REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By SOLYMAN HEATH,
REPORTER TO THE STATE.

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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. JOSEPH HOWARD,
HON. RICHARD D. RICE,
HON. JOSHUA W. HATHAWAY,
HON. JOHN APPLETON,
HON. JONAS CUTTING,

} ASSOCIATE JUSTICES.

ATTORNEY GENERAL.

HON. GEORGE EVANS.

ERRATA. — These corrections should be made in the following pages: —

	Page	117,	in the last line, for *entirely* read mainly.
	"	119,	13th line from top, for *then* read there.
	"	387,	9th line from bottom, for *poison* read poisons.
	"	"	2d line from bottom, for *or* read as.
	"	389,	7th line from bottom, for *intuities* read intuitus.
	"	521,	7th line from bottom, for *Woodark* read Woodcock.
	"	522,	5th line from top, for *when* read where.
In Vol. 37,	"	537,	5th line from bottom, for *Shu.* & *Per.* read Stew. & Por.
"	"	357,	11th line from top, for *ex cathedra* read ex contractu.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

MIDDLE DISTRICT,

1854.

COUNTY OF KENNEBEC.

PRATT *versus* LEADBETTER.

Of the construction of a will.

In determining the meaning of a *particular devise* reference may be had to the other provisions of the will.

That a devisee may have an estate of *inheritance*, it must appear to have been the intention of the testator by the *words used* in the devise, or *clearly* implied from the entire instrument.

A testator made the following devise: — "I give and bequeath unto my son O. P. the land he is now in possession of, also one-half of lot No. 5, to him during his natural life to improve, and then to his heirs after him for their sole right;" — *held*, that as the other clauses in the will furnished no evidence of an intention to give the devisee an estate of *inheritance*, he took only thereby an *estate for life*.

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

ENTRY to recover possession of a tract of land in Leeds.

Both parties claimed title to the premises through Othniel Pratt, jr., who died in 1851, intestate. The tenant derived title from him through sundry mesne conveyances in fee simple.

The demandant was one of his children, and claimed as heir, and also had the rights by conveyances of all the heirs but one.

Evidence was introduced tending to show, that Othniel Pratt, senior, the father of Othniel Pratt, jr., was seized of the premises from 1794, to the time of his decease in 1810; that Othniel, jr., was in possession of them on April 8, 1809, and for several years before and after; that on the day last mentioned, Othniel, senior, made his will, which was duly proved, &c., in February, 1810.

The several bequests in the will were as follows:—

"1st, I give and bequeath unto my daughter Deborah Berry a lot of land in Livermore number four, during her natural life, and ten acres of the south end of said lot to her disposal and the remainder of said land to her two eldest children Ezra and Clarissa Pratt.

"2d, I give and bequeath unto my son Othniel the land he is now in possession of, also one half of the lot number five on the north side of said lot lying in Livermore, to him during his natural life to improve and then to his heirs after him for their sole rights.

"3d, I give and bequeath unto my daughter Hannah Draper and her husband during their natural life, then to her heirs, the land they now live on in the town of Livermore.

"4th, I give and bequeath unto my son Isaac the land he is now in possession of, also one half of lot number five on south side of said lot lying in Livermore, to him for his use and benefit during his natural life; then to his heirs for their sole use and right forever.

"5th, I give and bequeath unto my daughter Ruth Lane and her husband during their natural life, then to her heirs after her, lot number one, also twenty-four rods wide off of the lot number two on the west side running the whole length of said lot in Livermore.

"6th, I give and bequeath unto my daughter Sarah Moulton and her husband during their natural life, then to their

heirs after her, the land they now live on, also part of lot number two being in Livermore.

"7th, I give and bequeath unto my son Elisha the land he is now in possession of, also lot number three and strip of twenty-four rods wide on the east side of lot number two lying in Livermore.

"8th, It is my will and intent if there is any embarrassments on any of the aforementioned lands that the same be paid equally by each and every one of my children."

