish on the shore by digging up the soil," and Chancelor KENT, in his Commentaries, vol. 3, p. 417, said, "it has been decided that though the sea shore, between high and low water mark, be held by grant as private property, the common right still exists to go there and fish, and even to dig and take shell-fish; and if the owner of the soil claims an exclusive right he must show a prescription for it, controlling the general right at common law," and cites *Bagott* v. *Orr*, and *Peck* v. *Lockwood*, 5 Day, 22, as the only authorities to sustain his text, and adds in a note to his first edition, "but the case of *Bagott* v. *Orr*, may be considered as overruled by that of *Blundell* v. *Catterall*, 5 Barn. & Ald. 268, and the doctrine of *Peck* v. *Lockwood* seems to be very questionable;" and by recurring to the opinion of the Court in *Peck* v. *Lockwood*, it will be perceived that *Bagott* v. *Orr* is the authority upon which that case also was decided.

We have here a goodly superstructure of authorities, all resting upon one case, which the learned Chancelor who cites it informs us had been overruled.

But the case of *Bagott* v. *Orr* concludes nothing upon the right in question, nor is there any apparent reason for saying it has been overruled. The case seems to have been

misapprehended. The opinion of the Court therein, which was very brief, only recognized the unquestioned principle that, by the common law of England, the subject, *prima facie*, had a right to take sea-fish; and *decided* that if the plaintiff had it in his power to abridge that right "he should have replied that matter specially." The decision was upon the pleadings.

The case of *Weston & al.* v. *Sampson & al.* 8 Cush. 347, relies also upon *Bagott* v. *Orr* and *Peck* v. *Lockwood* before cited. In that case the Court held, "that when flats are left wholly open to the natural ebb and flow of the tide, unoccupied by the upland proprietor, the right of fishing exists on the part of the public, and that the law in this respect makes no difference between swimming or floating fish and shell-fish, and the Court held, that the defendants having gone in their boat upon the plaintiff's flats when they were covered with water, and after remaining there till the tide was out, dug five bushels of clams and put them into their boat, and departed with them therein, on the returning flood tide, that their ingress and egress having *been by water*, they were not trespassers. The Court, in that case, has the merit of directly deciding a question in Massachusetts, which had never before been decided in Massachusetts or Maine, and whether or not that decision be in accordance with the rights of soil as established and confirmed to the riparian proprietors, by the colonial law, or in conformity with the uniform course of decisions of the Courts, whenever the rights of parties under that law have been presented for their consideration, are questions which need not be considered in this case.

"When the Revolution took place, the people of each State became themselves sovereign, and in that character held the *absolute right* to all their navigable waters and the soils under them, for their own common use, subject only to the rights *since* surrendered by the constitution to the general government; a grant made by their authority, must therefore manifestly be tried and determined by different

principles from those which apply to the grants of the British crown, where the title is held by a single individual, in trust for the whole nation." Per TANEY, C. J., *Martin & al.* v. *Waddell*, 16 Peters, 410. "The power of the Commonwealth, by the Legislature, over the sea, its shores, bays and coves, and all tide waters, *is not limited*, like that of the crown, at common law." *Commonwealth* v. *Alger*, 7 Cush. 82, and authorities there cited.

The colonial ordinance of 1641 was adopted by the Commonwealth of Massachusetts, and is common law there and in this State, with all the effect and force of a statute, and it has the sanction of the judicial tribunals, as having the effect of a *valid and irrevocable grant* of the fee in the soil to the riparian proprietors, subject only to the express reservations contained therein. *Commonwealth* v. *Alger*, before cited.

The counsel for the plaintiff relies, with much stress, upon some remarks made by the Judge who delivered the opinion of the Court in *Parker* v. *Cutler Mill-dam Co.* 20 Maine, 353, by whom it was said, that "it cannot be readily admitted, under such a state of legislation, to have been the intention of the Legislature, by that ordinance, to part with any of the public rights of fishery." The high character of the Judge, by whom those remarks were made, entitle them to the most respectful consideration. But the conclusion cannot be avoided, that it is to be presumed, and should be admitted, that the Colonial Legislature intended to do precisely what they expressed their intention to do, by the language used in that ordinance. By its phraseology, which is marked and peculiar, *to wit*, "*the which more clearly to determine*," &c., it seems to have been their manifest intention, to enact the law in language so plain that it could not be misunderstood, and there is no ambiguity in it, either in the grant, the provisos or reservations; every thing is clearly and accurately *expressed*.

The riparian proprietor, bounded by tide waters, in this State, has the same title to his flats, between high and low

water mark, as one has holding such flats in England, as part of his manor, under a *valid* grant from the crown, or by prescription, which implies such grant, deducting only such portion of his absolute title, as was withheld from him, by the provisions of the ordinance of 1641.

Where the flats belong to the riparian proprietor, there is a marked distinction with respect to the right of fishery, in relation to floating fish, and those shell-fish which grow in beds between high and low water mark, and which are taken *only* when the ground is uncovered with water. The latter are local and connected with the soil, and constitute a part of it. In *Constable's case*, 5 Coke, 107, "It was resolved, that the soil upon which the sea floweth and ebbeth, *scil* between high water mark and low water mark, may be parcel of the manor of a subject, and that when the sea floweth and hath *plenitudinem maris*, the admiralty shall have jurisdiction of every thing done upon the water, between the high water mark and low water mark, yet when the sea doth ebb, the land may belong to a subject, and every thing done upon the land, when the sea is ebbed, shall be tried at the common law, for the same is then part of the county." And "evidence, to prove the shore parcel of a manor, disproves the general right of all the king's subjects on the shore, at least when and where it is not covered with water." *Hale, De Jure Maris*, 26, 27. Opinion of HOLROYD, J., in *Blundell* v. *Catterall*, before cited; *Carter & al.* v. *Mencott & al.* 4 Burr. 2162.

Whatever may be the effect of the statute, upon which this action was brought, as applicable to shell-fish, which grow and are taken below low water mark, and below one hundred rods from high water mark, where the tide ebbs further, and also to the taking of such shell-fish between high and low water mark, as may be taken when the flats are covered with water, is not material, in this case. But to give the statute a construction, which would prohibit the owner of the soil from digging and taking clams, at his pleasure, on his own flats, when uncovered with water, "from

their beds, where they had been accustomed to grow," would be authorizing a violation of his rights of property in the land, between high and low water mark, which was granted, and intended to be secured to him, by the Colonial ordinance, and would, in my opinion, be entirely unjustifiable by law. And upon the facts presented by the report, I think, this action cannot be lawfully maintained.

SMALL *& al. versus* THURLOW.

Where no time is fixed in which arbitrators are to make an award, it is to be done at *their pleasure*, unless either of the parties specially request them to make it in a reasonable time, and in case of refusal revoke the submission.

When a matter has been referred to arbitrators, and they have the power of adding another to their number, on a refusal to make an award, the matter referred cannot be withdrawn from their jurisdiction, unless they have refused to appoint the other referee, or have been requested so to do.

If an action at law is commenced on the subject matter thus pending before such referees, it can only be defeated by pleading such pendency in *abatement*.

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

ASSUMPSIT, to recover the price for certain goods.

The general issue was pleaded, and a brief statement filed, that the cause of action had been submitted to arbitration by agreement of the parties under seal.

At a former term of the Court a suit was pending for the same causes of action, and also a cross action.

The parties agreed with each other under seal to submit the subject matter of the two suits and all other differences to four referees, two to be chosen by each party, and if they could not agree, or they should choose, a fifth should be by them selected, and their decision to be final. No time was fixed in which the decision was to be made.

All proceedings at law were to cease, and the actions were entered "neither party."

The four referees were appointed. They met and did

not agree, and have not appointed the fifth referee as contemplated in the submission, and refused to make an award.

The Court ruled that as the referees failed to agree under the submission, and refused to make an award, the present action might be maintained.

If this ruling was right, the defendant would be defaulted; otherwise the action to stand for trial.

O'Donnell, for the defendant.

Baker, for the plaintiff.

RICE, J. — The parties, on the 15th day of June, 1850, then having an action and cross action pending between them, agreed to refer all their difficulties at issue to the decision of four men, to be selected, two by each party, and in case the four thus selected could not agree, or should they desire to do so, they were authorized to choose a fifth referee, and the award of the four, if they should agree, or of the five, if the four should not agree, was to be final between the parties. There was no time specified in the agreement within which an award should be made.

The referees, when they met in June, did not agree, and did not select a fifth referee, as contemplated in the submission, and refused to make an award.

In this state of the case the plaintiff contends that the agreement to refer became inoperative and void, and that the parties were remitted to their original rights.

When no time is fixed within which an award is to be made, the arbitrators may take what time they please, unless either of the parties specially request them to make an award within a reasonable time, and in case of refusal, revoke the submission; for parties will not be bound by an award after such revocation. Kyd on Awards, 96.

The case finds that the four referees refused to make an award; but it does not find that they refused to appoint the fifth referee, or that they had ever been requested to do so by either party. There is no evidence, therefore, that a determination of the matters submitted, have become impracti-

cable, or that either party were in a position to revoke the submission.

The matter in suit was, so far as appears from the facts reported, pending before the arbitrators when this action was commenced. That fact does not, however, by its own force operate to divest this Court of its jurisdiction, but leaves the parties in the same situation that they would have occupied had a suit for the same cause of action been pending in some other court. It should have been pleaded in abatement.

A plea that the causes of action in the declaration have been referred to arbitrators and are still under their consideration, and that a reasonable time for making their award has not yet elapsed is bad, in bar; and if not commencing and concluding in abatement, cannot be treated as a plea in abatement. 1 Saund. Plead. 285.

The Court being of the opinion that under the existing state of the pleadings the action is maintainable, a default is to be entered, according to the agreement of the parties.

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

GIBBS *versus* LARRABEE.

Where it appears that a *way* had its *origin* in the action of the *town*, and has been repaired and used by the citizens as a town way for a *long series* of years, without any complaint of the *owner* of the land over which it passes; it may be inferred that *all* the requirements of the law had been complied with in its original location, though the *records* of the town may not exhibit *full proof* of such preliminary proceedings.

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

TRESPASS, *quare clausum*.

The case was submitted to the Court with power to draw such inferences from the testimony as a jury might, and to enter such judgment as the rights of the parties might require.

The facts found by the Court are detailed in the opinion.

Littlefield, for defendant.

Strout, for plaintiff.

RICE, J. — The plan of the *locus in quo,* referred to in the report has not come into the hands of the Court. We understand, however, that the land of the plaintiff lies north of, and adjoining to the county road; that the brook is north of plaintiff's land, and that the house built by Ball, and afterwards occupied by Thompson, is situated north of the brook. The way, across which the plaintiff had constructed a fence, led from the county road, over his land, and across the brook, to the Thompson house. For removing the fence thus erected by the plaintiff on land of which he was the owner of the fee, by the defendant, in his capacity as highway surveyor, this action is brought.

The question thus presented for decision, is whether this way leading to the Thompson house was a legally established town way.

To show that such was the character of the way, the defendant introduced parol evidence showing the manner in which it had been used and repaired, and also the extracts from the records of the town, referred to in the report.

Reuben Ball testified that he built the Thompson house in 1825; that he lived in the house ten years; that while he lived there he always occupied the passage-way uninterruptedly as a highway. On cross-examination he testified, that Chase gave the town permission that he should cross his land, to the county road over this passage-way. That he called on the selectmen to lay him out a road, and that they did lay out a road over or near this pass-way; that when the town proceeded to act upon the location Chase objected to a town way through his door yard, and told the town that if they would not accept the road as located, Ball might travel over this pass-way to the main road. That the selectmen never located a road over this pass-way but once, and that the town did not accept the location, except so far as from the Thompson house to the south side of the brook.

That this was while Ball lived in the Thompson house, and that he afterwards traveled over this pass-way while Chase occupied and owned the Chase land, under permission of Rufus Chase, given at the time of the action of the town upon the location of the selectmen.

This witness evidently had no knowledge of, or had forgotten, the action of the town on the 30th of April, 1831. His testimony, however, is important as showing the preliminary action of the selectmen, and knowledge on the part of Chase.

The plaintiff also introduced evidence showing, that the way had been at times incumbered, and partially obstructed by him, in piling wood and lumber therein.

The records introduced are defective and do not show that all the requirements of the statutes then in force for the location of town ways had been complied with.

Where it is shown that a way had its orign in the action of the town, and has been used by citizens as a town way, and repaired by the town, as such, and that use has been acquiesced in by the owner of the land over which such way passes for a long series of years, an inference may fairly be drawn from such facts, that all the requirements of the statute had been complied with in its original location, though the records of the town may not exhibit full proof of all the preliminary proceedings required by law. *Commonwealth* v. *Belding*, 13 Met. 10; *Avery* v. *Stuart*, 1 Cush. 496; *State* v. *Bigelow*, 34 Maine, 243; *Bigelow* v. *Hillman*, *ante*, 52.

From all the evidence in this case, we are of opinion that the legitimate inference is, that the way in question from the Thompson house to the county road was a legally established town way, and that the defendant, acting as a surveyor of highways in said town, was authorized to remove the fence erected by the plaintiff by which it was obstructed.

Plaintiff nonsuit.

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1854.

COUNTY OF KENNEBEC.

YOUNG *versus* TARBELL *& als.*

A demand for dower in land owned by minor children, made of them and of their guardian, is sufficient, although in the demand, the person is not described as guardian.

It is no defence to such claim, that dower has been assigned in the premises to a widow, whose right was subsequent to that of the demandant.

A brief statement of *non-tenure* cannot avail, unless filed within the time allowed for pleas in abatement, or by special leave of the Court.

Where land was conveyed to the demandant's husband, and he mortgaged it back at the same time, to secure the purchase money, the demandant, as against the *mortgagee* or *assignee*, is dowable of only an equity of redemption; but against all beside, she has a right of dower in the land.

An *administrator*, whose intestate owned land incumbered by such mortgage, but which land is not needed to pay the debts of the intestate, or charges of administration, has no authority to purchase the mortgage, and cannot make it a charge upon the estate.

And if the administrator purchases *such mortgage*, the *heirs* cannot set it up in *his hands* to defeat the widow of the *mortgager* of her claim of dower.

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

WRIT OF DOWER.

The defendants were minor children of Charles Tarbell,

deceased. The action was commenced for, and entered at the December term of the District Court, in 1851. A general appearance was entered under the names of the defendants, by George Evans, Esq., in the District and Supreme Court.

At the August term, 1853, when this action came on for trial, Mr. Evans was appointed guardian for defendants *ad litem*. He then offered a plea in abatement to the plaintiff's writ, or a portion of the land described therein, on the ground, that the defendants were not tenants of the freehold, but that one Sarah B. Tarbell was such tenant. The counsel for demandant objected to this plea being received at that time, and the objection was sustained.

The counsel for defendants, as guardian, then pleaded the general issue, and filed a brief statement, alleging special *non-tenure* in the third part of the premises set off as dower to the widow of Charles Tarbell. The general issue was joined, but the brief statement was objected to on the ground, that the facts therein stated were not provable in this stage of the action.

That question, and whether the rejection of the plea in abatement was correct, were reserved for the decision of the full Court.

The plaintiff introduced evidence of her marriage with David Young, jr., his death and issue, and a conveyance during her marriage to her said husband of the premises described in the writ, from William B. Grant, dated May 1, 1838, acknowledged and recorded May 18, 1839. She also introduced copies of sundry deeds showing that the same land was finally conveyed to Charles Tarbell, the father of defendants, on January 10, 1842.

It also appeared that said Charles Tarbell died in possession of the premises in March, 1844, intestate and solvent, leaving said Sarah B. Tarbell his widow, and the defendants his heirs at law, who are still minors.

Mrs. Tarbell was duly appointed their guardian in 1844, and has remained such ever since.

The plaintiff also proved a demand for her dower more than thirty days before the commencement of her action, by a writing directed to Mrs. Sarah B. Tarbell, and to each of the defendants, which was duly served by an officer.

It also appeared, that the annual rent of the premises since the time of demand, Oct. 13, 1851, was $150.

Defendants put in an assignment of dower to Sarah B. Tarbell, by order of the Judge of Probate for the county of Kennebec, out of the premises described in the writ, made Aug. 10, 1845; and the part so assigned, being the same described in the defendant's plea in abatement and brief statement; and of which she had ever since retained the possession.

The defendants' counsel also read a deed of mortgage from David Young, jr., to said William B. Grant, dated May 1, 1838, acknowledged and recorded on May 18, 1839, of the same premises conveyed to said David Young, jr., of that date. This mortgage was not signed by plaintiff, nor has she ever relinquished her right of dower in said premises.

The defendants also introduced an assignment of said mortgage, and the notes it was given to secure, of about $800, from Grant to H. B. Hoskins, administrator of the estate of Charles Tarbell; but there was no proof of any transfer of said mortgage by Hoskins to defendants.

It was agreed, that the estate of Chas. Tarbell was solvent, and that this property was not needed for the payment of his debts or expenses of administration.

The cause was then taken from the jury and referred to the full Court, who were to draw all inferences that a jury might from the facts proved or admitted, and to decide all legal questions, and to determine whether the plaintiff shall recover her dower in the whole premises, or, if not, of how much; and to assess the damages up to the time of the judgment, if not otherwise agreed upon. But if the plaintiff is not entitled to dower in any portion demanded, she is to become nonsuit.

Evans and *Clay*, for the defendants.

1. The demandant's husband was never so seized of the premises, as to give her a right of dower therein.

The deed in fee from Grant to him, and his deed of mortgage to Grant, to secure the payment of the consideration notes, constitute but one transaction. His seizin was transitory — but for an instant. It came and went by the same act. In such case no dowable seizin is acquired by the husband. The doctrine is too well established and too ancient to be forgotten or shaken. *Holbrook* v. *Finney*, 4 Mass. 566; *Bird* v. *Gardiner*, 10 Mass. 364; *Clark* v. *Munroe*, 14 Mass. 351; Stearns on Real Actions, 280; 4 Kent's Com. 38; *Stow* v. *Tifft*, 15 Johns. R. 458; *Jackson* v. *Dewitt*, 6 Cowen, 316, "*cum multis aliis.*"

These decisions and the doctrine which they inculcate, have been repeatedly recognized in this State. *Gammon* v. *Freeman*, 31 Maine, 243.

No case can be found in this State or elsewhere, where such a seizin has been held to confer a right of dower, against the mortgagee.

If, however, it should be urged, that the mortgage has been canceled, and that therefore the widow can be let in, the answer is, that the fact is not so, and was never intended to be so. *Stanwood* v. *Dunning*, 14 Maine, 290.

The mortgage was *assigned* — and expressly with reference to its being upheld.

Tarbell's title accrued by two independent conveyances: — 1st. The deed of Young, which made no reference to the mortgage; — 2d. By the assignment of the mortgage.

The law is well settled. Where it is for the interest of the party to uphold the mortgage, it will be done, unless the intention at the time was to extinguish it.

Where the intention is not discernible, the Court will consider what was most for the party's benefit. *Freeman* v. *Paul*, 3 Greenl. 260; *Gibson* v. *Crehore*, 3 Pick. 482.

See several cases cited in the preceding. *Carle* v. *Butman*, 7 Greenl. 102.