The presiding Judge instructed the jury, that by virtue of said will, Othniel Pratt, jr., took but a life estate in the land of which he was in possession when the will was made.

A verdict was returned for demandant for a portion of the premises demanded, and the defendant excepted.

H. W. Paine, in support of the exceptions.

When it is manifest the testator intended a fee, it will pass without words of limitation. *Cook* v. *Holmes & ux.*, 11 Mass. 528; *Baker* v. *Bridge*, 12 Pick. 27; *Godfrey* v. *Murphy*, 18 Pick. 295.

In the first article testator gives a fee to his daughter Deborah, in ten acres, without words of limitation.

In the seventh article he gives a fee to his son Elisha, in two parcels, without words of limitation.

In this article he gives a fee, because he no where disposes of the remainder.

Now in the second article, testator in devising to his son Othniel the land he was in possession of, uses the same language which he employs in his devise of a fee to Elisha.

Othniel then takes a fee as to "the land he is in possession of," unless the words subsequently employed in that article reduce the devise to a life estate or bring it within § 3, c. 60, Stat. 1792.

There is no grammatical rule which requires the two clauses to be so coupled together, that the latter shall control and limit the effect of the former.

In the 6th article the testator uses language clearly indi-

cating an intention to give only a life estate; but no where does he use words of limitation.

Bradbury, contra.

1. There are no words of inheritance, and nothing to indicate an intention to grant a larger estate, and the devisee took, therefore, only a life estate. 2 Jarman, 170; *Kirby* v. *Holmes*, 2 Wilson, 80.

2. The grammatical construction of the section containing the bequests to Othniel, jr., requires that the words of limitation "during his natural life" be applied to both parcels of the land devised. *Stevens* v. *Snelling*, 5 East, 87; 2 Jarman, 744.

3. The well established rule of construction that when a testator divides his will into sections numerically arranged, the words of limitation will be considered applicable to the several devises contained in that section, is decisive in this case. 1 Jarman, 436.

SHEPLEY, C. J. — The will of Othniel Pratt appears to have been drawn by a person not learned in the law and not familiar with its technical terms, and yet not so entirely ignorant of them, that he could not use appropriate language to give an estate for life, when such was the intention. There are some considerations presenting difficulties in coming to a correct and satisfactory construction. The same language precisely is not used in making different devises, when the intention appears to have been to give like estates.

The question presented is, whether Othniel Pratt, the son, took an estate for life or in fee in the land then in his possession. The devise to him is in these words.

"Secondly, I give and bequeath unto my son Othniel, the land he is now in possession of, also one half of the lot number five on north side of said lot lying in Livermore, to him during his natural life to improve and then to his heirs after him for their sole rights."

After having made devises to each of his children he uses this language.

"Eighthly, it is my will and intent, if there is any embarrassments on any of the aforementioned lands, that the same be paid equally by each and every one of my children."

This clause would not necessarily impose any burden on a devisee. If the embarrassment were upon his own devise, it would give him relief. It may therefore be well doubted, whether it can be considered as making a charge upon a devisee. If it can be so considered, it cannot authorize a construction, that a devise of an estate expressly for life is thereby to be enlarged to a fee.

Certain rules have been established and decisions made, from some of which assistance may be obtained for a construction of the devise under consideration.

It is a fundamental rule that an intention must be disclosed, either by the words used or by clear implication from an examination of the whole of the will, to devise an estate of inheritance, or the devisee will not take such an estate. *Denn* v. *Gaskin*, Cow. 657; *Right* v. *Sidebotham*, Doug. 759; *Hay* v. *the Earl of Coventry*, 3 T. R. 83.

When there is no connection by grammatical construction or reference between the parts, and nothing declarative of a common purpose to make a similar disposition, one devise or clause cannot determine the meaning of another. Yet the whole may be examined to ascertain the meaning of the testator in the devise or clause under consideration. *Compton* v. *Compton*, 9 East, 267.