In *Popkins* v. *Bumstead*, 8 Mass. 491, it was held that a discharge of the mortgage, even, did not revive the widow's right of dower.

If it be further urged, that the defendants cannot hold under the mortgage, because the assignment was not to *them*, but to the administrator of their ancestor under whom they claim, the answer is, that the estate of the intestate was solvent; the property was not wanted for the purposes of administration; that in such case the administrator holds in trust for the heirs; and that being in possession, the title is vested. *Webber & al.* v. *Webber*, 6 Greenl. 127.

Independent of the *actual* possession, by the Statute of Uses, 27 Hen. 8, c. 10, which PARKER, J., in 4 Mass. 607, considers to be in force here, the possession would be vested in the heirs.

By our R. S., c. 125, § 13, an administrator who may recover seizin and possession, holds it to the use and behoof of the widow and heirs, &c.

In the case at bar, the ancestor died seized; the heirs are in possession; the administrator has no occasion for, and no right to, the property, or seizin thereof; the assignment, of necessity, enures to the benefit of the heirs.

2. The demandant, if entitled at all, is not entitled to recover any part which has been assigned to Mrs. Tarbell, as her dower.

The plea should have been received. Defendants are infants, and can appear only by guardian, and the plea was filed, as soon as they were legally in court.

The appearance in the District Court, *by Attorney*, was of no avail, as an infant cannot appoint an attorney.

3. The suit should have been against the guardian appointed by the Probate Court, of whom, also, the demand should have been made, and who alone could set out the dower.

Allen, for demandant.

APPLETON, J. — An estate in dower is a continuation of

the estate of the husband and upon his death the right thereto becomes consummate. By the common law the heir, though within age, might assign dower and the assignment would be held good, subject to be corrected, if excessive, by writ of admeasurement of dower. By R. S., c. 110, § 22, the guardian of a minor heir is empowered to assign and set out dower. The same right on his part has been held to exist at common law. *Jones* v. *Brewer,* 1 Pick. 314. The evidence shows dower to have been legally demanded, and the action is properly brought against the defendants as tenants of the freehold.

The elder title to dower must prevail. The seizin of the demandant's husband was prior to that of the tenant's father. Her right to be endowed takes precedence of that of his widow. *Geer* v. *Hamblen,* 1 Greenl. 155, n.

The brief statement, alleging special non-tenure in the third set-off as dower to Mrs. Tarbell, was filed too late. Stat. 1846, c. 221, requires, that when non-tenure is pleaded in bar, that the pleadings shall be filed within the time required for filing pleas in abatement and not after, except by special leave of the Court, which does not appear to have been given in this case.

It is well settled by the entire weight of authority, as well as upon the clearest principles of equity, when a conveyance is made to one, who at the time mortgages back the premises to the grantor to secure the purchase money, that the widow of such mortgager is not, as against the mortgagee, entitled to dower save in the equity of redemption. The deed and mortgage back being at the same time, though separate instruments, are to be regarded as part of one and the same transaction, in the same manner as the deed of defeazance forms with the deed to be defeated but one contract, though engrossed on several sheets. *Holbrook* v. *Tenney,* 4 Mass. 566. The husband is not deemed sufficiently or beneficially seized by an instantaneous passage of the fee in and out of him, to entitle the wife to dower as against the mortgagee. *Mayberry* v. *Brien,* 15 Pet. 21; *Bullard* v. *Bowers,* 10 N. H. 500; *Stow* v. *Tifft,* 15 Johns. 459.

But as the mortgage is held only as an incumbrance of the estate, the right of the wife to dower will be enforced as against all but the mortgagee. If the mortgage has been satisfied, the tenant cannot set it up in bar of dower. Unless, therefore, the tenant can invoke the mortgage by way of defence, the demandant is entitled to dower, subject to being divested thereof by the prior rights of the mortgagee. *Wilkins* v. *French*, 20 Maine, 111.

If the mortgage is redeemed by the husband or his executors, the widow will be entitled to dower. *Bullard* v. *Bowers*, 10 N. H., 500. But instead of paying the mortgage and having it discharged, it may be assigned and upheld as a subsisting incumbrance when the interests of the parties require it. *Freeman* v. *Paul*, 3 Greenl. 260; *Gibson* v. *Crehore*, 3 Pick. 475. The case finds the mortgage to have been assigned and not discharged. The claim of the mortgage is paramount to that of the demandants. The only question therefore, that arises, is whether the tenants are in a situation to set up the mortgage to defeat the demandant's claim at law, for it is well settled that she is entitled to enforce it in equity. *Smith* v. *Eustis*, 7 Greenl. 41.

The estate of the father of the tenants was solvent. The case finds that the administrator on his estate purchased the mortgage and took an assignment of it. The mortgage was not given by his intestate, nor was he bound, as administrator, to pay the same as a debt against the estate. It becomes important, therefore, to determine whether he could of right invest the funds of the estate in the purchase of notes and mortgage, and charge the estate with such purchase, and thereby become entitled to an allowance of the sums thus paid, in the settlement of his estate in the Probate office.

The real estate descends to the heirs subject only to the prior rights of creditors. As the estate was solvent, no question as to their interests can arise. If there are outstanding mortgages, it is for the heirs, if of full age, to determine as to the expediency of removing existing incum-

brances. It is for them to judge whether they exceed or not the value of the estate. If the heirs are minors, the right to manage and control the estate is vested in the guardian. The funds of the estate, upon settlement and distribution, belong to him for their use. If there are incumbrances upon real estate, it is for the heirs, if of full age, if not, for the guardian, subject to the approbation of the Judge of Probate, to determine as to the expediency of removing them. By R. S., c. 110, § 23, the sale of the personal estate and the investment of the funds of the ward is made subject to the order of the Judge of Probate. The purchase of the mortgage seems to have been made by the administrator, upon his own mere motion, and it is not easy to perceive upon what principle he can of right charge the estate with this appropriation of its funds.

The case of *Webber* v. *Webber*, 6 Greenl. 127, does not apply. The levy by an administrator upon a judgment which he has obtained must necessarily be in his name, and he takes the fee in such case, clothed with a trust for the benefit of the heirs. So notes secured by mortgage are assets in the hands of an administrator and the foreclosure of the mortgage must be in his name. But when the estate becomes foreclosed in his name, he holds it in trust. But the right of an administrator, whose duty it is to collect and distribute the funds of the estate among those interested, to purchase up notes and mortgages therewith, and charge the same to the estate, is another and very different affair.

As the defendants are in no respect bound by, so they can derive no benefit from the purchase of the mortgage. If the investment was unwise, it is at the risk of the administrator. The defendants show no connection with it. The demandant is consequently entitled to dower, subject however to the superior rights of the mortgagee or his assignee, if they deem it expedient to enforce them. But in assigning dower in this action, the mortgage is not to be regarded.

Defendants defaulted.

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

STATE *versus* FAIRFIELD.

An agent duly authorized to sell intoxicating liquors under c. 211, of the Acts of 1851, whose agency continued after c. 48 of the Acts of 1853 took effect, is subject to the limitations prescribed by the latter Act.

Such agent, for selling intoxicating liquors to a minor, knowing him to be such, without the *written* order of his parent or guardian, after the Act of 1853 took effect, is liable to the penalty therein imposed.

Delivery of the article is sufficient evidence of the *sale*.

Nor will it be a defence, that the liquor was sent for with the money, by a third person, to whom it might lawfully have been sold, and that the agent was so informed when he delivered it to the minor.

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

COMPLAINT.

The defendant was accused of selling a pint of spirituous liquor to a minor, knowing him to be such, and the case came up by appeal from the judgment of a magistrate.

The defendant appeared to be an agent duly authorized to sell intoxicating liquors in the town of Vassalboro', for one year from May 2, 1853; and in July of that year was called on by a minor for a pint of rum for his brother, who was twenty-three years of age, who complained of a pain in his side. The minor informed defendant that his brother wanted it, and handed the money, which was sent by him, and received the liquor.

The defendant's counsel requested the Judge to instruct the jury that the government having shown that the defendant was an agent to sell according to the provisions of the Act of 1851, and that he received his appointment prior to the time when the Act of 1853 went into effect, the prohibition in the latter Act against selling to minors did not apply to him; also that the proof did not show a sale to the minor, and did not sustain the allegation.

But the Judge declined so to instruct, and ruled that the Act of 1853 did apply to the defendant, in its prohibition against selling to minors, as fully as if his license or appointment had been granted since the Act of 1853 went into operation; and that the Act of 1853 prohibited the

sale of intoxicating liquors to a minor, by the agent, knowing him to be such, without the written order of his parent, master or guardian, although the article was sent for by and purchased for another person, the money of this other person paid over, and the agent informed for whom the purchase was made.

The jury returned a verdict against the defendant.

Bradbury and *Morrill*, in support of the exceptions.

Vose, County Attorney, contra.

CUTTING, J. — It is contended, that the defendant, having been appointed agent under the Act of 1851, and given the statute bond, has thereby acquired a vested right, which could not be impaired by the law of 1853, prohibiting agents from selling to minors intoxicating liquors, so long as his license continued. With equal propriety it may be argued, that all laws are *ex post facto* which prohibit the sale of liquors purchased previous to their passage. A vendee has made an investment relying upon the stability of existing laws, but every year a new statute throws further impediments in his way, curtailing his rights; but no one as yet, for that cause, has seen fit in his behalf to broach the constitutional question, although the argument in this case would seem to be approximating towards it.

Section 8 of the Act of 1853 provides, that the agent "shall not sell any such liquors to any minor, or servant, or apprentice, knowing them to be such, without the written order of the parent, guardian or master of such person." And it is urged, that the evidence discloses no sale, but only a delivery to the minor. But by § 9, a delivery is made "sufficient evidence of sale." Besides, the statute contemplates, that the verbal request of a minor shall be disregarded by the agent, otherwise the prohibition might be evaded with impunity.

Exceptions overruled and Judgment on the verdict.

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

(*) FRANKLIN BANK *versus* STEWARD *& als.*

Of the powers and duties of agents.

Of the admissibility of declarations made by agents.

Of those declarations made by agents, which are to be viewed as parts of the *res gestæ*, and are admissible in evidence.

Of those declarations made by agents, which are not to be viewed as part of the *res gestæ*, and are not admissible as evidence.

Of the character and extent of the agency pertaining to the cashier of a bank.

It is not a part of the duty pertaining to the office of a cashier, to give to customers of the bank, information *as to transactions of the bank which have been fully transacted and past.*

Such information, if given by the cashier, will not bind the bank.

The declarations of the cashier, giving information as to a past transaction of the bank, though such transaction pertained to his own department of the business of the bank, are not receivable as evidence against the bank.— Per SHEPLEY, C. J., and TENNEY and HOWARD, J. J. — RICE and APPLETON, J. J., dissenting.

The surety on a note to the bank sent his agent after the pay-day, to inquire of the bank whether the note had been paid. To that inquiry the cashier, in the banking room, declared that the note had been paid. In a suit by the bank against the surety, — *Held*, that the declaration made by the cashier was inadmissible as evidence against the bank.

A surety on a note to the bank, having in his possession the property of the principal, with which he might have secured himself by attachment, sent his agent, after the pay-day, to inquire of the bank whether the note had been paid. To that inquiry the cashier, in the banking room, declared that it had been paid; whereupon the surety, relying upon that information, surrendered the property to the principal, who soon afterwards failed, became and has continued to be insolvent. In a suit by the bank against the surety, — *Held*, that the declaration made by the cashier was inadmissible as evidence against the bank. — Per SHEPLEY, C. J., and TENNEY and HOWARD, J. J. — RICE and APPLETON, J. J., dissenting.

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

ASSUMPSIT on a note to the plaintiffs, dated Dec. 16, 1845, for $350, payable in ninety days from date, and signed by David C. Dinsmore as principal, and by Stephen Webber and James Steward as sureties. The general issue was pleaded and joined. The plaintiffs read in evidence the note declared on. The defence set up was that the note had been paid. To prove such payment, among other wit-

nesses, the defendants called John Frost, who testified *that*, in the spring of 1846, after the ice broke up in the Kennebec river, he, at the request of Steward, (then being connected with him in the business of sawing lumber,) called at the Franklin Bank, for the purpose of ascertaining whether said note had been paid, and inquired of Hiram Stevens, the cashier, in the banking room, if the note aforesaid, on which said Steward was surety, had been paid; to which question said Stevens replied that it had been; *that* he, the witness, then left the bank, no further inquiry being made, and communicated said answer to Steward; *that* Steward and himself had then lumber in their possession belonging to Dinsmore, which they had sawed for him, with which Steward might have secured himself by attaching it; *that* they had a lien upon it for the sawing and stumpage; *that* they detained said lumber several days, until the witness was informed upon said inquiry, that said note had been paid; *that* they then gave up the lumber, on payment of the lien; *that* Dinsmore failed in business in June or July, 1846, and has ever since continued insolvent, and is now worthless.

The plaintiffs, among other evidence, to show that said note was not paid, examined Joseph Eaton, Esq., who had been first called as a witness by the defendants, and who was one of the trustees chosen by the stockholders of said bank, who testified *that* said note was, in December, 1848, turned out to said trustees as an unpaid note, and as part of the assets of the bank, by said Stevens, as cashier; *that* said Stevens died in September, 1849; *that* there was no entry on the books of said bank of any payment of said note; *that*, on the contrary, there appeared from the said books to be a balance of upwards of $200 against said Dinsmore.

It was proved that said Steward and Webber had resided in Gardiner since said note was given, and were then, and have continued to the present time to be men of property.

The evidence of said Frost to the declaration of said Stevens was objected to by the counsel for plaintiffs, but the objection was overruled.

The Judge instructed the jury, *that*, if they believed the testimony of Frost, and that Stevens, when employed by the plaintiffs, as cashier, actually declared said note to be paid, upon the inquiry of said Frost of him, at the request of Steward, whether it had been paid, they were authorized from that evidence to infer payment of said note: also *that*, if they believed that said Stevens, when so inquired of by Frost, told him said note had been paid, and said Frost communicated that information to the sureties, and they acted and relied upon that information, and lost the opportunity of securing themselves out of the property of said Dinsmore in consequence of said information, the said sureties should thereby be discharged, whether said note had actually been paid or not; and *that*, if either of the defendants *was* entitled to a verdict, the verdict must be for all the defendants, for it must be against all or none.

If said testimony of Frost was legally admissible, and if said instructions to the jury were correct, the verdict, which was for the defendants, is to stand; otherwise, the same is to be set aside, and a new trial granted.

Allen, for the plaintiffs.

L. M. Morrill, for the defendants.

SHEPLEY, C. J. — The question presented is, whether a declaration of the cashier of the bank, that the note had been paid, was properly admitted as evidence.

The powers and duties of the officers of corporations are usually determined by their charters and by-laws, and by the laws of the State. Many of the powers and duties of the officers of banks are so determined in this State. Their general management is committed to a board of directors, who are the general agents of their respective banks, and who appoint their cashiers. The laws of the State require the cashiers to perform certain duties, and that each should give a bond with sureties for the faithful performance of his duties. The laws regard them therefore, as having certain official duties to perform. They may become the agents

of their respective banks for the performance of other duties. If they assume such duties, the extent and limit of their powers should be exhibited by proof of the acts which they have been held out to the public as accustomed to perform. When a bank presents its cashier as habitually performing certain acts or duties, these may be regarded as official acts or duties, and for the performance of them, he may be considered as its general agent. He cannot be regarded as a general agent for the transaction of all the business of the bank. The directors alone are authorized by law to make discounts; and they alone can make contracts binding upon it. A cashier, it is well known, is allowed to present himself to the public as habitually accustomed to make payment for its bills or notes payable to other persons. To make payment for bills and notes discounted by the directors. To receive payment for bills of exchange, notes and other debts, due to the bank. To receive money on deposit, and to pay the same to the order of the depositors. He is presented as having the custody of its books, bills, bills of exchange, notes and other evidences of debt due to it, and indeed of all its movable property. As making entries in its books, and as keeping its accounts and a record of its proceedings.

In many banks these duties are performed in part by tellers, clerks or other assistants, but generally, it is believed, under his superintendance, and he might at any time assume the performance of them, and perform them, if able to do so, without such assistance.

His true position appears to be, that of a general agent for the performance of his official and accustomed duties. While acting within the scope of this authority he would bind the bank, although he might violate his private instructions. *Hatch* v. *Taylor*, 10 N. H. 538; *Planters' Bank* v. *Cameron*, 3 Sm. & Mar. 609.

Is it the duty of a cashier to give information respecting the past transactions of the bank to those dealing with it? If so, it must in this case be regarded as a part of his offi-

cial duty, for there is no evidence, that he had been held out by the bank as accustomed to give such information. If a suit were commenced on the bond, securing a faithful performance of his official duties, and the only breach assigned, was that of giving false information respecting a past transaction of the bank, no judgment, it is believed, could be rendered against him and his sureties, upon pleadings putting that matter only in issue. Neither the cashier nor his sureties undertake, that he shall retain in his memory past occurrences and transactions, to which he was at the time a party. The most assumed by them is, that he shall keep a correct account of them, for exhibition, upon the books of the bank. The books, papers and documents of the bank ordinarily are, and are designed to be, the true exponents of its past transactions. Upon these alone would a bank, or any intelligent dealer with it, consent to rely for information respecting such transactions with testimony upon oath, if need be, respecting the facts.

If the question were presented to the deliberate consideration of any well managed bank, whether it would consent to make its cashier its official agent to communicate information respecting its past transactions, can there be any doubt, that it would refuse to do so; and that it would choose to refer to its records, books, paper and other documents as the proper source of information? If the question were put to a cashier and his sureties so varied as to inquire, whether they would regard it as the official duty of the cashier to give such information, can there be a doubt, that it would be answered in the negative? If so, this would show, that it could not have been the intention of the bank or of its cashier, that it should be within the scope of his official duties.

It may be said, that the cashier is the only person, from whom a dealer with the bank can obtain such information.

He may be the agent to communicate such information, as it is the duty of a bank to give respecting past transactions to those dealing with it. But is a bank obliged to

communicate any such information further, than it is to be ascertained from its records, books, paper and documents? It cannot be regarded as assuming responsibilities or duties in this respect greater than those imposed upon individuals.

Persons may, and they often do, communicate information respecting their past transactions with others. This may be both useful and desirable for the correct and convenient transaction of business; but this does not prove, that a person is under any legal or moral obligation to do so. No suit could be maintained for a refusal to do it. The facts might not be sufficiently fresh in his recollection to enable him to do it. Or his present business might be too important and pressing to allow him to enter upon a history of past transactions. Such communications are matters of courtesy and of convenience, not of right.

Being no more matters of duty or of right on the part of a bank than on the part of an individual, its cashier cannot be considered its official or authorized agent to make them, unless they constitute a part of some transaction performed at the time of making them.

There may not be an entire conformity in the decided cases to rules believed to be well established for the reception or exclusion of the declarations, representations or admissions of agents; while an examination of them will exhibit but few cases opposed to rules generally approved.

The declarations, representations or admissions of an agent authorized to make a contract made as inducements to or while making the contract, are admissible as evidence against his principal.

They are also admissible as evidence against him, when made by his agent accompanying the performance of any act done for him.

They are not admissible and do not bind the principal, when not made as before stated, but at a subsequent time.

While it is generally stated in the decided cases, that the subsequent admissions of an agent, of what he had previously done, are not admissible as evidence against his prin-

cipal, there are cases, in which a conversation after the business appears to have been completed was held to be admissible. In the case of *Mortimer* v. *McCallan*, 6 Mee. & Wels. 58, Lord ABINGER says, "As a general principle it is undoubtedly true, that conversations with an agent after the transaction, are not evidence against his principal; but the question is whether this be not part of the *res gestæ*." After some further remarks he observes, "it is a conversation between an agent and principal after the transaction is concluded, but a conversation at the time he is dealing with him and a part of the *res gestæ*."

In the case of the *Bank of Monroe* v. *Field*, 2 Hill, 445, the admissions of the president of the bank were received respecting the payment of a note, but they were made upon an examination of its books and were therefore regarded as a part of the *res gestæ*.

There are a few cases to be found in which the declarations of an agent made after the transaction had been completed appear to have been received as evidence against his principal; but they are at variance with the well established and generally received rule in England and in this country.

The principles upon which the declarations of an agent can be received as evidence against his principal were so correctly stated by that accomplished jurist, Sir WM. GRANT, in the case of *Fairlie* v. *Hastings*, 10 Ves. 123, as to command general approbation. In that opinion he said: "As a general proposition what one man says, not upon oath, cannot be evidence against another man."

"What the agent has said may be what constitutes the agreement of the principal; or the representations or statements may be the foundation of or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So in regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party therefore to be bound by the act must be affected by the words. But except

in one or the other of those ways I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as agent."

It is worthy of notice that these principles are not stated to be applicable to the declarations of special agents only but to all descriptions of agents. That they necessarily exclude the declarations of all agents not made at the time and not constituting a part of some transaction. And they appear to have been uniformly so regarded. *Langhorn* v. *Allnutt*, 4 Taun. 511; *Betham* v. *Benson*, 1 Gow. 45; *Garth* v. *Howard*, 8 Bing. 451; *Mortimer* v. *McCallan*, 6 Mee. & Wels. 58.

The same principles are recognized and the same rules prevail in the Courts of the United States. *United States* v. *Gooding*, 12 Wheat. 469; *American Fur Company* v. *United States*, 2 Peters, 364; *Barclay* v. *Howell*, 6 Peters, 498; *Westcott* v. *Bradford*, 3 Wash. C. C. R. 500; *Maury* v. *Tallmadge*, 2 McLean, 157.

Mr. Justice WASHINGTON, stated the rule very concisely and clearly in the case of the *American Fur Company* v. *The United States*, "whatever an agent does or says in reference to the business in which he is at the time employed and within the scope of his authority is done and said by the principal."

The same principles and rules appear to have been received as the established law in many States of the Union. *Woods* v. *Clark*, 24 Pick. 35; *Haynes* v. *Rutter*, Id. 242; *Stiles* v. *Western R. R. Corporation*, 8 Metc. 44; *Corben* v. *Adams*, 6 Cush. 93; *The Fairfield County Turnpike Corporation* v. *Thorp*, 13 Conn. 173; *Thallhimer* v. *Brinckerhoff*, 4 Wend. 394; *Rossiter* v. *Rossiter*, 8 Wend. 494; *The Bank of Monroe* v. *Field*, 2 Hill, 445; *Hannay* v. *Stewart*, 6 Watts, 489; *Stewartson* v. *Watts*, 8 Watts, 392; *City Bank of Baltimore* v. *Bateman*, 7 Har. & John. 104; *Franklin Bank* v. *Steam Navigation Co.*, 11 Gill. &

John. 28; *Strawbridge* v. *Spawn*, 8 Ala. 820; *Tomlinson* v. *Collett*, 3 Blackf. 436; *Waterman* v. *Peet*, 11 Illinois, 648.

A different or more extended rule cannot be received in this State, without overruling decided cases. *Haven* v. *Brown*, 7 Greenl. 421; *Gooch* v. *Bryant*, 13 Maine, 386; *Maine Bank* v. *Smith*, 18 Maine, 99.

It is but a perversion of language to say, that a declaration made when no act is performed, and having reference only to a past transaction, is a part of the *res gestæ*. To do this would be destructive of the rule, by abolishing all distinction between declarations made at the time, and constituting part of a transaction and those made subsequently and having no connexion with it.

With respect to the propriety of any attempt to extend or vary the rule, or to restrict it to special agents, the remarks of TINDALL, C. J., made in the case of *Garth* v. *Howard*, are peculiarly appropriate. "It is dangerous, (he says,) to open the door to declarations of agents beyond what the cases have already done. The declaration itself is evidence against the principal not given upon oath; it is made in his absence when he has no opportunity to set it aside, if incorrectly made, by any observation or any question put to the agent; and it is brought before the court and jury frequently after a long interval of time. It is liable therefore to suspicion originally from carelessness or misapprehension in the original hearer; and again to further suspicion from the faithlessness of memory in the reporter and the facility with which he may give an untrue account. Evidence therefore of such a nature ought always to be kept within the strictest limits, to which the cases have confined it."

In the present case one of the sureties sent a messenger to the bank sometime after the note had become payable, to inquire whether it had been paid. Upon inquiry of the cashier then in the discharge of his duties in the bank, he received for answer that it had been. This was communi-

cated to one of the sureties who thereupon surrendered property of the principal in his hands, from which he might have obtained payment. This he was under no obligation to do without a production of the note or other satisfactory evidence of payment. The messenger does not appear to have communicated to the cashier that he was requested by any party to the note to make the inquiry, and the cashier might have concluded that it was an impertinent attempt to pry into the private concerns of a debtor. It does not appear that any inquiry was made whether the note had been delivered to the maker. It in fact remained uncanceled in the bank. Or that the cashier made any examination of the books of the bank or of its notes to ascertain whether payment had been made, or that he was requested to do so.

The declarations of the cashier made under such circumstances cannot be regarded as legally admissible evidence against the bank. Nor can the instructions to the jury respecting the effect of that testimony be regarded as correct. *Verdict set aside and new trial granted.*

TENNEY and HOWARD, J. J., concurred.

RICE and APPLETON, J. J., dissented.

RICE, J. — Were the declarations of Hiram Stevens, the cashier, that the note in suit had been paid, competent evidence for the defendant? To determine this point the relations which existed between Stevens and the bank, the character of the declaration relied upon, and the time and the circumstances under which those declarations were made, must be considered.

The statement or representation of an agent in making an agreement, or in doing any act within the scope of his authority, is evidence against the principal himself and equivalent to his own acknowledgment. 1 Phil. Ev. 99. The rule admitting the declaration of the agent, is founded upon the legal identity of the agent and principal; and

therefore they bind only so far as there is authority to make them. Where this authority is derived by implication from authority to do a certain act, the declaration of the agent, to be admissible, must be part of the *res gestæ*. 1 Greenl. Ev. § 114.

The cashier of a bank is its agent, and as such entrusted with very large powers. He is usually entrusted with the funds of the bank, in cash, notes, bills and other choses in action, to be used from time to time in the ordinary and extraordinary exigencies of the bank. He receives directly, or through subordinate officers, all moneys and notes of the bank. He delivers up all discounted notes, and other property where payments have been made; and draws checks from time to time for money wherever the bank has deposits. In short, he is considered the executive officer through whom and by whom the whole moneyed operations of the bank, in paying or receiving debts, or discharging or transferring securities are to be conducted. Story on Agen. § 114; Angell & Ames on Corp. 244.

Again, we are told that the cashier of the bank is, *virtute officii*, generally entrusted with the notes, securities and funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management and disposal of them. Angell & Ames on Corp. 245.

Such being the scope of the authority of a cashier as general agent of the bank, the authority of Stevens to receive payment of the note in suit, and to discharge the parties thereto, will not be contested. Nor is it denied that declarations made by him at the time of the payment, and explanatory of that act, might, with propriety be given in evidence by the defendant. But it is contended, that his declarations, to be admissible, must have been made at the very time of payment, and have constituted a part of that transaction; and that declarations made by him subsequently, though with reference to the same subject matter, to a party interested, while his agency continued, and when he was acting in the business of that agency, are inadmissible.

The general rule under which the declarations and admissions of agents to affect the rights of principals, seems to be universally recognized in courts of justice.

In the application of the rule to particular cases there has not been entire uniformity of practice. In very many instances, by Courts and text writers of high authority, the application of this rule has been restricted to those declarations made by the agent at the very time the act was done, to which they referred.

Thus in the case of *Barclay & als.* v. *Howell's lessees*, 6 Pet. S. C. R. 498, it is said that the declarations of an agent with respect to a thing done within the scope of his authority, are not evidence to charge his principal, unless they were made at the time the act was done, and formed a part of the transaction.

In *Magill* v. *Kauffman*, 4 S. & R. 317, the Court say the agent is authorized to *act*, therefore his acts explained by his declarations, *during the time of action*, are obligatory on his principal; but he has no authority to make confessions after he has acted, and therefore his principal is not bound by such confessions.

In *Corbin* v. *Adams*, 6 Cush. 93, in which the declarations of a son, who had made a contract for his own services as the agent of his father, as to the terms of that contract, were offered in evidence. Mr. Justice WILDE says — "the rule of evidence is laid down in the case of *Stiles* v. *Western Railroad*, 8 Met. 44. When an agent is acting within the scope of his authority, his declarations accompanying his acts, are admissible, as they may qualify his acts; but his declarations as to other matters and transactions are merely hearsay testimony."

It should be remarked, however, that in the case of *Stiles* v. *the Railroad*, cited above, the declarations offered referred to matters not within the scope of the agent's authority, and the Court, in their opinion, so declare, and for *that* reason they were rejected.

The representation, declaration or admission of an agent,

does not bind the principal, if it is not made at the very time of the contract; or if it does not concern the subject matter of the contract, but some other matter, in no degree belonging to the *res gestæ*. Story on Ag. § 135.

These cases are cited as illustrating the doctrines with which the rule in relation to the declarations of agents has been applied by courts and elementary writers whose opinions are entitled to great consideration.

But whether too great a degree of strictness has not sometimes been observed in this class of cases may well admit of doubt.

A manifest distinction exists touching the admissions and declarations of special agents with authority to perform certain specified acts, and those of general agents who are entrusted with the supervision and control of a particular or general business. The former having authority delegated to do a certain specified act, when that act is done, all privity of interest between the principal and agent ceases. They become strangers to each other. In the latter the privity continues in relation to all acts performed by the agent, within the scope of his authority, until the agency, itself, is terminated.

Hence, in the former case, it may with propriety be held, that only such declarations as are made at the time the particular act is done, by the agent, shall be admitted, while in the latter, explanatory declarations, made subsequently to the transaction, but while the agency continued, have been admitted as being within the scope of the agent's authority, or as part of the *res gestæ*.

The case of *Fairlie* v. *Hastings*, 10 Vesey, 122, is often cited as a leading case, establishing the strict doctrine contended for by the plaintiffs in the case at bar. An examination of that case will, however, show that it is not authority to the extent usually claimed for it. The Master of the Rolls, in that case did state certain general propositions, in relation to this kind of evidence, broad enough, perhaps, to cover the principles contended for. These statements were,

however, *mere dicta.* The declarations were excluded in that case, because they came from a party who was not in fact proved to be the agent of the defendant. The acts sought to be established by the declarations of the supposed agent, were performed by the defendant himself. And in view of this state of things the learned Judge very justly remarks; "a man cannot admit what another has done, or agreed to do; but he must prove it."

In the case of *Garth* v. *Howard & al.*, 8 Bing. 451, which was *detinue* for certain plate of plaintiff, pawned without his authority to the defendant, a pawn-broker; the only evidence to show that the plate had ever been in defendant's possession was, proof of the declarations of his shopman, that it "was a hard case, for his master had advanced all the money on the plate, at five per cent." TINDALL, C. J., in giving the opinion of the Court, said:—"If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by a person interested in the goods deposited with the pawnbroker. In this case, the rule laid down in *Fairlie* v. *Hastings*, 10 Vesey, which may be regarded a leading case, as evidence on this head, directly applies;" showing clearly that this able jurist did not understand the rule to be that the declarations of a general agent were restricted to those made at the time of the transaction, and further, that he did not understand that such a rule was laid down in the case of *Fairlie* v. *Hastings*. "But," continues the Judge, "the transaction with the defendant, is not a transaction in his business as a pawnbroker." The evidence was excluded on that ground.

PRATT, C. J., 1st Stra. 527, allowed the declaration of a

wife as to what she had agreed to pay for nursing a child as good evidence to charge the husband.

In *Hughes, adm'r,* v. *Stokes, adm'r,* 1 Hay. 372, which was assumpsit for board and lodging; on the part of the defendant, it was offered in evidence that Mrs. Hughes had acknowledged the accounts to have been discharged, or nearly so. This evidence was objected to; but the Court say "the wife, in the present case, acted as the agent or servant of the husband, and received his moneys. The business was carried on by her, and her declarations should be admitted to discharge Stokes."

In *Emerson* v. *Blanding,* 1 Esp. 142, Lord KENYON stated the rule of law to be, that when the wife acts for her husband, in any business by his consent, he thereby adopts her acts and must be bound by any admissions or acknowledgments made by her respecting the business.

In the case of *Welsh* v. *Carter,* 1 Wend. 185, which was assumpsit on a promissory note given for a quantity of barrilla, sold by one Fitch as agent, and represented by him as of a good quality, but which turned out to be worthless; the defendant offered to prove declarations and representations made by Fitch to sundry persons, subsequent to the sale to the defendant, relative to the value and quality of that portion of the article which remained on hand. This testimony was objected to but admitted.

SUNDERLAND, J., in giving the opinion of the Court, said, "The declarations or representations of Fitch in relation to this same lot of barrilla, to other persons, to whom he offered parcels of it for sale, subsequent to the sale to the defendant, I am inclined to think were properly admitted. Fitch was the agent for the plaintiff for the purpose of selling the whole lot of barrilla, and his agency continued until that was accomplished, or his power was withdrawn."

In the case of *McCormick* v. *Barnum,* 10 Wend. 104, one Baker had been employed as a surveyor to lay out the north half of a township into lots. It was proved on the trial that immediately thereafter, Baker, (who was dead at

the time of the trial,) said "he and Wood had been to examine the division line near Copely; that they had found it to be as near right as two different surveyors would be likely to get it; that they had found it to be correct, and allotted the north half accordingly; and that they had made a field book and map of the survey, reported their proceedings to an agent of Harrison, and received payment for their services." Proof of these declarations was objected to, but the evidence was received, and the full Court, SAVAGE, C. J., delivering the opinion, held they were properly received, as being declarations within the scope of his authority as agent.

In *Curtis* v. *Ingraham*, 2 Vermont, 287, the declarations of the wife, who was proved to be the agent of the husband, "that she had got rid of the demand (in suit) and she was glad of it; that she had sold it to her son-in-law, Farnham, who was carrying on the suit," were admitted as competent evidence for the defendant, who claimed to have settled the demand with Farnham.

The Court in their opinion say, "her sayings must not be considered merely as acknowledgments of previously existing facts, but also as declaratory of the actual situation of Farnham, and the confidence that might be placed in him by the defendant."

The admissions of an agent are binding upon his principal if made within the scope and during the existence of his agency; but after his agency ceases, his admissions or statements are not binding. *Levy* v. *Mitchell*, 1 Eng. 138.

In the case of the *Bank of Monroe* v. *Field*, 2 Hill, 445, the declaration of the president of the bank, that a note had been paid, made after an examination of the book, was admitted as proper evidence for the defendant as being part of the *res gestæ*, on the ground, that the president was a principal officer of the bank, and this being within the scope of his authority.

In the case of *State Bank* v. *Wilson & al.*, 1 Dev. N. C. R. 485, which was an action against the defendants as sure-

ties on a note, it was proved at the trial, that the cashier, (who had died insolvent,) on being applied to by an agent of the defendants, to learn the situation of the debt, replied, "that the indorsers were discharged, the debt having been paid by himself, and the whole business settled." The full Court, on advisement, held, that this testimony was properly admitted. There was no entry on the books of the bank showing that the note had been paid.

It will be found difficult, perhaps impracticable, to reconcile all the adjudicated cases, with any general rule, by which this kind of evidence is admitted or excluded.

The distinction between subsequent declarations made by special agents, with powers limited to the performance of particular acts only, and the explanations of general agents, having under their control a general business, made with reference to their own acts within the scope of their authority, and during the continuation of their agency, does not seem at all times to have been kept in view.

The reason for adopting the more extended rule, applicable to general agents, would seem to apply with peculiar force in the case at bar. The plaintiff is a banking corporation, an institution having numerous and important business transactions with the public. The general direction of its affairs is, it is true, under the supervision of a board of directors. But this board has little direct communication with the public. The cashier is the officer with whom the customers of the bank transact a very large proportion of their business. He has the custody of all the notes, bills and other securities belonging to the bank. To him all payments are made, and by him all securities are surrendered, when paid. As those securities are under his exclusive control, their condition must be, necessarily, within his personal knowledge, and his answers to inquiries made by persons interested, while in the discharge of his ordinary official duties, as to the conditions of such securities, are, in my opinion, acts clearly within the scope of his authority. To hold otherwise, would be to exceed the popular theory,

that such institutions are destitute of an important vital element possessed by natural persons, and to determine that they are also, practically, without any responsible organ of communication with the world.

It is contended, that the books of the bank, its records of the acts of its directors, are the legitimate and proper evidence of its contracts and proceedings, and that the declarations of its officers can only be given in evidence, if at all, in relation to past transactions, when made in connexion with an examination of the books, thus being made a part of the transaction or *res gestæ*.

The books are the private property of the bank over which its customers have no control; and besides, the records of the proceedings of the directors would not show what notes had, or had not been paid, even if they were accessible. But the question is not what could be shown by the records if they were introduced as evidence, but whether the act of examining them changes the character of the declarations of the agent, in relation to past transactions, performed by the agent. Suppose the cashier in this case had examined the books on which the acts of the directors were recorded, or any memoranda made by himself at the time of the payment of the note, before making his declarations. Such examination would have constituted no part of the *res gestæ* of payment. At most it could only serve to refresh his recollection of a past transaction, and would be wholly useless, if his recollection was distinct without the reference. In one case he would state a fact within his own knowledge, from recollection; in the other he would state the same fact with his recollection refreshed by an examination of the books or memoranda. The principle of evidence would be the same in both cases.

It is undoubtedly true that the bank is under no legal, and possibly no moral obligation to give information to its customers as to the condition of its securites or as to their liability on paper which the bank has discounted. Nor is an individual obliged to give information in relation to his

business transactions, past or present. In both cases the giving of such information may be a mere act of curtesy. Yet although a suit at law might not lie against an individual who should be so discourteous as to give false information, still his admissions or declarations would be competent evidence against him in an action where they were pertinent to the issue, and it is not perceived why the same rule should not apply to a bank.

Onerous indeed is the situation of the customers of banks, if they can only obtain responsible information touching their liability upon notes in the custody of cashiers, by calling a meeting of directors, to answer a simple inquiry relating to transactions peculiarly within the knowledge of their cashiers, by a formal, official resolution of the board.