Different devises or different clauses of the same devise are not to be connected, without a discovery from the language used in the will, of an intention that they should be. *Meredith* v. *Meredith*, 10 East, 503.

"The safest course is to abide by the words, unless upon the whole will there is something amounting almost to a demonstration that the plain meaning of the words is not the meaning of the testator." *Crooke* v. *De Vandes*, 9 Ves. 197.

Mr. Viner has collected in his abridgment the result of several ancient decisions under the title Devise, Q. a.

Some of them may have a bearing upon the construction of this will.

1. I devise black acre to my daughter F and the heirs of her body begotten. Item, I devise unto my said daughter white acre.

The daughter shall have but an estate for life in white acre; for the word "Item" is not so much as the same manner.

2. If a man devise black acre to one in tail, also white acre.

The devisee shall have an estate tail in white acre also; for this is all one sentence and so the words, which make the limitation of the estate, go to both.

4. Item, I give my manor of D to my second son. Item, I give my manor of S to my said son and his heirs.

It was resolved that in the first he had an estate for life, and the "Item" seems to be a new gift to a greater preferment.

8. I devise black acre to J S. Item, I devise white acre to J S and his heirs.

Per COKE, C. J. — It is only an estate for life in black acre: the Item has no dependence upon the first clause, but is distinct and several.

11. A devise of white acre to J S and his heirs; and, or item, black acre.

In both these cases J S has a fee simple in black acre as well as in white acre. But if it was, I devise white acre to J S and his heirs, and Item I give black acre. Or Item, I give black acre. J S has but an estate for life in black acre.

Guided by these rules and cases and by other cases to be noticed, the conclusion must be that Othniel Pratt devised to his son Othniel an estate for life only in the lands then in his possession. For these reasons, the testator used no words of inheritance in that clause of the devise; and if it be considered as disconnected with the second clause the language gives but an estate for life.

It appears, that the testator had an impression, that it was

fit to use some language to give an estate greater than for life, when such was his intention. This is perceived in the devise to his daughter Deborah of ten acres "to her disposal." In the devise to the heirs of Othniel "for their sole rights." And in the devise to the heirs of Isaac "for their sole use and right forever."

The force of this last reason is somewhat impaired by the consideration, that in the devises to the heirs of his daughters, no other language was used than, "then to her heirs," or, "then to her heirs after her," following a devise to the daughter and her husband of an estate for life.

The language used in the devise to Othniel does not authorize a conclusion, that the testator intended to give an estate in fee in one lot and an estate for life in half of the other lot; while it does authorize a conclusion, that he intended to give the same estate in both. That both clauses constitute but one devise is perceived, because there are found no words of devise or bequest in the second clause; and it is only by its connection with the first, that they are obtained. The devise of the last estate is incomplete without a reference to, and connection with the first clause. This commends itself to the judgment as almost, if not quite, conclusive, while it receives the sanction of ancient as well as more modern authority.

It was upon a like basis, that the decisions in the cases of Viner essentially rest. In each of those cases in which a decision was made, that the devisee took a different estate by a different clause in the devise, the words of devise were found in each clause. And in each case, when the decision was, that the devisee took by each clause the same estate, the words of devise were not found in both clauses, one clause being found incomplete without reference to the other.

In the case of *Hopewell* v. *Ackland*, 1 Salk. 239, the language of the will is stated to have been in this form:

"Item. I devise my manor of Bucknall to A and his heirs.

"Item. I devise all my lands, tenements and hereditaments to the said A, he paying my debts and legacies." *Et per* TREVOR, C. J. — "Item is an usual word in a will to introduce new distinct matter, therefore a clause thus introduced is not influenced by, nor to influence a precedent or subsequent sentence, *unless it be of itself imperfect and insensible without reference*, therefore not here where both clauses are perfect and sensible."