From these considerations, I am of the opinion, that both upon principle and authority, the declarations of the cashier were properly admitted. The degree of credit they were entitled to should be determined by the circumstances under which they were made.

The next instruction to which objection is taken is so intimately connected with the one which has already been considered, as necessarily to stand or fall with it. I think it was correct. *State Bank* v. *Wilson*, 1 Dev. 485.

APPLETON, J. — If a surety having security for his liability should surrender the same, or, if having an opportunity to obtain indemnity, he should omit obtaining it in consequence of receiving information from the creditor, that the debt for which he was liable, is paid, he is discharged from such liability, though the creditor was in mistake, the debt not having been paid. *Baker* v. *Briggs*, 8 Pick. 123; *Waters* v. *Creugh*, 4 Shu. & Per. 410.

Corporations and individuals are alike subject to the general rules of law. The facts which would discharge a surety, where the creditor is an individual, should have the same effect where that relation is sustained by a corporation.

Individuals can act personally or by the intervention of agents. The action of corporations is by a vote of the corporate body and by their duly appointed agents.

The duties of a cashier are well defined and clearly understood. He is the principal agent of the bank, through whom communications relating to its business transactions are made. The notes or bills deposited with, or discounted by the bank are in his custody and under his control. All payments are made to him, and when notes or bills are paid he delivers the same to the party by whom such payments are made.

If notes or bills, whether deposited or discounted, are not paid at maturity, it is his duty to notify the indorsers or cause them to be notified, and if he neglects this duty, the bank is liable for his omission.

The indorser or surety is bound to perform the contract of his principal, when notified of his failure. If bound to pay, he must have a right to know at any time, the then present condition of his liability. The note or bill, though not paid at maturity, may since have been paid in whole or in part. The bank may have taken collateral security and upon payment by an indorser, he is entitled to all the rights of subrogation. Whether there is collateral security or not, he is entitled to the possession of the note or bill when paid by him as evidence of his rights against his principal, or against those who may have preceded him as indorsers.

The indorser or surety may well claim to know at any time the then present condition and extent of his liability; to ascertain his rights and duties, so that he may be in a condition to claim the one and perform the other. The cashier is the individual, who has the rightful custody of the paper discounted, and to whom payment is to be made. The books of the bank show what has been discounted and what payments have been made, and are under his control. The cashier is therefore the officer of the bank, to whom application is to be made by a party interested, to ascertain at any time the then condition of his liability.

In giving the desired information, the cashier, when called upon for that purpose at the bank, may give his recollection or he may examine particularly, the books of the bank, and state the result of such examination. It is for him to determine the degree of attention he will bestow upon the subject matter before him. Whether the information given is the result of a more or less careful examination, whether it be verbal or in writing, the same rule as to its admissibility must apply. If his official certificate would be evidence, his declarations at the bank during banking hours to one interested and having a right to inquire must be equally admissible. If injurious consequences result from negligence, falsehood or fraud in the communications made, and a loss follows therefrom, it should be borne rather by the bank than by one whose only fault it is, that he relied upon the statements of its accredited agent.

The inquiry in this case was made of the cashier at his regular place of business during banking hours, and while he was in the exercise of his official duties. It was made by one having an interest in the inquiry, or by his agent. It was made of the cashier as an officer of the bank, and because he was such officer. The information given by him was given while in the transaction of his official business, and not by him as an individual. I cannot regard this other than the acts of an agent in and about the business of his agency, and within the scope of his official duty. It is the ascertainment of the present relation of a supposed surety to the bank, whether a liability formerly existing still remains. It is not a statement of the past, but a present transaction relating to the proper business of the bank. If then the cashier is to be regarded as acting officially in giving information to a surety rightfully inquiring of him at the bank of the then present condition of his liability, the same consequences should result against the bank from this information, if erroneous, as would result in case the cashier had been the owner, against him.

If the surety with the money of his principal should pay

the note or draft upon which he is liable at the bank, and in banking hours, it would not be questioned that the cashier in receiving it, was acting in the discharge of his duty as such officer. If the surety with the money of his principal should, at the same time and place, offer to pay such money and should receive the information of such cashier that the note had been paid and surrendered to the principal, he would be equally acting officially as if he received the money and applied it to the discharge of the note or draft upon which the person paying it was liable. If in such case, acting upon the information thus received, the surety should surrender his security to his principal, it will hardly be contended that another and different rule should exist where the claim is held by a corporation, than would obtain if the cashier had been the owner and had made the same statements. So if the surety, having ample indemnity for his protection, should apply to ascertain whether it will be required or not, and should be told that the note or bill was paid, and in consequence thereof should give up to his principal the property which he would otherwise have appropriated to its payment; is it easy to perceive why the bank should be exempted from the operation of those rules of law which in a similar case would have discharged such surety had the note belonged to the cashier?

Neither the declarations of the holder of the note, when he is an individual, nor those of an agent, when, as in this case, his principal is a corporation, are conclusive. If the information thus given is erroneous, and no injury should result from it, or if the error should be seasonably corrected, the bank should not suffer. The principle upon which the surety is relieved, is that his condition has been injuriously affected by the wrongful or negligent acts of the bank or its agent. If no such injury has arisen, then the grounds upon which the surety rests his claim for exoneration from liability, no longer exist.

The cashier is not bound to answer impertinent inquiries, or to satisfy idle curiosity. The surety may apply person-

ally or by agent. If any question as to the authority of the agent to make the inquiries should arise, the cashier may withhold the information until he shall be reasonably satisfied they are made at the instance and in behalf of the party interested.

Whether the bond of the cashier would, in this and similar instances, protect the bank from the consequences of his neglect, must be determined by the language the parties may have used in drafting it. It may or it may not. Whether the action of the cashier in a particular case, was or was not within the scope of his authority, depends upon the extent and limits of his agency, rather than upon the peculiar form of indemnity which he may have given his principal.

The bank is bound to know the character of its officers. It holds them out as entitled to confidence. If they are negligent, unfaithful or dishonest, it should suffer the consequences of such negligence, unfaithfulness or dishonesty. Any other result would relieve the bank from the effects of the misconduct of its agents and impose them upon strangers, who have no choice in their selection nor control over their action.

The questions involved in the decision of this case are of no slight importance. For this cause, I have deemed it expedient briefly to state the reasons which have induced me to dissent from the conclusions to which the majority of the Court have arrived.

HASKELL *versus* MATHEWS.

An action on a note payable in "legal services on demand," cannot be maintained, without proof of a demand, and the nature of the services required of the promisor made known to him; unless it is shown that he is *disabled* or *disqualified* to perform the contract.

When such a contract has been made, the promisee has a *reasonable time* in which he may require it to be performed, without unexpected expense or inconvenience to himself in obtaining it.

But the promisor is not bound to remain in the place or vicinity, where the contract was made, for any period it may suit the promisee to wait, before he makes a demand for its performance.

Even his removal out of the State, *after* a reasonable time has elapsed in which the promisee might have demanded and received the services, will not make the promisor liable to an action on the contract, unless an occasion for such services be proved.

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

ASSUMPSIT. The general issue was pleaded.

The note declared on was dated at Clinton, Jan. 28, 1840, payable to order of plaintiff "in legal services" on demand. The writ was dated July 17, 1851.

At the time the note was given, the plaintiff was a trader living in Clinton, and the defendant an attorney at law, hiring an office in the same building.

In 1846 and 1848, two small indorsements were made upon the note for writs made by defendant in part payment.

Mathews lived in the town of Clinton in the fall of 1840, and part of the winter of 1841; he then removed to Waterville, five miles distant, and there commenced publishing a newspaper, and had a sign as attorney at law.

In 1843, he removed to Gardiner, and there published a paper; and in 1847, removed to Boston, where he has since resided and published a paper.

The case was taken from the jury and submitted to the Court for such judgment as the law upon these facts required.

Paine, for the defendant.

Smith, for the plaintiff, cited Chipman on Cont. 30; *Dunn* v. *Marston*, 34 Maine, 379; *Newcomb* v. *Brackett*, 16 Mass. 165; *Brown* v. *Gammon*, 14 Maine, 276; Chitty on Cont. 571.

SHEPLEY, C. J. — The contract of the defendant to pay in legal services on demand, did not prescribe the place, where those services should be performed. While the defendant, by a fair construction of it, would not be at liberty to con-

duct so as to prevent the plaintiff from obtaining payment within a reasonable time without incurring unexpected expense or inconvenience, it could not be so construed as to require the defendant to remain in a particular office or to reside in a particular place for any period, that it might please the plaintiff to wait before he made a request for payment.

The contract was of such a character, that the defendant could not perform it, until he was requested to do so, nor until the services desired were made known to him.

He appears to have continued to reside for three months or more in the place where the contract was made; and for more than two years afterward within about five miles from it, where, without great inconvenience or expense, he might have been requested to perform the services at the place, where the contract was made, if it were important to the plaintiff, that they should be performed there.

No demand for performance appears to have been made at any time or place. Nor does the defendant appear to have been disabled or disqualified to perform. Or that the plaintiff had any occasion for the legal services of the defendant after his removal from the State.

Plaintiff nonsuit.

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

BEEMAN *versus* LAWTON.

A mortgage of personal property, to be valid against others than the parties to it, must be recorded, or the possession of the property *taken and retained* by the mortgagee.

A *like possession* is necessary to constitute a pawn or pledge.

A mere *executory* agreement with defendant, in relation to personal property remaining in possession of the owner, confers on him no right of property or of possession.

And instructions upon a matter which cannot affect the party excepting, are immaterial.

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

TROVER, for the conversion of a Piano Forte.

Both parties claimed under one Bartlett, who mortgaged it to defendant, in Feb. 1851, which mortgage was recorded, and some months after, (Nov. 4, 1851,) gave a bill of sale of it to plaintiff, but he could prove no delivery or possession.

The plaintiff introduced evidence tending to show, that the mortgage was made with the design of defeating the creditors of Bartlett.

The defendant proved by his partner in business, (after a release by him of all his interest in the piano,) that in May, 1851, Bartlett wished him to become surety for him on a poor debtor's bond. He declined. Bartlett then said to defendant, "you have that piano, if you will sign the bond, and I dont hold you harmless, you take the piano and sell it or keep it, as you see fit." The defendant and his partner signed the bond.

In the succeeding fall the defendant took the piano into his possession.

In the spring of 1853, the witness paid the execution upon which the bond was given, out of the partnership funds, amounting to one hundred and forty dollars.

The Judge instructed the jury that if Bartlett authorized the defendant to sell or keep the piano, in consideration that his partner would sign the bond, then the release of said witness to defendant, discharged the defendant's claim.

The verdict was for plaintiff, and defendant excepted.

Paine & Clay, for defendant.

Danforth & Woods, for plaintiff.

APPLETON, J.—It appears that on February 27, 1851, one Bartlett, from whom both parties derive title, executed a mortgage of the piano in dispute, to the defendant, who in the fall following took the same into his possession. The plaintiff's bill of sale was dated November 4, 1851. As between these opposing titles, that of the defendant was prior and possession was acquired under it, but it was resisted on the ground that it was fraudulent. No exceptions having

been taken to the instructions on this branch of the case, they must be deemed correct. Indeed it was conceded that the instructions given did not apply to the written mortgage, so that the question to be considered is whether they are erroneous in reference to the subject matter to which they were specially applicable. The verdict of the jury, which was for the plaintiff, tends to establish the fact that the written mortgage was fraudulent or invalid for some other cause, as unless such had been the case, the defendant, being in possession under a title prior to the plaintiff, must necessarily have been entitled to a verdict.

It appears that in May, 1851, Bartlett called on S. W. Lawton, a witness in the case, with his brother, the defendant. Bartlett wished the witness to execute as surety for him a poor debtor's bond, which he declined. He then turned to the defendant and said "you have the piano, and if you will sign the bond and I don't hold you harmless, you take the piano and sell it or keep it, as you see fit." The witness signed the bond. Last spring the witness paid the execution upon which the bond was taken, out of the joint funds of the defendant and himself, they being partners. The amount paid was one hundred and forty dollars. It is in reference to this transaction that the instructions complained of were given.

It is to be observed, that at this time the defendant was not in possession, so that the conversation related to a piano of which he neither had possession, nor (the mortgage being for some cause void,) the right to possession. The defendant claimed that this transaction constituted a mortgage, but such was not its character. By R. S., c. 125, § 32, no mortgage "shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee; or unless the mortgage has been or shall be recorded by the clerk of the town where the mortgager resides." A delivery of personal property for security, is not a transfer on condition, and does not constitute a mortgage thereof, but

a pledge merely. *Eastman* v. *Avery,* 23 Maine, 248. So that even if the piano had been delivered for the purposes of security, the defendant could not have held the property as mortgagee. Much more will it not constitute a mortgage, when the property is neither present nor delivered.

The defendant shows no right to retain the property as a pawn or pledge. To constitute a pawn or pledge, there must be a delivery and retention of the possession of the thing pawned. If the pawnee give up the possession to the pawner, his rights are gone. The element of possession failing, there can be no pawn nor pledge. Story on Bailments, § 300; *Haven* v. *Law,* 2 N. H. 16; *Bonsey* v. *Amee,* 8 Pick. 236. It can at most be viewed only as a mere executory agreement, conferring no rights of possession or property over the thing to which it related.

The witness Lawton, was neither mortgagee, pawnee nor vendee, and could confer no right on the defendant to retain possession, nor would his release be of any avail. As by the transaction of May, no rights were acquired by the defendant or the witness, and as the instructions related thereto, they must be regarded as immaterial.

Exceptions overruled.

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

SMITH, *complainant, versus* LINT.

A complaint under the bastardy Act is in the nature of a civil suit, and should be entered at the term of the Court for the transaction of civil business.

If, pending such complaint, and before a trial, the child dies, the putative father is, nevertheless, chargeable with the expenses prior to its death.

ON FACTS AGREED.

COMPLAINT under c. 131, R. S., which was entered at the April term of the District Court for the trial of civil actions in 1852.

At that time there were separate terms fixed by law for the trial of criminal matters.

The child was born alive but died in August, 1852, at the age of eight months. The defendant was its admitted father.

Before pleading, the defendant filed a motion to have the prosecution dismissed, because it was entered at the civil and not at the criminal term of the court.

At the March term, 1854, of the Supreme Judicial Court, it was contended by the defendant that no further proceedings could be had on this process, the child having deceased before any trial in the case.

It was then agreed to submit the determination of the case to the full Court, upon the preceding facts, and if the process was rightfully entered and it is competent for the Court to make any order against the defendant, for the maintenance of said child, then the defendant to be heard as to the amount with which he shall stand charged.

E. Abbott, for defendant.

A. Libbey, for complainant.

APPLETON, J. — It has been decided that a complaint under the bastardy Act is to be deemed a civil suit, and as such it should be entered at the term held for the transaction of civil business. *Mahoney* v. *Crowley*, 36 Maine, 486.

The object of the statute relating to bastard children and their maintenance was to compel the putative father to aid in supporting his illicit offspring. The expenses for the maintenance of an illegitimate child commence at its birth. They include what may be necessary for its support and comfort. The liability of the father is coëxtensive with that of the mother and relates to the past as well as the future. The order of court, charging him with maintenance, embraces expenses which have been, as well as those which may be, incurred. The death of the child relieves the father from future support, but furnishes no discharge as to the past. If it were otherwise, if the order were prospective only in its operation, it would afford direct inducement for delay, as the longer the termination of the suit could be de-

ferred, the less would be the burthen imposed upon the father.

The R. S., c. 131, § 7, provides for filing a declaration and specifies the facts to be therein set forth, the proof of which are necessary for the successful maintenance of the suit. If, upon such declaration, the jury should find the respondent guilty, then, by § 9, "he shall be adjudged by the Court the father of such child, and stand charged with the maintenance thereof." All this may be done, whether at this time the child be living or not. The order of court may embrace the past and the future, or it may relate only to the past, as the exigencies of the case may require. ***Kenniston*** v. ***Rowe,*** 16 Maine, 38. Any other or different construction would limit and restrain the just and beneficial operation of this statute.

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

ELLIS *versus* WHITTIER.

The provision of R. S., c. 115, § 56, giving costs to the prevailing party, prevails in all cases, except when specially limited by some other statute.

And the *costs* in an action are controlled by the laws in force when the *judgment is rendered,* and not by those in force when the action *was commenced.*

Thus an action, commenced while c. 97, § 15, R. S., was in force, is not affected by it, if the judgment in the action is rendered *after* the absolute repeal of that statute.

ON FACTS AGREED.

TRESPASS. The writ was dated Aug. 16, 1849, and contained two counts; one for breaking and entering plaintiff's close and taking a yoke of oxen and heifer, the other for taking the same property. The damages were laid at $100.

The question was merely as to costs.

In the late District Court, the plaintiff recovered a verdict at the December term, 1850, for taking the heifer only, $15,10, from which he appealed and recovered in the Su-

preme Judical Court for the oxen and heifer $73,30. But the jury found the defendant not guilty as to breaking the close.

Upon these facts the defendant claims costs since the appeal, and resists any claim of plaintiff for costs.

J. S. Abbott, for the defendant, to sustain his view of the case, relied upon the fact that the action was in the Supreme Court, on appeal, long before the enactment of c. 246, of laws of 1852, and that, therefore, the costs should be regulated by R. S., c. 97, § 15, and cited *Sawyer* v. *Bancroft*, 21 Pick. 210.

Currier, for plaintiff.

APPLETON, J. — By R. S., c. 115, § 56, it is enacted, that "in all actions the party prevailing shall be entitled to his legal costs." This general provision is to control in all cases, except when limited or restricted by some other statute.

By R. S., c. 97, § 15, which establishes the District Court and determines its jurisdiction, a limitation is imposed on the costs of the plaintiff, and they are allowed the defendant, in a certain event, in case of appeal. By R. S., c. 96, § 16, the appellate jurisdiction of the Supreme Judicial Court, is "subject to the provisions of the 15th § of c. 97." If R. S., c. 97, were now in force, it is obvious, that no question could arise. But by the Act of 1852, c. 246, "the Act establishing the District Court, and its jurisdiction, and all Acts additional thereto," were repealed, and the jurisdiction of that Court, was transferred to, and conferred upon the Supreme Judicial Court. The R. S., c. 97, was consequently, repealed by the Act of 1852, c. 246. But if the provisions as to costs arising under § 15, of that chapter, had been repealed, it is clear that the plaintiff would be entitled to his legal costs as the prevailing party. But whether the whole chapter or the particular section affecting costs be repealed, the result must be the same. There would not in either case be any valid and existing statute,

by virtue of which the general provisions of R. S., c. 115 which give the prevailing party costs, would be limited or restricted. Neither would there be any Act by which the defendant could claim to recover costs.

The decision in *Sawyer* v. *Bancroft,* 21 Pick. 211, has been relied upon by the learned counsel for the defendant. But that rests upon the construction of the repealing and saving clauses of the R. S. But in the Act of 1852, c. 246, there are no saving clauses whatever. It cannot therefore be deemed as applicable.