In the case of *Stevens* v. *Snelling*, 5 East, 87, the same rule of construction is recognized and enforced by Lord ELLENBOROUGH, who says, "then he devises to George Snelling and his wife the premises in Bramley, also the premises in Wonersh; these two estates, it is to be observed, are disposed of in the same continuing and entire sentence; for the words "I give and bequeath" are not repeated, and must necessarily therefore extend to the subsequent part of the sentence in order to make it intelligible."

In the case of *Doe* v. *Westley*, 4 B. & C. 667, the devise appears in this form. Item. I give and bequeath unto Mary Westley all that messuage or tenement whereon I now dwell, with the garden and all the appurtenances thereto belonging; and I also give to the said Mary Westley all my household goods and chattels and implements of household within doors and without, all for her own disposing, free will and pleasure immediately after my decease.

The devising words having been used in each clause of the devise, making each complete in itself, the decision was that the clauses were distinct, and that she took only an estate for life in the messuage.

In the case of *Fenny* v. *Ewestace*, 4 M. & S. 58, the devising words were repeated in each clause of the devise. The first clause contained words of inheritance, and the second did. They were held to constitute but one devise; and the case, for other reasons stated in the case of *Doe* v. *Westley*, was not regarded as opposed to this rule of construction.

Another reason of less importance is, that the clauses of devise to Othniel are connected by the word "also." A

word not indicative of a separation and independence of the two clauses, but of their connection.

This construction is authorized by the second of Viner's cases, and by the remarks of Justices GROSE and LAWRENCE, in the case of *Stevens* v. *Snelling*.

A further reason for this construction of the devise to Othniel is found in the forms of other devises in that will. The testator devises to his daughter Ruth Lane and her husband "during their natural life, then to her heirs after her, lot number one; also twenty-four rods wide off the lot number two, on the west side running the whole length of the lot in Livermore." The word "also" being here used in the sense of "and." In the devise to his son Elisha, the two clauses of devise are connected by the same word "also," used in the same sense, and without any words of devise in the second clause.

Upon an examination of the whole of the will, no language is found indicative of an intention to give to his son Othniel an estate of inheritance.

Upon the construction of this will there have been, it is said, different opinions and doubts among members of the profession for thirty years. If it be so, it may not have been wholly without a precedent; for Lord ELDEN commences his opinion in the case of the *Earl of Radnor* v. *Shafto*, 11 Ves. 453, with the remark: "Having had doubts upon this will for twenty years, there can be no use in taking more time to consider it."

With the best light to be obtained by a more limited consideration and examination, the Court has come to a very satisfactory conclusion respecting the correct construction of the devise to Othniel Pratt. *Exceptions overruled.*

TENNEY and APPLETON, J. J., concurred.

WILSON *& als. versus* WILSON.

It is a general rule in a conveyance of real estate on certain conditions, that any one interested in the conditions or in the land, may perform them.

Where the condition of a grant of land is, that the *grantee* shall maintain and support in a comfortable manner the persons therein named, no personal trust is charged upon him, and the support may be furnished by others.

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

ENTRY. The action was brought by the heirs of Ephraim Wilson to recover possession of his late homestead.

In 1835, the said Wilson conveyed the premises described by deed of warranty to one of his sons, William Wilson, his heirs and assigns, *on this condition*, "that the said William Wilson is to maintain and support in a comfortable and convenient manner the said Ephraim Wilson, together with his wife Eunice Wilson, also Ephraim Wilson, jr., and Polly Wilson, children of the said Ephraim, during their natural lives; then this deed to remain in full force and virtue, otherwise to be null and void."

The plaintiff entered and took possession, of the premises before the commencement of this action, for condition broken in the above deed.

It appeared that the grantee Wilson, had alienated the premises to the defendant, and consigned Ephraim Wilson, jr., and Polly to him to maintain. The consent of Polly was signified in writing, but none by Ephraim. The *defendant* had also kept Ephraim at different places.

There was evidence tending to show that Ephraim was not properly cared for, and also evidence tending to show that all was done for him that could be. William, the grantee of Ephram, senior, was admitted to testify for defendant, after being released from his covenants, against the objections of plaintiffs.

The Judge was requested to instruct the jury, that the trust charged upon the grantee in Ephraim Wilson, senior's deed was a personal one, and that he had no authority to transfer the care and support of Ephraim and Polly to

other parties, and himself leave them to be cared for by strangers.

To obtain a decision upon other points in the case, the Court ruled that the grantee had a right of alienating the estate and transfer the charge and support of the persons named in the condition to any one he might choose.

A verdict was returned for defendant and plaintiffs excepted.

Heath, in support of the exceptions.

Hinds, contra.

RICE, J. — On the eighth day of October, A. D. 1835, Ephraim Wilson conveyed certain real estate to William Wilson by deed of general warranty, subject however, to the following conditions, to wit; "that the said William Wilson is to maintain and support in a comfortable and convenient manner the said Ephraim Wilson together with his wife Eunice Wilson, also Ephraim Wilson, jr., and Polly Wilson, children of the said Ephraim, during their natural lives, then this deed to remain in full force and virtue, otherwise to be null and void."

The case finds that Ephraim Wilson, jr., and Polly Wilson, mentioned in the condition of the deed from Ephraim Wilson to William Wilson, had been consigned to the charge of the defendant for support and maintenance, by the grantee in the deed of Ephraim Wilson, with the consent of Polly Wilson in writing, and that the defendant had employed one Quimby and others, at different times, to take care of Ephraim.

It may be inferred, though it is not so expressly stated in the case, that Ephraim and his wife have deceased, and that William has conveyed the estate to the defendant.

The Court was requested to instruct the jury, or to rule that the trust charged upon the grantee in Ephraim Wilson's deed, was a personal one, and that he had no authority to transfer the care and support of Ephraim and Polly to

other parties, and himself to leave them to be cared for by strangers. This request was refused.

The condition in the deed of Ephraim to William, was designed to secure the support of Ephraim, his wife and two children. There does not appear to have been any personal obligation on the part of William to provide for the support of the parties mentioned in the condition of the deed from Ephraim. They were to be supported in a comfortable and convenient manner, or the estate was to be forfeited. But there was no place specified at which the support was to be furnished, nor is there any specific provision how they should be supported, further than that it should be done in a "comfortable and convenient manner." Such support could be furnished by other parties as well as by William. There is no language in the deed, nor can an inference be drawn from the situation of the parties as disclosed by the facts in the case, which would seem to render it necessary that the "support" provided for in the condition of the deed should only be furnished by William under his personal superintendence. Such does not appear to have been the intention of Ephraim Wilson, the original grantor. *Simonds* v. *Simonds*, 3 Met. 558.

With respect to the persons who may perform a condition, it is a general rule that every one who has an interest in the condition, or in the lands to which it relates, may perform it. As if a feoffee, upon condition to pay at Michaelmas twenty pounds, enfeoffs another person before that time, the second feoffee may perform the condition. Cruise's Dig., Greenl. Ed. vol. 2, c. 2, § 6.

William Wilson, being under no personal liability to support Ephraim, jr., and Polly, and being only liable to the defendant on his covenants, was, after being released by the defendant, a competent witness for him. No error is perceived in the ruling. *Exceptions overruled and Judgment on the verdict.*

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

STATE *versus* HINCKLEY.

Where exceptions *only* are taken, the cause must be determined by the points thus presented; and any questions which might have been raised upon the special findings of the jury, not thus saved, cannot be considered.

When an indictment alleges that the property embezzled was *possessed by C. P. B. and by him delivered to the defendant*, proof that it was delivered by C. P. B. to some *one* acting for, and by the *latter*, to defendant, will support the allegation in the indictment.

EXCEPTIONS, RICE, J., presiding.

This was an indictment against defendant in which were two counts.