The rights of parties are not to be governed by statutes which are repealed, but by those which are in force when judgment is rendered. The costs of a pending action may be changed or modified by a statute passed during its pendency. In *Billings* v. *Segar,* 11 Mass. 340, the Court held, that an action commenced was subject to the provisions of a subsequent statute as to costs. In *Freeman* v. *Moyes,* 1 Ad. & El. 338, executors were held liable to costs in actions brought before the passage of the statute giving them. In *Commonwealth* v. *Cambridge,* 4 Metc. 35, the Commonwealth was adjudged liable to costs in consequence of the provisions of an Act passed during the pendency of the cause. Indeed, it is difficult to perceive how costs can be allowed or refused under the provisions of a repealed Act, when there is no saving clause to that effect in the repealing statute.

The plaintiff is entitled to tax his costs as the prevailing party since his appeal, and they are denied the defendant.

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

MCNALLY *versus* KERSWELL.

The joint liability of partners is severed by their death, and a claim against their estate cannot be prosecuted against their administrator, *in one action,* although the same individuals should administer on both estates.

McNally *v.* Kerswell

After an estate has been represented insolvent, a creditor cannot maintain an action against the administrator, unless his claim has been filed before the commissioners, should the estate even prove to be solvent.

An action against an officer for neglect of serving a writ cannot be supported without proof of *loss* sustained by such omission.

Where the creditor would enforce a *lien* claim on logs, by an attachment under the provision of c. 216 of the Acts of 1851, against an administrator of an estate represented to be insolvent, the nature of the claim must appear in the writ itself.

If in such suit it does not appear by the writ, that a *lien* claim is sued for, no action can be maintained against the officer for neglecting to serve it.

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

CASE against the defendant, as a deputy sheriff for not making an attachment on a writ committed to him with special directions, and which he neglected to serve.

When the plaintiff's attorney gave the writ to the defendant for service, he said he had already attached some logs, and that they were ample security for the lien claims. The attorney directed him to make a subsequent attachment on the lot of logs and complete the service by leaving a summons. The defendant said he would. After keeping the writ three months, the defendant returned it to plaintiff's attorney, without any service being made.

The principal facts in the case will be found in the opinion of the Court.

The case was submitted to the full Court for a decision.

J. S. Abbott, for defendant.

C. Hinds, for plaintiff.

APPLETON, J. — This was an action of the case against the defendant, a deputy sheriff, for neglecting to serve a writ in favor of the plaintiff against Peter S. Ellis, administrator.

The officer in the writ, was commanded to attach the goods and estate of Joseph Ellis and Benjamin H. Ellis, late of said Madison, now deceased, in the hands and possession of Peter S. Ellis, of said Madison, administrator on the estate of said Joseph and said Benj. H. Ellis." Both of

those estates were represented insolvent at a probate court holden on the first Tuesday of May, 1851, and commissioners of insolvency appointed. The writ against the administrator is dated June 20, of the same year, and is brought to recover the balance of an account due from both estates, and for work and labor done in and about the business of the said Joseph and Benjamin H. Nothing in the writ indicates it to have been a lien debt, or that it was for work and labor done and performed upon any specific logs, whereby the plaintiff acquired a lien on the same.

The defendant was described as the administrator on the estate of Joseph and Benjamin H. Ellis. No joint action can be maintained against the several administrators of deceased partners. Neither can it be against the same individual in his double capacity as administrator on the estates of each partner. The estates are separate. The duties of the administrator in regard to each, and the bonds given for the performance of those duties, are several and distinct. The demand, which was joint, is severed by death and all remedies for the enforcement of claims must be against the several administrators upon each, or if the same individual be administrator upon both estates, against him in each case as he is administrator upon the estate sought to be charged.

The law is well settled that upon the issuing of a commission of insolvency, all attachments are dissolved. It is obvious that what is to be distributed should be freed from attachment. *Martin* v. *Abbott*, 1 Greenl. 333. If the estate is represented insolvent a creditor cannot sue the administrator, unless his claim has been filed before the commissioners, though the estate finally prove to be actually solvent. *Paine* v. *Nichols*, 15 Mass. 264; *Dillingham* v. *Weston*, 21 Maine, 263.

If the plaintiff was entitled to bring his claim within the provisions of the Act of 1851, c. 216, and by maintaining an action against the administrator, to enforce his lien on the logs by virtue of its provisions, the writ should have

disclosed those facts, so that the officer should know he was not called upon to act in violation of law. The writ disclosed no such facts. From any therein set forth, he not merely had no apparent justification in making an attachment, but on the face of the proceedings he would have been without justification in so doing. He was not bound to assume the existence of a state of facts, which might bring the case within the purview of one statute, when the papers upon which he was required to act, commanded a palpable violation of another.

The plaintiff does not show how, or in what way he has sustained any loss, and without such proof the action cannot be sustained. *Plaintiff nonsuit.*

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

PAGE, *Petitioner for mandamus to the Court of County Commissioners.*

Where the inhabitants of a town neglect to open and build a legal road, laid out by the Commissioners, *within the time limited for that purpose*, they become liable to pay the expenses consequent on such neglect.

The *liability* of the town to pay for the expenses of making the road, *attaches* at that time.

Although the territory over which the road is laid, was incorporated into another town before the road was opened and completed by the agent, this will not relieve the town, in which the road was when laid out and ordered to be opened, from its liability for the expenses of building it.

ON FACTS AGREED.

PETITION FOR MANDAMUS to the County Commissioners' Court.

Upon proper proceedings, the County Commissioners laid out a county road in the town of Augusta, and allowed that town until December 1, 1848, to open and build the same.

The road not being opened, at the August term of the Commissioners' Court in 1850, a petition was filed for an agent to be appointed to open the road.

Page, petitioner for Mandamus.

At an adjourned term of that Court, held October 23, 1850, the petitioner was appointed agent, and commissioned on November 1, following.

The agent accomplished his service to the satisfaction and acceptance of the Commissioners, a part of the road being finished prior to January 1, 1851, and the remaining part subsequent to March, 1851.

The Legislature of the State, by an act approved August 12, 1850, incorporated the town of Kennebec, embracing within its corporate limits all that part of the city of Augusta over which the said road was located and constructed.

The town of Kennebec held a town meeting, legally notified, in September, 1850, and again in March, 1851.

At the December term, 1851, of the County Commissioners' Court, the petitioner presented his account for opening and making said road, and requested that they would notify the town of Kennebec and city of Augusta.

The Commissioners refused to notify either, and to allow his account.

Notice was given of this petition, and the Commissioners, the town of Kennebec and city of Augusta appeared by their attorneys.

The town of Kennebec and city of Augusta each claim, that if a mandamus is to issue to the Court of County Commissioners, it should require the said Court to notify the other, as the municipal corporation solely interested in the settlement of the account.

Vose, County Attorney, for Commissioners.

Titcomb, for city of Augusta.

Paine, for town of Kennebec.

North & Fales, for petitioner.

APPLETON, J. — It is admitted that the County Commissioners duly laid out the road in the town of Augusta, in relation to the making of which the controversy between these parties has arisen, and that the time allowed by law for constructing the same expired on Dec. 1, 1848. The town hav-

ing neglected to open and complete the same, on the third day of August, 1850, Alden Sampson and others petitioned the Court of County Commissioners, at their August term holden at Augusta, to appoint an agent to open and make said road.

On the 12th of August, 1850, the town of Kennebec was incorporated including within its limits the portion of Augusta over which the road passed, and it was duly organized under its Act of incorporation, in Sept. 1850.

On the twenty-third day of October, 1850, the County Commissioners appointed this petitioner an agent to open and make passable said road, which he did to their satisfaction and acceptance previously to March, 1851.

It is conceded that the petitioner is entitled to compensation for the services he has rendered in completing the road. The controversy is as to whether this liability attaches to the city of Augusta or to the town of Kennebec.

The language of R. S., c. 25, § 40, is clear and explicit. It provides that "if any town *liable to open and make or allow any highway or private way, duly ordered and accepted by the County Commissioners, shall neglect to do so* within the time limited by the provisions contained in this chapter, the said Commissioners, on application therefor, shall appoint an agent," &c. The agent thus appointed is to cause the road to be made by contract or otherwise. When the same shall be agreed to be made passable or altered, by contract, the agent is to file a certified copy of such contract in the office of the clerk of the Commissioners, who shall certify to the assessors of the town or plantation interested the amount he has contracted to give and the time within which by the contract it is to be completed. No account of such agent is to be allowed without notice to the town interested. "After the completion of the service of the agent and the final allowance of his accounts, the town shall be liable to pay all sums expended by the agent, with the incidental expenses of his agency and the settling of his accounts, adjudged by the said Commissioners to be reasonable, and the

amounts due on any contracts by him made; and if such town shall neglect to pay the same for thirty days the Commissioners shall issue a warrant of distress therefor against such town." The town of Augusta on the first day of Dec. 1848, was the town, which being liable to open and make the road, had neglected so to do. Its liability then attached. No other existent corporation had been guilty of neglect. The town thus liable and thus guilty of neglect is the town against which the warrant of distress is finally to issue. The subsequent action of the County Commissioners, consequent upon the corporate neglect of the town liable, necessarily results from such neglect and is at the cost of the negligent corporation. The warrant of distress can issue only against the town originally liable and guilty of neglect. The town of Augusta having been once liable, that liability remains unless it has in some way been removed.

Nothing has been done by the Act incorporating the town of Kennebec, passed Aug. 12, 1850, (Special Acts, c. 355,) by which the town of Augusta has been relieved from the burthen thus imposed. By § 3, "the highways also in said town of Kennebec, during the annual municipal year, are to remain chargeable respectively to the *city and towns from which said new town is taken.*" This section can have no such effect, for it leaves the city and towns originally liable as still chargeable.

The County Commissioners, therefore, should give notice to the city of Augusta before proceeding to the allowance of the accounts of the petitioner. *Writ to issue.*

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

MEANS *versus* WILLIAMSON.

To make a sale of personal property valid without a written contract, where nothing is paid, there must be a *legal* delivery.

But it is not necessary for *such delivery*, that the property should pass into the hands of the vendee; if it is so situated, that he is entitled to, and can rightfully take possession of it at his pleasure, the sale is perfected.

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

ASSUMPSIT. This action was commenced on Nov. 20, 1850, on the following account: — Oct. 6, 1849. For 1 chaise and harness, $30,00.

It appeared in evidence, that the defendant wished to buy a second hand chaise which was owned by the plaintiff. It was in the stable attached to the plaintiff's house. The parties went out to look at it, and soon returned to the plaintiff's store and had a conversation as to the price of the chaise and manner of payment. The price of chaise and harness was $30,00, to be paid for in wood, at market price, part hard wood to be delivered the next winter, and part soft wood from the mill where the defendant then worked.

The defendant spoke of not having at that time a proper place to keep the chaise; and said he should have to build a shed. The witness also said, that the substance of the conversation was, that the chaise was to remain where it was until the defendant should build his shed.

The defendant never delivered any wood, or removed the chaise, nor has it been used by the plaintiff.

The case was referred to the decision of the full Court, and submitted without argument.

SHEPLEY, C. J. — The suit has been commenced to recover an agreed price for the sale of a chaise and harness. The testimony shows, that a bargain was completed for the sale at an agreed price, to be paid at a future time in wood at the market price. There having been no payment in part, or written contract, the question is, whether the sale was completed by a delivery.

When the bargain was made the chaise was in the plaintiff's stable, where it had been examined by the parties and the defendant had spoken of having no proper place to keep it, and that he should have to build a shed. The witness appears to have stated without objection, "the substance of the conversation was, that the chaise was to remain where

it was, until the defendant should build his shed." It was so to remain not as security for payment, but at the pleasure of the defendant, and for his accommodation. Nothing further remaining to be done; the sale was completed, if there was a legal delivery. For that purpose it is not necessary, that the property should pass into the actual possession of the vendee.

When it was so situated, that he is entitled to, and can rightfully take possession of it at his pleasure, he is considered as having actually received it, as the statute requires, although it may by his request have continued in the custody of the vendor. *Houdlette* v. *Tallman,* 14 Maine, 400; *Chapman* v. *Searle,* 3 Pick. 38; *Riddle* v. *Varnum,* 20 Pick. 280; *Barrett* v. *Goddard,* 3 Mason, 107. In the latter case, the cases bearing upon the question of such a delivery were examined, and Mr. Justice STORY stated, as his conclusion, "that a continuance of the possession of the vendor does not prevent the delivery being completed, if nothing further remains to be done on either side, and the possession is by mutual consent."

The sale should not be regarded as defeated by a favor granted by the vendor to the vendee upon request.

Defendant defaulted.

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

INHABITANTS OF WAYNE AND FAYETTE, *Petitioners for certiorari, versus* COMMISSIONERS OF COUNTY OF KENNEBEC.

In laying out a highway, the Commissioners are not required to follow minutely the line indicated in the petition, but a substantial compliance with it, under the exercise of a sound discretion, is all that is demanded.

Where neither public nor private injury appears to have been sustained, by a slight deviation in the road as located, from that prayed for, the Court, in the exercise of its discretionary power, will not interpose to vacate the proceedings.

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

PETITION for *Certiorari.*

The facts in the case are disclosed in the opinion. The case was reported for the decision of the full Court.

H. W. Paine, for petitioners.

Vose and *Bean, contra.*

RICE, J. — In the original proceedings there was an appeal taken from the decision of the County Commissioners, establishing the way referred to, under the provisions of c. 28, statute of 1847, to the District Court. A committee was appointed by said Court, which committee after due proceedings had, made a report affirming the doings of the Commissioners, establishing said way. This report was accepted by the District Court, and the judgment thereon certified to the County Commissioners. The duty of that board then became imperative. They must proceed to lay out the way according to the judgment of the appellate court.

There is no suggestion that the way thus established was not of common convenience and necessity. Upon the merits the parties were fully heard before two distinct tribunals, the County Commissioners, and the committee appointed by the District Court. The complaint now is, that in locating the way, the line indicated in the original petition was not followed, and therefore no jurisdiction was obtained by the Commissioners. The petitioners asked for a way to be located, "beginning in the village of North Wayne and passing up near the westerly margin of the pond lying north of said village, to near its upper end; thence near the westerly margin of the stream emptying into said pond, to the county road near Fayette mills."

Between the termini of the route thus indicated, are, as appears from the diagram presented at the argument, two ponds; one being very small, and lying north of, and near to, North Wayne village; the other lying further north and being of much larger dimensions. The larger body of water, or pond, was obviously "the pond" referred to in the petition.

The way, as located, commenced in North Wayne village and passed up on the easterly side of the small pond, and

crossing the stream between the two, continued northerly, passing up near the westerly margin of the larger pond. There is no precise point of departure in North Wayne villiage indicated in the petition, by reference to the stream or otherwise, which should require a location different from the one actually made. But it is contended, that the location of the way where it enters the county road, near Fayette mills, should be near the westerly margin of the stream on the west side, whereas it was actually located on the east side of that point. If the Commissioners were required to follow the description in the petition in the location of ways, with the same precision that would be requisite in conveyancing, perhaps such might be the result. But we do not understand, that they are thus confined to the precise points indicated by the petitioners. To hold them to the observance of such rigid and exact rules in the location of ways, would be to deprive them of all right to exercise their judgment, so as to avoid local difficulties or make improvements by partial deviations from the line indicated in the petition, and to compel them when obstacles should present themselves, either to subject the public to the inconvenience occasioned thereby, or the expense of their removal, or to abandon the route altogether. A construction which should thus limit and restrict their powers, would be unreasonable, and could not have been contemplated by the Legislature. In such case, the Commissioners are authorized to exercise a sound discretion. A substantial observance of the route indicated in the petition is all that is required. *Windham* v. *Cumberland County Commissioners,* 26 Maine, 406.

We do not think there was such a departure in this case, from the route prayed for, as will authorize this Court, in the exercise of a discretionary power, to interfere for the purpose of ousting proceedings in which neither public nor private injury appears to have been sustained.

Petition dismissed.

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

INHABITANTS OF WINSLOW, *Pet'rs for certiorari, versus* COUNTY COMMISSIONERS OF KENNEBEC.

By R. S., c. 14, § 18, it is provided, that if after notice by the assessors, an inhabitant of the town shall not bring in the required lists, (for the purposes of taxation,) he shall be thereby barred of his right to make application to the County Commissioners for any abatement of the assessment on him, unless he shall make it appear that he was unable to offer such list at the time appointed.

Before this mode of redress can be made available by any inhabitant, he must *personally* carry in such list to the assessors, and be ready to make oath to its correctness, if required; or make it appear to the Commissioners that *he* was unable to offer such list at the time appointed.

Although the Commissioners make an abatement without authority, and, from the whole case, it appears that no injury has been done to the town by their proceedings, the writ of *certiorari* will be denied.

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

PETITION FOR THE WRIT OF CERTIORARI.

The assessors of the town of Winslow, about the middle of April, 1850, posted up notices in that town, notifying the inhabitants thereof, to bring in to them, true and perfect lists of their polls and estates, not exempt, by law, from taxation, as of the 1st of May, 1850.

It was admitted that one Joseph Eaton, one of the inhabitants of that town, presented no such list, but *sent* in to the assessors *such a list* by the hand of a third person, on May 20, 1850.

Eaton complained to the assessors, that the valuation of his estate was greatly overrated and asked for an abatement. This was denied, and he then applied to the County Commissioners.

On the hearing before the Commissioners, the then respondents moved, that the petition of said Eaton should be dismissed, for want of compliance on his part with the provisions of R. S., c. 14, § 18.

The Commissioners denied the motion, and considered that said Eaton was overrated, and ordered a reimbursement to him from the treasury of said town of $6,76, for money tax, and $3,86, for highway tax, of that year.

The reasons alleged, that the proceedings and records are erroneous, were, that said motion should have been granted, and that the Commissioners had no right to order the reimbursement to said Eaton of the sums mentioned.

The presiding Judge refused to grant the writ, and the petitioners filed exceptions.

Drummond, for petitioners.

Paine, contra.

CUTTING, J. — For the purpose of defending our constitutional and "unalienable rights," it becomes necessary annually to raise money by taxation; and consequently that each citizen should contribute his proportion according to the amount of his property to be protected; to ascertain which the Legislature has established certain rules and modes of procedure. (R. S., c. 14, § § 17, 18, 19.)

By these sections it clearly appears, that each inhabitant of a town, being possessed of property therein, liable to be taxed, is not only required to make a perfect list of such property, but also to bring it in to the assessors, and be personally before them and ready to make oath, if required, that the same is true. But when a list is brought in by another, no opportunity is afforded for ascertaining by the oath of the party, who best or only knows, its truth or falsity. Hence, if *he* neglect, *he* is barred of his right to an abatement, unless it shall be made to appear that *he* was unable to offer such list at the time appointed.

The case finds that the person applying for, and obtaining, an abatement, did not personally hand in his list, and no reason is offered or excuse made for such neglect. The true reason in some cases may be a willingness to avoid the oath, in which event the party delinquent throws himself upon the final judgment and discretion of the assessors. In this instance the County Commissioners erred in making the abatement.

But the case further discloses that no real injury has been done to the petitioners; for it is admitted that *such* a list

was before the assessors, as they had notified to be produced, which was a true and perfect list, and it could not have been made more true and perfect, even by an oath.

For this cause the exceptions are overruled and the petition must be dismissed.