The first count charged him with larceny of sundry packages of money belonging to different individuals.

The second count alleged "that Charles P. Branch at Gardiner aforesaid, was possessed of (several packages of bank bills belonging to several individuals,) and the subject of larceny; and the said Charles P. Branch on, &c., at, &c., entrusted and delivered the same packages to Hannibal C. Hinckley aforesaid, who upon the 6th day of January aforesaid, was, and for a long time prior thereto, had been, a common carrier of money, goods and other property, for hire between Gardiner aforesaid and Portland in the county of Cumberland, to be by him, the said Hannibal C. Hinckley aforesaid, carried and conveyed for hire from said Gardiner to said Portland, and there delivered to the proprietors of Prince's Express, so called, to be by them carried and delivered in Boston, Massachusetts; yet the said Hinckley at Gardiner aforesaid, on the 6th day of January aforesaid, did wilfully and feloneously embezzle and fraudulently convert said bills," &c.

There was evidence on both counts.

Evidence was also introduced tending to show that the defendant was not in Gardiner at the time alleged; but that he left Portland for Augusta in the railroad train about the time the train left Augusta; that he came as far as Freeport, where the two trains met, and where the defendant left the

train and took the one bound to Portland, but left it at North Yarmouth and took passage in the cars for Waterville.

It also appeared that when the defendant was detained, or unable to accompany the express, as its messenger, some one of the agents of said express, at the several stations on the route, sent a person in his place, and that one Stearns was occasionally sent in the absence of defendant; and that he stated he came from Portland to Freeport on the day alleged, and there met Stearns on the train from Augusta and received from him a carpet-bag.

It was also shown that the messenger was provided with a carpet-bag for the conveyance of packages of money.

The defendant requested the instruction, that the government must satisfy the jury by the evidence, that the money alleged in the indictment to have been embezzled, was delivered by Branch to the defendant as alleged in the indictment, in order to convict him under the second count.

But the Court declined, and did instruct them, that if they being satisfied from the evidence, that the packages of money described in the indictment came into the hands and possession of defendant, with the full knowledge on his part of their destination, through the agency of some other person who received them for him, from Branch, to be carried and delivered in the manner described in the indictment, and were received by him and converted to his own use before delivery, he would be liable under the second count.

The jury returned a verdict of guilty on the second count, and not guilty on the first, and found specially that the several packages of money described, were not delivered to the defendant at Gardiner by Charles P. Branch, but were received by him at Freeport by the hand of some person to whom they were delivered by said Branch.

The defendant excepted.

Glazier, in behalf of the exceptions, contended that in no way was the offence committed in the county of Kennebec.

The delivery of the packages was not here, nor the *embezzlement*, nor the *conversion*, nor was the defendant shown to have been in the county on that day, and as the venue is laid in Kennebec, the error is fatal. Roscoe's Crim. Ev. (4th Am. ed.) 259; same 110 and 644; 26 Maine, 263; 21 Maine, 14; 10 Mass. 154; 8 Wend. 229; 5 Hill, 401; 1 Johns. 66; Hawkins' P. C., B. 2. c. 25, § 83; 3 Bos. and Pul. 569. Other points were also taken.

Vose, County Attorney, *contra*. The only question that can be agued arises upon the exceptions. It is of no sort of importance whether the property was delivered directly or through another person. 2 Starkey's Ev. 367, 368. As to the alleged discrepancy between the allegation and finding, the matter is settled in *State* v. *Douglass*, 17 Maine, 193.

The defendant could be indicted either in the county where he took the money or in any county where he converted it. It appears that he brought it into Kennebec. *State* v. *Haskell*, 33 Maine. 127.

Morrill, in reply.

1. The first point on which we rely is that the government did not show that the possession was in Branch at Gardiner. Here is a variance between the charge and proof which is fatal. Greenl. Crim. Ev. § 161.

2. The indictment charges a delivery of the packages to defendant by Branch. That being alleged must be proved, but Branch had the property only for a special purpose, and that was accomplished when he gave it up to another agent of the express.

3. The entire offence is charged as committed in this county, the jury have found otherwise.

4. It is indispensable that the offence should be proved as alleged. *The People* v. *Mather*, 8 Wend. 229; McNally's Evidence, 503. *The People* v. *Barrett*, 1 Johns. 66.

CUTTING, J. — Is there any motion in arrest of judgment?

Morrill. There is not.

It is said by the County Attorney that there is evidence

the defendant went to Waterville, but the jury do not find he took the money with him, but the conversion appears to have been in the county of Cumberland.

CUTTING, J. — At the argument various points were made, which do not properly arise in the case. The only question now before us, is that which is presented by the exceptions.

It is contended that if Branch was originally possessed of the packages, as his special property, which became so by being delivered to him for a special purpose, and that purpose, on being accomplished by a transfer of the property to another agent of the same company, his special title was terminated and it became vested in the agent to whom it was so delivered, and consequently Branch, when it subsequently came into the possession of the defendant, was not, in the language of the indictment, "possessed of" the property.

Assuming this position to be sound law and good logic, the trouble is, that it is not presented by the exceptions. The request was, that the Court should instruct the jury, that in order to charge the defendant, they must be satisfied that the money "was delivered by Branch to the defendant," which does not presuppose, and nothing more, as now contended, that it came to the defendant through the agency of some person belonging to the company, who was entitled to receive it and thereby discharge Branch from his special liability. If it did, the Judge should have given the requested instruction. But the request was broad enough to embrace any individual, through whose hands the money might have passed to the defendant, whether an agent of the company or the particular agent or servant of Branch, and a delivery to the latter would not have discharged Branch from his personal responsibility and divested him of his constructive possession; and consequently the Judge was justified in refusing to give the instruction precisely as requested. Whereas, the instruction given presented the true issue, which was in substance, that to convict the

defendant, the jury must find, that the property came to him from Branch through the agency of some one acting "for him," the defendant. And the general verdict of guilty establishes the fact, that the jury must have so found, and consequently the person through whose hands the money passed to the defendant's possession, was the *defendant's* and not Branch's or the company's agent. And the reception of the money from Branch by some one acting for the defendant, and a delivery to him, was in law equivalent to the allegation in the indictment, that the delivery was made by Branch to the defendant, on the principle involved in the familiar maxim of the common law, that "he who acts by or through another, acts for himself."

The special findings of the jury could have no other effect than to raise a question of jurisdiction, which is made no part of the exceptions. *Exceptions overruled.*

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

COCHRANE *versus* CLOUGH, *Executor.*

By statute of 1846, c. 205, § 10, no action can be maintained upon any claim or demand in whole or in part for spirituous liquors, sold in violation of law.

Where some of the items of an account in suit were for liquors thus prohibited, and on trial, by leave of Court, were stricken out and no exceptions taken to such amendment, a judgment may be rendered for the account *thus diminished*, without violating the provisions of this statute.

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

ASSUMPSIT on account annexed. The general issue was pleaded.

The items in the account were sold and delivered to defendant's testator, but the plaintiff was not authorized to sell spirituous liquors.

Two items of the account being for alcohol, the defendant contended that the action could not be maintained.

Thereupon, on motion, those items were stricken out by leave of the Court, against the defendant's objection.

The case was then taken from the jury by consent, and agreed to be reported for the full Court to order a nonsuit or default, as the law may require.

H. W. Paine for defendant.

Snell, with whom was *Morrill,* for plaintiff.

SHEPLEY, C. J. — No exceptions were taken to the leave granted to amend by erasing two items of the account for intoxicating liquors.

The amount of the account might be diminished by leave of the Court by the abandonment and erasure of certain items.