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

WOODWARD *& al. versus* WARE *& al.*

By R. S., c. 115, § 12, in actions of contract, pending in court, the plaintiff may, on motion, amend his writ, by inserting the names of other persons, as defendants, and service being made upon them, such additional defendants *shall be deemed parties to the suit*, and *may plead to the action accordingly*.

In a suit on a joint and several promissory note, commenced against the principal alone, and under this section *amended* by making the surety a party *after* six years from the time the cause of action accrued; such surety may interpose the limitation bar to prevent a recovery against him.

Whether the statute of limitations could be made available, by a party thus made a defendant by amendment, where the *contract* sued was incapable of being *severed, quere.*

ON FACTS AGREED.

ASSUMPSIT on two promissory notes, dated December 1st, 1846, and signed P. M. Ware, principal, S. W. Weston, Stephen Webber, sureties, one payable in three, the other in six months from its date.

The writ, dated Nov. 14, 1851, was made against Ware, alone, and service made, and the action entered at the late District Court, December term, 1851. The action was continued from term to term, until the November term of the Supreme Judicial Court, for 1853, when leave was obtained to amend the writ by the insertion of the names of the sureties, as defendants, which was done, and in Feb. 1854, service thereof was made upon them.

At the following March term, Webber appeared and pleaded the statute of limitations. Weston did not appear.

As to Webber's liability, the question was submitted to the determination of the Court.

Chadwick, for defendant.

Danforth & Woods, for plaintiff.

CUTTING, J.—Had the action been commenced against either of the sureties, instead of the principal, within the six years after the notes had become due, and judgment had been recovered and satisfied, then according to the decisions in *Crosby* v. *Wyatt*, 23 Maine, 156, and *Odell* v. *Dana*, 33 Maine, 182, cited by the plaintiffs' counsel, such judgment debtor might seek contribution of his co-surety, or the whole amount of the principal, notwithstanding the six years had elapsed. But such a principle is not involved in the case now under consideration.

Revised Statutes, c. 115, § 12, provides, that "in any action on contract, express or implied, the plaintiff may, on motion, amend his writ, by inserting therein the names of any other person or persons as defendants, and the Court may order a copy of the writ, and the order of the Court thereon indorsed, to be served on such additional defendant, and his property to be attached in the same manner, as in case of original writs; and on return of such service and attachment, if any shall be made, such additional defendant or defendants shall be deemed parties to the suit, and may plead to the action accordingly."

By virtue of this section the plaintiffs, by leave of Court, have amended their writ, by inserting the names of two other defendants, who appear to have been sureties on the contracts sued; one of whom appears and pleads the statute of limitations. It further appears, that the amendment was made more than six years after the notes had become due; and the question presented is, whether under the circumstances such plea can be available under the twelfth section; or in other words, whether the original suit can be said to have been legally commenced against the sureties at the time of its date.

It is a rule of law, that a statute of doubtful import, is to be expounded, not according to the letter, but according to the intention of its makers, and so as to reach all cases within the mischiefs to be remedied. At common law a suit might be abated for non-joinder of all the joint contractors, if within the jurisdiction. And it not unfrequently occurred, that the plaintiffs failed in their suits for such cause, especially in actions against partners, where it was difficult to ascertain all the members of the company; and thus a party, having a good cause of action and guilty of no apparent negligence, often, instead of recovering judgment, was himself compelled to pay an execution for costs. Such was the mischief, and this twelfth section was intended as a remedy. And in such cases, where the claim is prosecuted substantially against the company, we would not say, that any member of it, not originally sued, might not be cited in and made a party and subjected to the same liabilities, as though his name had been originally inserted in the writ. Such construction would give to the section its full force and effect, without militating in any degree against the legal maxim, that "*the laws assist those who are vigilant, not those who sleep over their rights.*"

But in such contracts there can be no severance, whereas in this case a question of a different character is presented. This suit is brought on notes, wherein the promisors obligate themselves jointly and severally to pay at certain specified times; on which it was optional with the plaintiffs to have sued them jointly or severally; they selected the latter mode and brought their suit against the one, who was the principal in the notes. They might at the same time have included the others in the suit, or have commenced separate suits against them, but they saw fit to sever the contracts, and after the statute of limitations had barred their claim against the sureties, they now seek to associate them with the principal in their original writ, and thus avoid the statute's otherwise legal operation. The insertion of other defendants in the writ was an *ex parte* pro-

ceeding, and although it seems to have been authorized by the letter of the statute, yet, as before intimated, doubts may be entertained, whether in all cases it was so intended. Until the additional defendant's name is inserted, and service of the amended writ made upon him, he is not deemed such a party to the suit as would authorize him to plead to the action; consequently, he can be guilty of no *laches* in not opposing such preliminary proceedings. But when duly in Court, it is contended he is subjected to the same rules of pleading as an original defendant. If so, he is placed in a worse position, than he would have been, had his name been originally in the writ, for he would lose his right to file certain motions and pleas in abatement, which can be done only at the term, when the action is first entered. We think that such is not the true construction of the 12th section. Although it provides, that "such additional defendant or defendants, shall be deemed parties to the suit," it does not say, that they shall be deemed *original* parties. It further provides, that "they may plead to the action accordingly." This language is not imperative, that the plea shall have relation only to the date of the writ, if so, it could be only by means of a fiction, which the law never tolerates to work injustice.

We perceive nothing in that section designed to affect the statute of limitations, and we are not at liberty to affect it by construction. The contracts were capable of a severance, and they were severed by the voluntary act of the plaintiffs, and if, afterwards, they saw fit to join all the promisors in their writ, instead of bringing separate suits, they can avail themselves of no other right than they would have had, if they had pursued the latter remedy. Neither should the defendants be debarred from setting up the same defence. Consequently Webber must be discharged.

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

APPENDIX.

RULES

OF THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

AT PENOBSCOT, JULY TERM, 1855.

ORDERED, that the following RULES AND ORDERS, are ordained and established, as the rules for regulating and conducting business in this Court :—

1. OF THE ADMISSION OF ATTORNEYS OF THE COURTS OF ANOTHER STATE.

Any person, who shall have been admitted an attorney of the highest Judicial Court of any other State, in which he shall dwell, and afterwards shall become an inhabitant of this State, may be admitted an ettorney or counselor of this Court, at the discretion of the Justices thereof, after due inquiry and information concerning his moral character and professional qualifications; such person having first conformed to the requisition of the statute regulating the admission of attorneys.

2. OF THE TIME OF ENTRY OF ACTIONS.

No civil action shall be entered after the first day of the term, unless by consent of the adverse party, and by leave of the Court; or unless the Court shall allow the same upon proof that the entry was prevented by inevitable accident, or other sufficient causes; and in all cases the christian and surname of the parties, and of each trustee shall be entered upon the docket. Writs are to be filed before entry of the action, and are to remain on file. And any action may be made a mis-entry at any time during the first term, upon proof that the action was settled before the sitting of the Court.

3. OF THE ENTRY OF THE ATTORNEY'S NAME ON THE CLERK'S DOCKET, AND OF A PARTY'S CHANGING HIS ATTORNEY.

Upon the entry of every action or appeal, the name of the plaintiff's or appellant's attorney shall be entered at the same time on the Clerk's docket, and in default thereof, a nonsuit may be entered; and after the entry of the action or appeal, before the call of the new docket, the attorney of the defendant or respondent shall cause his name to be entered on the same docket as such attorney, and if it be not so entered, the defendant or respondent may be defaulted. And if either party shall change his attorney, pending the suit, the name of the new attorney shall be substituted on the docket for that of the former Attorney, and notice thereof given to the adverse party in writing. And until such notice of the change of an attorney, all notices given to or by the attorney first appointed, shall be considered in all respects as notice to, or from his client, excepting only such cases in which by law the notice is required to be given to the party personally: *Provided however*, that nothing in this rule contained, shall be construed to prevent either party in a suit, from appearing for himself, in the manner provided by law; and in such case the party so appearing shall be subject to all and the same rules that are or may be

provided for Attorneys in like cases, so far as the same are applicable.

4. Of amendments in matters of form.

Amendments in matters of form will be allowed as of course, on motion; but if the defect or want of form be shown as cause of demurrer, the Court will impose terms on the party amending.

5. Of amendments in matters of substance.

Amendments in matters of substance may be made, in the discretion of the Court, on payment of costs, or on such other terms as the Court shall impose; but if applied for after joinder of an issue of fact or law, the Court will in their discretion, refuse the application, or grant it upon special terms; and when either party amends, the other party shall be entitled also to amend, if his case requires it. But no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action.

6. Of pleas in abatement.

Pleas or motions in abatement, or to the jurisdiction in actions originally brought in this Court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if consisting of matter of fact not apparent on the face of the record, shall be verified by affidavit.

7. Of obtaining a rule to plead.

Either party may obtain a rule on the other to plead, reply, rejoin, &c., within a given time, to be prescribed by the Court; and if the party so required, neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the Court for good cause shown, shall enlarge the rule.

8. Of the time of filing amendments or pleadings.

When an action shall be continued, with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, &c., if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the Clerk's office, by the middle of the vacation, after the term when the order is made; and in such case the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, &c., as the case may be, by the first day of the term to which the action is continued as aforesaid. And if either party neglect to comply with this rule, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require; unless the Court, for good cause shown, shall allow further time for filing such amendment or other pleadings.

9. Specifications of defence.

Parties filing specifications of the nature and grounds of defence, with the Clerk, under the Act of March 16, 1855, (c. 174, § 4,), shall, in all cases, be confined on the trial of the action, to the grounds of defence therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial. And in all actions now pending, and not provided for by the Act aforesaid, the like specifications shall be filed in like manner, within the first three days of the next succeeding terms, in the respective counties, where the same are pending, and with like effect; unless the Court, for good cause shown, shall enlarge the time.

10. Denial of signatures, and partnerships.

No party, or his attorney, shall be permitted to deny the signature to any paper, or call for proof of its execution, which is declared on, or referred to in the declaration, or filed in set-off, or mentioned in any specification filed by the plaintiff, or in defence, unless the party, or his attorney, shall first make affidavit that he has reason to believe, and

does believe that such signature or execution is not genuine; or that the paper purporting to be so signed or executed has been mutilated or altered, since it was executed; or that the production of any subscribing witness thereto, is material and necessary for the purposes of justice, and shall have given reasonable notice to the other party of his denial, or intended denial of such signature or execution. And in all cases where a partnership is alleged in the writ or declaration, or in the specification of defence, and the names of the members thereof are set forth therein, such partnership shall not be denied, unless upon affidavit of the party or his attorney, that he has reason to believe, and does believe that such partnership did not exist as alleged.

11. SPECIFICATIONS BY THE PLAINTIFF.

In actions of assumpsit on the common counts, a specification of the matters to be proved in support thereof, shall be filed, on motion of the defendant, within such time as the Court shall order. And in actions upon an account annexed, one copy of the specifications shall be furnished by the party presenting the same, for the Court, and one other copy for the jury.

12. TRUSTEE DISCLOSURES.

In cases of foreign attachment, when any trustee shall present himself for examination, he or his attorney shall give written notice thereof to the attorney for the plaintiff, or in his absence, cause the same to be noted on the docket; and upon motion, the Court may fix a time for the disclosure to be made. Before the disclosure is presented to the Court for adjudicatiom, there shall be minuted upon the back thereof the names of the counsel for the plaintiff, and such trustee, with the date of the service of the writ upon him, and the number of the action upon the docket.

13. CONTINUANCES.

No costs will be allowed, unless for cause shown, to either party for that term when an action is continued by consent of parties.

14. OF THE TIME OF MAKING MOTIONS FOR CONTINUANCES.

All motions for the continuance of any civil action shall be made at the opening of the Court in the morning of the second day of the term unless the cause shall come in course to be disposed of in the order of the docket on the first day. *Provided however,* where the cause or ground of the motion shall first exist or become known to the party after the time prescribed by this rule, the motion shall be made as soon afterwards, as it can be made, according to the course of the Court; and whenever an action is continued on such motion, after the time above prescribed, the party making the motion shall not be allowed any costs for his travel and attendance for that term, unless the continuance is ordered on account of some fault or misconduct in the adverse party.

15. OF AFFIDAVITS TO SUPPORT A MOTION FOR CONTINUANCE.

No motion for a continuance, grounded on the want of material testimony, will be sustained, unless supported by an affidavit, which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation; and the endeavors and means that have been used to procure his attendance or deposition, to the end that the Court may judge whether due diligence has been used for that purpose. And no counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove; but any of the other facts stated in such affidavit may be disproved by the party objecting to the continuance. And no action shall be continued on such motion if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the affidavit, and

will agree that the same shall be received and considered as evidence on the trial, in like manner as if the witness were present and had testified thereto; and such agreement shall be made in writing at the foot of the affidavit, and signed by the party, or his counsel or attorney if required. And the same rule shall apply, *mutatis mutandis*, when the motion is grounded on the want of any material document, paper or other evidence that might be used on the trial.

16. Of the evidence to support any motion grounded on facts.

The Court will not hear any motion grounded on facts, unless the facts are verified by affidavit or are apparent from the record, or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their attorneys, and the same rule will be applied as to all facts relied on, in opposing any motion.

17. Of motions for new trials.

Motions for new trials must be made in writing, and assign the reasons thereof, and must be filed within two days after the verdict, unless the Court shall for good cause by special order enlarge the time.

18. Motions for new trial and exceptions.

When a party shall file "a motion for new trial upon evidence as reported by the presiding Judge," such party shall report the evidence, and give due notice thereof to the adverse party, or his counsel, and present the same to the Judge, within six days after the verdict shall have been rendered, or before the adjournment of the Court, if that shall sooner take place; and unless that be so done, the Judge shall not be required to sign the same. And all bills of exceptions shall be presented to the presiding Judge within the same time; and in default thereof judgment will be entered upon the verdict.

19. MOTIONS IN ARREST OF JUDGMENT IN CRIMINAL CASES.

Motions in arrest of judgment, in criminal cases, shall be filed and presented to the Court for adjudication, during the term in which the accused has been found guilty, whether exceptions be, or be not filed and allowed; and if not so presented all right to file the same shall be considered as waived.

20. TIME OF FILING MOTIONS, PRESENTING PETITIONS, &c.

All motions, petitions, reports of referees, applications for commissions to take depositions, surveys, or for views by the jury in causes touching the realty, and such like applications shall be made and presented at the opening of the Court on the morning of the second day of the term :— *Provided*, that where the cause or ground of such motion or other application shall first exist or become known to the party, after the time in this rule appointed for making the same, it may be made at any subsequent time. But motions or applications, such as from their nature require no notice previous to granting the same, may be made at the opening of the Court on the morning of each day.

21. OBJECTIONS TO REPORTS.

Objections to any report offered to the Court for acceptance, shall be made in writing, and filed with the clerk, and shall set forth specifically, the grounds of the objections, and these, only, shall be considered by the Court.

22. OF NOTICE PREVIOUS TO MOTIONS.

When any motion is made in relation to any civil action at the times specifically assigned for such motions by the rules of this Court, no previous notice of such motion need be given to the adverse party. But the Court, if notice have not been given, will allow time to oppose the motion if the case shall require it. Where however for any special cause, such motion may by the proviso of any rule be made at a subsequent time, it will not be heard, unless seasonable notice thereof shall have been given to the adverse party.

23. Of depositions taken in term time.

Depositions may be taken for the causes, and in the manner by law prescribed, in term time, as well as in vacation: *provided,* they be taken in the town in which the Court is holden, and at an hour when the Court is not actually in session. But neither party shall be required during term time to attend the taking of a deposition, at any other time or place than is above provided, unless the Court, upon good cause shown, shall specially order the deposition to be taken.

24. Of commissions to take depositions.

The Court will grant commissions to take the depositions of witnesses, and will appoint the commissioners; and in vacation a commission may be issued upon application to either of the Judges of the Court, in the same manner as may be granted in term time; or either party upon application to the clerk, may obtain a like commission; but in the latter case, unless the parties shall agree on the person to whom the commission shall issue, the commission shall be directed "to any Judge of any Court of record." And in each case the evidence by the testimony of witnesses shall be taken upon interrogatories to be filed in the clerk's office by the party applying for the commission, and upon such cross-interrogatories as shall be filed by the adverse party, a copy of the whole of which interrogatories shall be annexed to the commission. And no such commission shall issue but upon interrogatories to be filed as aforesaid by the party applying, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within fourteen days from the service of such notice. And no deposition taken out of the State without such commission shall be admitted in evidence unless the same were taken by some Justice of the Peace, Notary Public or other officer, legally empowered to take depositions or affidavits in the State or county in which the deposition is taken, nor unless the adverse

party was present, or was duly and seasonably notified but unreasonably neglected to attend.

25. Of the filing of depositions.

All depositions shall be opened and filed with the clerk, at the term for which they are taken; and if the action in which they are to be used shall be continued, such deposition shall remain on the files, and be open to all objections when offered on the trial, as at the term at which they were opened; and if not so left on the files, they shall not be used by the party who originally produced them; but the party producing a deposition may, if he see fit, withdraw it, during the same term in which it is originally filed, in which case it shall not be used by either party.

26. Of the use of copies of deeds.

In all actions touching the realty, office copies of deeds pertinent to the issue from the registry of deeds, may be read in evidence without proof of their execution, 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.

27. Of notice to produce written evidence.

Where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless *previous notice* to produce it on trial shall have been given to such adverse party or his attorney, nor will counsel be permitted to comment upon a refusal to produce such evidence, without first proving such notice.

28. Of the order in which civil actions are to be tried.

All civil actions shall be heard and tried in the order in which they stand on the docket, unless the Court shall, upon good cause shown, postpone any trial to a time later than that in which it would come in course: — *Provided however*, that any one action may with the consent of all parties concerned, and with the leave of the Court, be substituted for

another action standing earlier on the docket; but in such case the said action which stood earliest, shall take the place of the one which is substituted for it, and shall be tried when the latter would have come on in course, if no such change had taken place. And *provided also*, this rule shall not be construed to extend to questions and issues of law.

29. OF COPIES IN CAUSES FOR ARGUMENT ON QUESTIONS OF LAW.

No cause standing for argument on a question or issue in law will be heard by the Court, until the parties shall have furnished each of the Judges with a copy or abstract of the case, fairly and legibly written or printed, containing the substance of all the material pleadings, facts and documents, on which the parties rely, and each of the parties, or their respective counsel, before, or at the commencement of the argument of each case, shall furnish to each Justice of the Court present, and also to the Reporter, a written or printed statement of all the points of law to be made in the argument, noting under each point the authorities to be cited to sustain it. Should both parties neglect to comply with this rule, the case, when it comes in the order of the docket, to a hearing, will be continued, or judgment will be immediately entered therein, at the discretion of the Court. Should one party comply and the other neglect to do so, the party complying may be heard in argument, and the case be decided without hearing the other party.

Statements of points may be omitted by a counsel who presents an argument in writing and confines himself to it, except in strict reply. One copy only of the case will be required in cases submitted upon written arguments or briefs not read to the Court.

In all cases of writs of error or *certiorari;* issues of law on pleadings, facts agreed and stated by the parties, and trustee processes, it shall be the duty of the plaintiff or complainant to furnish the papers or abstracts for the Court; and in all other cases the same shall be done by the party who moves for a new trial, or who holds the affirmative upon

the question to be argued; but this shall not prevent the adverse party from furnishing the papers if neglected by him whose duty it is to furnish them; and where the party whose duty it is shall neglect to furnish the papers as by the rules of this Court is required, he shall not have any costs that term, and shall further be liable to be nonsuited, defaulted, or to have judgment against him as upon a *nol. pros.* or discontinuance, or such other judgment as the case may require.

30. Of the payment of jury and clerk's fees.

No cause shall be open for trial by the jury, until the fees due in that behalf are paid to the Clerk; all other fees due to the Clerk shall be paid as soon as they are by law payable, and if the Clerk shall fail to demand and receive any such fees when payable as aforesaid, he shall be chargeable with all those, for which he is by law required to account to others, in like manner, as if he had actually received the same.

31. Of costs in actions under reference.

When an action is continued by the Court for advisement, or under reference by a rule of Court, costs shall be allowed to the party prevailing, for only one day's attendance and his travel, at every intermediate term.

32. Of the taxation of costs.

Bills of costs shall be taxed by the Clerk, upon a bill to be made out by the party entitled to them, if he shall present such bill, and otherwise upon a view of the proceedings and files appearing in the Clerk's office; and no costs shall be taxed without notice to the adverse party to be present, provided he shall have given notice to the Clerk in writing, or by causing it to be entered on the Clerk's docket, of his desire to be present at the taxation thereof; and either party dissatisfied with the taxation by the Clerk, may appeal to the Court, or to a Judge in vacation, from whose decision no appeal shall be taken.

33. OF THE DAY OF RENDITION OF JUDGMENT.

The Clerk shall make a memorandum on his docket, of the day on which any judgment is awarded; and if no special award of judgment is made, it shall be entered as of the last day of the term.

34. OF THE CUSTODY OF PAPERS BY THE CLERK.

The Clerk shall be answerable for all records and papers filed in Court, or in his office; and they shall not be lent by him, or taken from his custody, unless by special order of Court; but the parties may at all times have copies. Provided only that depositions may be withdrawn by the party producing them, at the same term at which they are opened; and whilst remaining on the files, they shall be open to the inspection of either party, at all seasonable hours.

35. OF THE FILING OF PAPERS, AND RECORDING OF JUDGMENTS.

In order to enable the Clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party in every suit forthwith to file with the Clerk, all papers and documents necessary to enable him to make up and enter the judgment, and to complete the record of the case; and if the same are not so filed within three months after judgment shall have been ordered, the Clerk shall make a memorandum of the fact on the record; and the judgment shall not be afterwards recorded unless upon a petition to the Court at a subsequent term, and after notice to the adverse party, the Court shall order it to be recorded. And no execution shall issue until the papers are filed as aforesaid. And when a judgment shall be recorded upon such petition, the Clerk shall enter the same, together with the order of the Court for recording it among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found; and the judgment

when so recorded, shall be, and be considered in all respects as a judgment of the term in which it was originally awarded. And the party delinquent in such case shall pay to the Clerk the costs of the recording judgment anew, and also the costs on the petition, and the costs of the adverse party, if he shall attend to answer thereto.

36. OF WRITS OF VENIRE FACIAS.

Every *venire facias* shall be made returnable into the Clerk's office by ten of the clock in the forenoon of the *first day of the term*, and the jurors shall be required to attend at that time; excepting only when in case of a deficiency of jurors, the Court shall order an additional *venire facias* in term time, in which case the same shall be made returnable forthwith, or at such time as the Court shall order.

37. OF WRITS OF CAPIAS UPON INDICTMENTS, AND SCIRE FACIAS UPON RECOGNIZANCES.

On indictments found by the Grand Jury, the Clerk shall *ex officio*, issue a *capias* without delay; and when default is made by any party bound by recognizance in any criminal proceeding, the Clerk shall in like manner issue a *scire facias* thereon, returnable to the next term, unless the Court shall make a special order to the contrary, and when not otherwise provided by statute.

RULES

FOR THE

REGULATION OF PRACTICE

IN CHANCERY CASES.

BILLS.

1. The bill must set forth clearly, succinctly, and precisely, the facts and causes of complaint, without circumlocution or repetition. A general interrogatory only shall be introduced, and it shall be sufficient to require a full answer to all the matters alleged. The usual formal averments of combination and pretence shall be omitted. Bills of discovery, and those praying for an injunction, must be verified by oath, as required in Rule 7.

SUBPŒNA AND SERVICE.

2. When the bill is inserted in a writ of attachment, in addition to the service required by law, a copy shall be left with each defendant, or at his last and usual place of abode, or he will not be required to file his answer within sixty days. When not so inserted, a subpœna in the form annexed shall issue on the filing of the bill with the clerk, and be served by copy, accompanied by a copy of the bill; and it may be made returnable on a day certain in or out of term time.

AMENDMENTS.

3. Amendments may be made in bills, and new parties plaintiff may be inserted, at any time within fourteen days before the answer is to be filed, by filing such amendments

with the clerk, and furnishing copies thereof to the defendants, or their attorneys. After that time such amendments may be made on leave granted, and on payment of the fees for the additional services required of counsel, and on such further terms as a member of the Court may direct. The names of additional defendants may be inserted, or those in the bill may be struck out, on the terms prescribed in c. 115, § § 11 and 12, of the Revised Statutes. Answers, pleas and rules may be amended at any time on the like terms as a bill.

APPEARANCE.

4. Each defendant shall enter his appearance on the docket on the return day. And upon proof of neglect, when there has been personal notice, a default may be entered, the bill be taken as confessed, and a decree be entered accordingly. When a discovery is required, or when there has been a legal but not personal service, a writ of attachment in the form annexed may issue, on which the defendant will be bailable on a bond with sufficient sureties taken to the plaintiff in such sum, as a member of the Court may order, which is to be returned with the writ. And in case of neglect to enter his appearance on the return day thereof the bond shall be considered as forfeited, and may be enforced by petition and notice thereon, and on a summary hearing, damages may be assessed, and an execution issued therefor; and a new writ of attachment may issue in term time on a special order therefor, on which he will not be bailable; or the bill may be taken *pro confesso.*

EXCEPTIONS TO THE BILL.

5. Exceptions may be taken to the bill for scandal or impertinence within twenty days after service, and such proceedings may be had thereon, as are provided in case of exceptions to an answer in Rule 8.

ANSWER AND PLEAS.

6. The defendant shall make his defence to the whole bill on the merits by demurrer, plea, or answer within sixty days after the entry of his appearance, unless exceptions are taken to the bill; and in such case within forty days after they are disposed of. He may demur or plead in bar to parts of the bill, and answer the residue; or may have the benefit of a plea in bar by inserting its substance in his answer. Demurrers, pleas, and answers, will be decided on their own merits, and one will not be regarded as overruling another.

ANSWERS HOW VERIFIED.

7. Answers are to be subscribed and verified by the oath of the party. The oath administered shall be in substance, that he has read the answer or heard it read, and knows the contents of it, and that the same is true of his own knowledge, except the matters stated to be on his information or belief; and that as to those matters he believes them to be true. The certificate of the magistrate must state the oath administered. An affirmation may be administered, instead of an oath, in cases where the statute authorizes it.

EXCEPTIONS TO AN ANSWER.

8. Exceptions to an answer should be drawn and signed by counsel and filed with the clerk, and notice thereof given within thirty days after the answer is filed. The defendant's counsel within sixteen days after notice shall admit the exceptions and amend the answer; or make his remarks on them in writing, and in either case give notice thereof; and in the latter case by copy. The excepting counsel may, within ten days after notice, make his remarks in writing in reply and give notice by copy; and may then forward copies of these papers and of the bill and answer to a member of the Court for decision. If a further answer be directed, it shall be made within twenty days after

notice, that it has been directed. These proceedings may be repeated till the answer is perfected. After a third failure to answer fully, the party may be regarded as in contempt, and may be dealt with, as is provided in Rule 28. And he shall also be responsible for such costs as have been occasioned by his not answering correctly and fully at first.

GENERAL REPLICATION AND NOTICE OF HEARING.

9. Within thirty days after the answer is filed, unless exceptions are taken, or within fifteen days after it is perfected, the plaintiff's counsel shall file the general replication, and give notice thereof; or give notice of a hearing at the next term on bill and answer.

ENLARGEMENT OF TIME.

10. When either party is apprehensive, that he may not be able to perform the act required within the prescribed time, he may, before the time elapses, and in case of mistake, sickness, or accident, afterward, file a rule with the Clerk and give notice by copy, stating the enlarged time desired and the reasons for it. And within five days after notice the opposing counsel shall give notice of his assent or dissent, and in case of dissent may state in his notice the reasons therefor. If the enlarged time be assented to, it is to be regarded as the time for the performance of the act instead of the original time. If not assented to, the moving counsel may reply and give notice, and transmit copies to a member of the Court for decision, who may grant further time with or without terms imposed, and return his order to the counsel, who will give notice of the result.

WANT OF DILIGENCE IN PLAINTIFFS.

11. If the plaintiff does not use due diligence in performing all acts required of him, the counsel of the defendant may file with the clerk a rule to show cause at the next term, why the bill should not be dismissed for want of

prosecution, and give notice thereof. And if good cause be not shown, the bill may be dismissed, or the party may be relieved on terms. And if such rule be not filed at least fourteen days before the term, the objection to delay will be regarded as waived.

WANT OF DILIGENCE IN DEFENDANTS.

12. If the defendant does not use due diligence in performing all acts required of him, the counsel of the plaintiff may file with the clerk a rule to show cause at the next term, why the bill should not be taken *pro confesso*, and give notice thereof. And if good cause be not shown, the bill may be taken *pro confesso*, or the party may be relieved on terms. And if such rule be not filed at least fourteen days before the term, the objection to delay will be regarded as waived.

TIME FOR TAKING TESTIMONY.

13. Ninety days after filing the general replication will be allowed for taking testimony. And it must be filed with the clerk within ten days after that time has elapsed; when publication will take place by his opening the depositions. No enlargement for the time for taking it will be allowed after publication. On petitions for a rehearing the time for taking testimony will be sixty days.

MANNER OF TAKING TESTIMONY.

14. All testimony is to be taken in writing, by virtue of a commission issued on interrogatories filed with the Clerk, except as hereinafter provided. The caption of the interrogatories will name the case, the names of the witnesses, and their places of residence; and notice thereof must be given by copy. Cross-interrogatories may be filed within fourteen days after notice. Specific objections may be taken to any direct or cross-interrogatory, and notice given, and it may be amended or struck out; and if not so amended as to obviate the objection, or struck out, the objection

to it, and to the testimony in answer to it, may be insisted on at the hearing. After the time for filing cross-interrogatories has elapsed, a commission may issue directed to an attorney at law, or to a person specially appointed by a member of the Court, or agreed upon in writing by the counsel. The commissioner will examine each witness, no other person being present, except the counsel of the parties by their own consent in writing, and will draw from him all the facts within his knowledge relating to the matters embraced in all the interrogatories, and write his answers in a fair hand, so that they can be easily read. He will not permit the witness to examine the interrogatories, or to know their contents, except as each is put to him in its order. Nor will counsel or parties be permitted to furnish copies of them to the witness, before he is examined, under the penalty of having the deposition suppressed at the hearing. Each witness is to be sworn according to law before the interrogatories are put, and he is to subscribe his name at the close, and then make oath to the truth of the facts by him stated. The only caption required of the commissioner shall state that he had this rule before him, when he executed the commission, and that he in all respects complied with its provisions. If the commission be not so executed, the testimony may be suppressed; and if the answers be not fairly written, as required, the commissioner will not be entitled to his fees, nor will they be taxed in the costs.

Depositions may be taken without interrogatories and according to the statute provisions, by persons authorized to execute commissions. When taken in this manner, the magistrate will make out his caption according to law, except that the cause of taking may be stated to be, that it is taken in chancery. And when so taken, counsel will be held responsible, that no irrelative or impertinent matter be introduced. And if such matter be introduced, the Court may direct that the expense of taking the deposition be not taxed in the costs by the party introducing it. And the

magistrate will be under like obligation to write in a fair hand or lose his fees.

DOCUMENTARY EVIDENCE.

15. All documentary evidence, not requiring proof by the testimony of witnesses, shall be filed with the Clerk before the publication of testimony and notice thereof given. Deeds executed in due form and recorded, or copies of them, and other instruments in writing, may be so filed and used without proof of execution, unless the due execution be denied, or fraud in relation thereto be alleged, of which notice shall be given within ten days after notice, that they are filed.

Copies of any votes, entries or papers found on the books of any corporation and attested by its clerk, may be received as testimony, instead of the books, unless it shall appear that the opposite counsel has been refused access to such books at reasonable hours.

PRODUCTION AND INSPECTION OF BOOKS AND PAPERS.

16. When books, papers, or instruments in writing, are in the possession of the opposite party, counsel may file a rule with the Clerk stating the fact, the ground on which the claim is made for their production or inspection, and the necessity therefor, and naming also the time and place, and give notice thereof. Within ten days after notice the opposing counsel will in writing express his assent, or his dissent, with the reasons therefor; and may propose any modification of the time and place, and give notice thereof. The moving counsel within ten days shall in writing express his assent or dissent to the modifications or objections proposed, and may assign his reasons therefor, and give notice. And may, when necessary, transmit a copy of the rule and these papers to a member of the Court, whose decision and directions will be binding on the parties.

Extracts from any books and papers thus produced, verified by signature of counsel, may be filed as documentary

evidence by each party and used as testimony instead of the books and papers. In like manner and with like proceedings a rule may be filed for the production or inspection of the books of any corporation, when copies are refused, but in such case a copy of the rule shall be delivered to the Clerk or President of the corporation and a reply thereto may be returned within ten days and become a part of the proceedings.

ABSTRACTS.

17. After publication of the testimony, it will be the duty of the counsel for the plaintiff to make a concise, correct, and faithful abstract of all the material parts of the bill, pleas, answers, documentary and other testimony; omitting all formal parts of them, inclusive of all the usual covenants of deeds, obligatory parts of bonds, and descriptions of estates, unless some question arises out of them. And to cause three copies thereof to be made in a fair handwriting, so that they can be easily read, or in print, preserving a margin of one inch at least in width, on which is to be noted against it, the bill, plea, answer, document or deposition. These copies are to be presented to the Court at the hearing. And one of them is to be presented to the opposite counsel fifteen days before the session, for his use until the hearing, or he will not be required to enter upon the hearing at that session. If the opposing counsel considers the abstract materially incorrect, he may make out in like manner for the use of the Court, three copies of "corrections of the abstract," at any time before the session, one of which is to be presented to the plaintiff's counsel for his use until the hearing.

ARGUMENTS.

18. The abstract will be read by the opening counsel for the plaintiff, with assistance in reading if he desires it. He will then in argument present all the points and positions taken upon the law and the facts in the case, and

make his references to books and cases to sustain them; and state what decree he hopes to obtain. The opening counsel for the defendant will then in like order present his case, and only when no other counsel argues for the defendant, also reply to the preceding argument. The reply may be made by another counsel, but he will be strictly limited to it; and cannot be allowed to make new points, or to repeat or reinforce the preceding argument. The reply to the argument for the defendant will then be made, and will in like manner be strictly limited to a reply. Counsel may present an argument in writing instead of one orally, or may submit his case without argument.

THE DECREE.

19. When an opinion is delivered, or a decision made, by which a party becomes entitled to a decree in his favor, it will be the duty of his counsel to draw the same in the proper form to secure his rights in strict conformity to such opinion and decision, and file the same with the Clerk, to be by him recorded, and give notice thereof. If the opposing counsel considers the proposed decree unauthorized, he may file "corrections of the decree," and give notice thereof. The counsel drawing it will then submit to such corrections, or cause a copy of the proposed decree and corrections to be transmitted to a member of the Court for decision.

COSTS.

20. When a party is entitled to costs, his counsel will tax each item of the bill in a fair handwriting, referring to the documents on file, or enclosed with it as proofs, and give notice thereof. The opposing counsel may, within two days after notice, make his objections to the same in writing, and give notice. A reply may be made in writing and the bill filed with these enclosed papers for the decision of the Clerk, who will make his decision in writing, from which either party may appeal, and transmit the pa-

pers to a member of the Court for decision. The Clerk may regard the costs as correctly taxed, when the opposing counsel certifies in writing on the back of the bill, that he does not find cause to object, or when no objections are made within two days after notice of taxation.

BILLS REVIVED.

21. Bills may be revived in proper cases by an amendment filed with the Clerk, on which a subpœna and other process may issue, and be served as in case of an original bill; and the appearance shall be entered, and the like proceedings be had as on original bills, so far as they have not before taken place, or in the manner provided by the statute.

BILLS SUPPLEMENTAL.

22. When material facts have occurred since the bill was filed, which would entitle the plaintiff to other or more extensive relief on the matters contained in the original bill, leave may be given to file a supplemental bill upon a rule being filed, verified according to rule 7, stating the facts, and notice given; and proceedings be had thereon, as is provided in case of exceptions to an answer. The subsequent proceedings, so far as applicable, will take place as on other bills.

NOTICES.

23. Notices required by these rules will be in writing, and signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases are to be properly directed to him and placed in the post office, and postage paid. They are to be preserved and produced, and they will in all cases be regarded as received, when the counsel giving the notice produces a memorandum made at the time on his own Court docket of their having been delivered or sent by mail on a day certain; unless the reception is positively, and not for

want of recollection, denied on affidavit. Either party may designate on the docket the name of his counsel to whom notices are to be given, and in such case no one will be good unless given to him. And in case of a change of such counsel, notice will be given thereof, and the change noted on the Clerk's docket.

COPIES.

24. Copies required by these rules may be verified by signature of counsel, for the accuracy of which they will be held responsible. When found to be inaccurate or badly written, they must be withdrawn, and others correctly made, furnished without additional charge.

ATTORNEYS PERSONALLY LIABLE.

25. The attorney making the application will be personally responsible, for the payment of fees to commissioners or magistrates taking testimony; to the Clerk for his fees; and for costs imposed as terms of amendment or relief, when the terms are accepted, by taking advantage of them. And when it shall be made to appear by the affidavit of a person interested, that an attorney who is so liable has after request, neglected to pay, he will, unless good cause be shown for such neglect, be suspended from practice in chancery cases, until payment is made. And when any attorney or counsel shall violate the great confidence reposed in him by these rules, he will be suspended in like manner, until the further order of Court.

APPLICATIONS TO THE COURT.

26. When an application for an injunction, or for a decision by virtue of these rules, is made to one member of the Court, and the same has been acted upon by him, it shall not be presented to any other member.

CLERK'S DUTY.

27. When a bill is filed out of term time, it will be entered on the docket of the last term. The day of issuing the subpœna and of its return will also be entered. The day of filing each paper will be noted on the back of it, and also on the docket. The day of the respondent's appearance will be noted on the docket, and also all orders or decisions by a member of the Court, and the day of their reception. Papers filed can be taken off only by special order, or when the rules permit; and in all cases the Clerk will take a receipt for them; but this will not prohibit the use of them in open Court, or in the presence of the Clerk, who will be held responsible for them.

CONTEMPTS.

28. Contempts in refusing or neglecting to obey any decree, decision, direction or order of the Court, or of a member of it, when a remedy is not provided by statute, may be punished by an attachment issued on a rule filed therefor by the counsel of the party injured, and notice thereof given, to which a response may be filed within ten days and notice given. The moving counsel may file a reply and give notice, and transmit copies to a member of the Court for decision, who may order a writ of attachment, returnable to the next term, on which the party will be bailable, and the same proceedings may take place as provided in case of attachments by Rule 4, and a new writ may issue in term time, on which he will not be bailable, but may be imprisoned until he comply, or till the further order of Court.

INJUNCTIONS.

29. Writs of injunction in the form annexed will be granted only as auxiliary to a bill in equity, except in cases specially provided for by statute; but will not issue before the bill is filed. A prayer for the writ, and the necessity therefor, should be clearly and concisely stated in the bill.

When granted without a previous notice and hearing, a rule may at any time be filed to dissolve, stating the reasons therefor; and the like course of proceedings may be had thereon as is provided on exceptions to an answer, except that only half of the time will be allowed for the performance of each act; and the application will be made out of term time to the member of the Court who ordered the writ. And he may in his discretion appoint a time and hear testimony, taken as he may direct. When granted on a hearing a rule may be filed to dissolve, and notice given for a hearing on it only in term time. In the mean time a rule may be filed, if need be, with notice, for taking testimony in relation to it, as in other cases preparatory to such hearing.

REHEARING.

30. Applications to the discretion of the Court for a rehearing may be made on petition, verified as required by Rule 7, and setting forth particularly the facts, and the name of each witness, and the testimony expected from him. The petitioner can examine only the witnesses named, except to rebut the opposing testimony. The petition, having been presented to a member of the Court, and by him allowed, may be filed, and the same proceedings may be had thereon as on an original bill. If the decree has not been executed, such member of the Court may suspend its execution until the further order of Court, by a writ of *supersedeas* or order, on the petitioner's filing a bond, with sufficient sureties, in such sum, and to be approved in such manner as he may direct, conditioned to perform the original decree, in case it shall not be materially modified or reversed, and pay all intermediate damages and costs.

FEE BILL.

31. The following fees may be taxed and allowed to the party entitled to cost, when no fees are provided by statute for the like service.

Rules for practice in Chancery.

ATTORNEYS.

Drawing and filing bill,		$5 00
" " answer,		5 00
" interrogatories, each set,		1 00
But all in one case not to exceed	5 00	
Making abstract, when hearing is on bill and answer,		2 50
" " when on bill, answer, and proof,		5 00
Drawing and filing decree when not requiring material alteration,		1 00
Drawing and filing each rule,		25
Each notice given, not to be taxed also as copy,		25

Copies of abstracts and other copies at the rate of ten cents for each page of 224 words.

The postage paid on notices and papers transmitted; no one postage to exceed twenty-five cents.

All papers transmitted to a member of the Court to be free from charge to him.

For an amendment of the bill or answer, when such amendment is occasioned by an amendment made by the opposing party, half the fee for drawing a bill or answer.

CLERK.

For filing each paper required to be filed on the back, and noting the same on the docket, and carrying it forward each term,	$ 05

COMMISSIONER OR MAGISTRATE.

For each jurat to bill, answer, or other paper requiring a like certificate,		20
For each deposition not exceeding one page of 224 words,		1 00
and for each additional page,		25
But no deposition to exceed	5 00	

FORMS ANNEXED.

SUBPŒNA.

[*Seal.*] *State of Maine.*

32. To the Sheriffs of our counties and their deputies:—

We command you to summon A. B. of ———, in our county of ———, to appear before our Supreme Judicial Court, next to be holden at ———, within and for the county of ———, on the ——— Tuesday of ——— next, to answer to C. D. of———, in the county of———, in a bill in equity, and to enter his appearance thereto by himself or his attorney. Hereof fail not, and make due return thereof and of your proceedings at the time and place aforesaid. Witness E. S., Justice of said Court, the ——— day of ———, in the year of our Lord, 18—.

——— ———, *Clerk.*

When made returnable out of term time, the words "the clerk of" are to be inserted between the words "before" and "our," and the statement, that a court is to be holden, is to be omitted, and in place of it, the day of the week, month and year, for his appearance inserted.

WRIT OF ATTACHMENT.

[*Seal.*] *State of Maine.*

To the Sheriffs of our counties and their deputies:—

We command you to attach the body of A. B. of———, in our county of———, so that you have him before our Supreme Judicial Court, next to be holden at———, within and for our county of———, on the——— Tuesday of ——— next, to answer for an alleged contempt in not [here insert the cause] and you may take a bond with sufficient sureties, to C. D., the party injured, in the sum of———, conditioned, that he then and there appear and abide the order of Court. Hereof fail not and make due return thereof and of your proceedings, at the time and place aforesaid. Witness E. S., Justice of our said Court, the ——— day of———, in the year of our Lord, 18—.

——— ———, *Clerk.*

When the party is not bailable, that part of the writ is to be omitted.

WRIT OF INJUNCTION.

[*Seal.*] *State of Maine.*

To the Sheriffs of our counties and their deputies:—

We command you to make known to A. B. of ———, in our county of ———, that C. D. of ———, in the county of ———, has filed his bill in equity before our Supreme Judicial Court, therein alleging [here insert the allegations in the bill, showing the cause for issuing the writ,] and that in consideration thereof, he, the said A. B., and his attorneys and agents, are strictly enjoined and commanded by our said Court, under the penalty of ———, absolutely to desist and refrain from [here insert the acts enjoined,] and from all attempts directly or indirectly to accomplish such object until the further order of our said Court. Hereof fail not and make due return thereof and of your proceedings, to our next Court, where the bill is pending. Witness E. S., Justice of our said Court, the ——— day of ———, in the year of our Lord, 18—.

——— ——— *Clerk.*

When the injunction is to be perpetual, the writ is to be varied accordingly.

33. All proceedings under these rules will take place in the respective counties, and upon the dockets there kept, and before any of the Justices of the Court, until publication of the testimony has been ordered, when the case will there be marked law, and be entered on the docket of the District at the next law term.

34. All former rules are hereby repealed, and the Reporter is authorized to procure 500 copies of these rules to be printed.

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See CORPORATIONS, 4.

ATTACHMENT.

1. An officer, unless *specially ordered* is not bound to attach the goods of a debtor, out of his possession. *Weld* v. *Chadbourne*, 221.

2. The law will imply no indemnity from the creditor for such an act. But the officer is required to use *diligence* and *good faith*, and if he knows of property belonging to the debtor, but not in his possession, he is bound to attach it under general orders from the creditor to attach all his property. *Ib.*

3. If a creditor *specially* directs an officer to attach *specific property* of his debtor, not in his possession, he is required to do so, although he held in his hands older precepts against the same debtor, with general orders to attach all his property. *Ib.*

4. Whether after such property has been attached under special directions, the officer is not excused from attaching the same on the older writs in his hands, from well grounded suspicions and reasonable grounds to believe that the title might be in controversy, is a question of fact to be determined by the jury. *Ib.*

5. Upon property attached and delivered by the officer into the hands of receiptors, who promised to pay a sum certain or re-deliver to him the property, the officer's lien is dissolved; and the property is liable to be attached at the suit of another creditor of the owner. *Waterhouse* v. *Bird*, 326.

6. Replevin by the former cannot be maintained against the latter officer for attaching such property. *Ib.*

See LIEN CLAIMS, 1.

ATTORNEY AT LAW.

See CONTRACTS, 2, 3.

AWARD.

1. To make an award upon a parol submission binding, it must be proved that the parties mutually and concurrently agreed to abide by it. *Houghton* v. *Houghton*, 72.

2. What words were used in making *such agreement*, and the meaning attached to them by the parties, under the circumstances of their utterance, can only be determined by the jury. *Ib.*

3. Where no time is fixed in which arbitrators are to make an award, it is to be done at *their pleasure*, unless either of the parties specially request them to make it in a reasonable time, and in case of refusal revoke the submission. *Small* v. *Thurlow*, 504.

BANKS.

See CASHIER OF BANKS, 2, 3. DECLARATIONS.

BASTARDY.

BILLS AND PROMISSORY NOTES.

COMMON ESTATE.

See CONSTRUCTION OF DEEDS, 13.

COMMON SELLER.

See INDICTMENT, 5, 8.

CONSIDERATION.

See CONVEYANCE, 5, 6.

CONSTITUTIONAL LAW.

CONSTRUCTION OF DEEDS AND INSTRUMENTS.

CONTINGENT REMAINDER.

See WASTE, 1, 2, 3.

CONTRACTS.

CONVERSION.

CONVEYANCE.

CORPORATIONS.

EVIDENCE.

FINES.

See CONSTITUTIONAL LAW, 9. MAGISTRATE, 10, 11.

FISHERY.

See COMMON FISHERY.

FORECLOSURE.

FOREIGN ATTACHMENT.

FORFEITURES AND PENALTIES.

GRANTS.

HEIRS.

HIGHWAYS AND BRIDGES.

ILLEGITIMATE CHILDREN.

IMPEACHMENT OF A JUDGMENT.

INDICTMENT AND COMPLAINT.

INDORSEMENT.

INSURANCE.

INTEREST.

INTOXICATING LIQUORS.

JUDGMENTS.

LIABILITY OF TOWNS.

LIABILITY OF SHARE OWNERS IN RAIL ROADS.

See LEVY OF LAND, 3, 4.

LIEN CLAIMS.

LIMITATION.

See ACTION, 2, 3. AMENDMENT, 9, 10. COUNTY COMMISSIONERS, 3.

MAGISTRATE.

MALICE, EXPRESS OR IMPLIED.

See INDICTMENT, 14, 15.

MANDAMUS.

See HIGHWAYS AND BRIDGES, 5.

MARRIED WOMEN.

1. The statute of 1847, c. 27, enacts, that a married woman may become the owner of real or personal property by bequest, demise, gift, *purchase* or distribution. To become the owner by *purchase*, she must make it from her own property,or that of others, by their consent, for her use.
Merrill v. *Smith*, 394.
2. The *earnings* of a *feme covert* are the property of her husband. *Ib.*
3. And a *purchase*, made on the credit, or from the means of her husband, gives the wife no property in the article purchased. *Ib.*
4. So property, *purchased* by a *feme covert*, by the avails of her labor, belongs to her husband. *Ib.*
5. In this State, to protect her own property, a married woman may maintain an action in her own name. *Davis* v. *Herrick*, 397.
6. And she may hold property without paying for it an adequate consideration, by direct or indirect conveyance from her husband, against his creditors *subsequent* to such conveyance. *Ib.*
7. If the conveyance was made to defraud *existing creditors*, whose debts were *subsequently* paid, the wife will hold the property against *subsequent creditors* of her husband. *Ib.*
8. By the statute of 1821, c. 60, § 1, a reversionary interest was made liable to attachment on mesne process, and to be taken on execution for the debts of the owner. Under that law, the reversion of a *feme covert* was liable to be levied on for debts of her contracting *before* her coverture.
Moore v. *Richardson*, 438.

See CONVEYANCE, 5, 6. FOREIGN ATTACHMENT, 1, 2.

MASTERS OF VESSELS.

1. The master of a vessel, merely as such, has no authority to order repairs in the home port. *Jordan* v. *Young*, 276.
2. A vessel, moored at the wharf, in a town adjoining that in which the owner resides, is at her home port. *Ib.*

MINORS.

See AGENT FOR THE SALE OF LIQUORS, 2, 4.

MISDEMEANOR.

See JUDGMENTS, 4.

MONUMENTS.

See EVIDENCE, 1, 20.

MORTGAGE.

See DOWER, 1, 2, 3, 6, 7, 8. EQUITY, 3. FORECLOSURE, 1, 2. FOREIGN ATTACHMENT, 8, 9, 10. NOTICE, 1, 2.

MOTIONS.

See AMENDMENT, 8. EXCEPTIONS, 1, 2.

NAVIGATION.

See COMMON FISHERIES, 8.

NOTICE.

OFFICER'S JUSTIFICATION.

See ACTION, 20. ATTACHMENT, 1, 4, 5.

ORDER.

OUTLAWED.

See LIMITATION, 3.

PAROL TESTIMONY.

See EVIDENCE, 22. FORECLOSURE, 3.

PARTNERS.

1. One of the partners may lawfully assign to a creditor thereof, a demand due to the partnership, *after its dissolution*. *Milliken* v. *Loring*, 408.
2. The joint liability of partners is severed by their death, and a claim against their estate cannot be prosecuted against their administrator, *in one action*, although the same individuals should administer on both estates. *McNally* v. *Kerswell*, 550.

See PLEADINGS, 5.

PAUPERS.

1. Chapter 32, § 48, provides, that towns shall be liable for any expense necessarily incurred for the relief of a pauper, by a person not liable for his support, after notice and request made to the overseers and until provision shall be made by them. *Grose* v. *Jay*, 9.
2. When provision is made upon such notice and request, the liability of the town to pay any such reasonable expense ceases. *Ib.*
3. If the person, making the request, is employed by the overseers of the poor to keep the pauper for a limited time, and he *continues* to support the pauper *after* the time agreed upon has elapsed; the town will not be liable for such support *after* the termination of their contract, without a new notice and request, although the overseers knew the alleged pauper was unable to support himself. *Ib.*
4. R. S., c. 32, § 1, provides, that upon the division of any town, and the incorporation of a portion of its territory into another *town*, the settlement of persons residing upon such territory at that time, shall be in the town into which it is incorporated. *Weld* v. *Carthage*, 39.
5. But the settlement of persons residing on territory set off from one *town*, and *not incorporated into another*, is not changed by such dismemberment. *Ib.*

PAWN OR PLEDGE.

See MORTGAGE, 8.

PAYMENT OF MORTGAGE.

See DOWER, 3.

PETITION FOR PARTITION.

See ABATEMENT, 2, 3, 4. AMENDMENTS, 5. HEIRS, 2.

PLANS.

See EVIDENCE, 4.

PLEADINGS.

1. When the defendant appears and pleads to the merits of the suit he thereby waives any objections to the want of service of the writ.
Woodman v. *Smith*, 21.

2. The corporate character of a plaintiff proprietary is admitted by pleading the general issue. *Roxbury* v. *Huston*, 42.

3. The degree of certainty required in a plea in abatement is such, as to exclude all such supposable matters, as would, if alleged on the opposite side, defeat the plea. *Tweed* v. *Libbey*, 49.

4. Thus, when the plea is to the mode of service of the writ, that the defendant's property was attached, but by the return thereof, no summons in the form of law was delivered to him, or left at the place of his last and usual abode, it is defective, although in the writ, he is declared against as an inhabitant of this State. *Ib.*

5. In an action of tort, wherein the defendants are described, and the wrongful act is alleged to have been done by them, as partners, and they severally plead the general issue, the allegation regarding the partnership, is immaterial and need not be proved. *Head* v. *Goodwin*, 181.

6. In an action against a town for injury from a defective highway, proof that it was suffered on the *precise day* alleged in the writ is not required.
Tripp v. *Lyman*, 250.

7. If the parties to a suit put in issue a matter, which is incapable of being legally made so, the Court may direct the pleadings respecting it to be struck out or disregarded. *Ham* v. *Ham*, 261.

8. And the omission of the jury to find *such an issue* is no ground of exception.
Ib.

9. A counter brief statement made up by the plaintiff's counsel and read to the Court during the progress of a trial, but which was not signed by the plaintiff or his counsel, forms no part of the proceedings, and may be withdrawn. *Blaisdell* v. *Roberts*, 239.

POLICY.

See INSURANCE.

PRINCIPAL AND SURETY.

See ACTION, 7. BILLS AND NOTES, 2.

SELECTMEN.

See FORFEITURES AND PENALTIES, 3, 4, 5.

SEIZEN.

See DOWER, 1, 2.

SET-OFF.

1. A claim in set-off, to be available, must be due and payable at the time of the *commencement* of the plaintiff's action. *Houghton* v. *Houghton*, 72.
2. But a mere *liability* as surety, existing at the time, but not discharged till *after* the plaintiff's suit, cannot be allowed in set-off. *Ib.*

See JUDGMENT, 2, 3.

SETTLEMENT.

See PAUPERS, 4, 5.

SHERIFF.

See LIEN CLAIMS, 2. OFFICER'S JUSTIFICATION, 1, 3, 4, 5, 6. TRESPASS, 8, 10, 11.

STATUTES AND CONSTITUTIONAL PROVISIONS, CITED, COMMENTED UPON, &c.

ENGLISH STATUTES.

COLONIAL STATUTE.

PROVINCIAL STATUTES.

STATUTES OF UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF MAINE PRIOR TO THE REVISED STATUTES.

REVISED STATUTES.

STATUTES OF MAINE PASSED SUBSEQUENT TO THE REVISED STATUTES.

SUPERINTENDING SCHOOL COMMITTEE.

See ACTION, 8, 9.

SUPPLIES.

See PAUPERS, 2, 3.

SURVEY AND SURVEYORS.

See CONTRACTS, 4, 5.

SURVIVING PARTNER.

See FOREIGN ATTACHMENT, 7.

TAXES.

1. It is provided by law, that "all personal property of the *inhabitants* of this State" shall be subject to taxation in the *manner* therein declared.
Baldwin v. *Trustees of Ministerial Fund*, 369.

2. The term "inhabitants," as used in the Revised Statutes, embraces bodies corporate as well as individuals. *Ib.*

3. The property of corporations, when not otherwise subjected to assessment to the shareholders, is taxable to such corporation. *Ib.*

4. To incur such liability, it is not necessary that the corporation should be the owner of the property, or should have a beneficial interest therein; it is enough that they have the *legal* ownership. *Ib.*

5. Thus the trustees of a *fund* for the support of the gospel ministry, though living in different towns, are liable to be assessed for such *fund* in the town where the income is to be applied. *Ib.*

6. The Act incorporating the Cumberland Marine Railway authorized the company to hold personal and real estate, and required that the *whole property* should be divided into shares, and that such *shares* should be considered in all respects as *personal estate*. — *Held*, that under the provisions of R. S., c. 14, § 51, and laws of 1845, c. 159, § 10, the *real estate* belonging to the company is liable, *as such*, to taxation.
Cumberland Marine Railway v. *Portland*, 444.

7. By R. S., c. 14, § 18, it is provided, that if after notice by the assessors, an inhabitant of the town shall not bring in the required lists, (for the purposes of taxation,) he shall be thereby barred of his right to make application to the County Commissioners for any abatement of the assessment on him, unless he shall make it appear that he was unable to offer such list at the time appointed. *Winslow* v. *County Commissioners*, 561.

8. Before this mode of redress can be made available by any inhabitant, he must *personally* carry in such list to the assessors, and be ready to make oath to its correctness, if required; or make it appear to the Commissioners that *he* was unable to offer such list at the time appointed. *Ib.*

TENANT.

1. If a tenant continues in possession after the expiration of his lease, the burden of proof is upon him to show the acquiescence of his landlord.
Chesley v. *Welch*, 106.

TRUSTEE.

TRUSTS.

USURY.

WHARF.

WILLS.

WITNESSES.