It being thus diminished, by allowing the plaintiff to take judgment, there will be no violation of the provisions of the statute declaring, that no action shall be maintained upon any claim or demand in whole or in part for spirituous liquors. *Defendant defaulted.*

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

WHITTIEER *versus* PORTLAND AND KENNEBEC RAILROAD COMPANY.

If land of the plaintiff over which there is an established highway, is taken by a railroad company under their charter, no action at law is maintainable for such taking.

Where a railroad company constructs its track across a highway in accordance with the directions and orders of the County Commissioners, no action can be sustained against them for damages suffered in consequence of their excavations, by the owner of the adjoining land.

Nor will they be liable for any damages to such owner by the necessary acts of the officers of the town in grading down the highway in consequence of the construction of their railroad across it.

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

CASE.

The writ alleged that the plaintiff owned a parcel of

land in Hallowell, bounded on the south by Winthrop street on which was a vaulable house and stable, and a stonewall erected thereon for the protection and support of the land and dwellinghouse; and that the Railroad company dug down and removed that part of the highway which was in front of the dwellinghouse, stable and stonewall, to the depth of four feet, whereby access and approach to his house, &c. were rendered impracticable, and the stone wall unsafe so that he had to rebuild it and make it higher.

The brief statement filed by defendants alleged that, before proceeding to dig down and remove any part of said highway, they filed their petition with the County Commissioners for the county of Kennebec setting forth their intention to cross said street with their railroad, and that notice to the selectmen of Hallowell was given and a hearing had, and determination was made by the Commissioners in regard to the crossing of the said street. That the report of their doings was accepted, and that all the acts done by them in and upon said Winthrop street, as alleged in the writ, were done in pursuance of said directions and not otherwise; and that the Commissioners had full warrant to direct the Railroad Company.

It appeard that the defendants cut down the traveled part of Winthrop street 4½ feet at the point where their centre line crosses said street, and graded said street westwardly on an ascending grade that terminated about at the west line of plaintiff's lot, and that they graded down the side-walk adjoining plaintiff's lot to the depth of eighteen inches at his east line, and also constructed platform bridges over the gutter between the road and the side-walk for ingress and egress to and from plaintiff's house and lot.

The plaintiff also showed, that about a year later, the town officers of Hallowell graded down the side-walk adjoining plaintiff's land to an increased average depth of two feet or more; and that thereupon it became necessary to take down his wall and relay it and build it higher, and grade out the passages from the street to his yard east

and west of his house, at an expense of $170; and some testimony tended to show, that this lowering was on account of the length of plank bridges made by the defendants.

It was admitted, that the defendants merely complied with the directions of the County Commissioners in what they did to Winthrop street.

The defendants contended: —

1st, That as all they did to Winthrop street, was done by the authority and in pursuance of the order of the Commissioners, the plaintiff could not maintain this action against them for any damages resulting therefrom; —

2d, That if defendants are liable in this action at all, they are not responsible in this suit for any damage resulting to him from the doings of the town in reducing the grade of the side-walk, and requested these instructions to the jury.

But the Court, for the purpose of presenting the questions of fact to the jury, instructed them, that the defendants were liable in this action for all the damages to plaintiff occasioned directly by, or necessarily resulting from, the acts of the defendants; and also that, if by the grading down of the traveled way by defendants, it was rendered necessary for the city to reduce the grade of the side-walk so as to render their street safe and convenient for travelers, then the defendants would be liable for the damages which the plaintiff sustained by reason of such reduction of the grade of the side-walk, as well as for the damages, which resulted immediately from the acts of the defendants.

A verdict was returned for plaintiff.

To said instructions and refusal to instruct, the defendants excepted.

J. H. Williams, in support of the exceptions.

1. The acts of defendants were all done by *authority* of law. This authority is found in the Act of March 1, 1836, specially referred to in § 1, of their charter. Being thus authorized they are not liable. *Callender* v. *Marsh*, 1 Pick. 435; *Spring* v. *Russell*, 7 Greenl. 295; *Parker* v. *Cutler*

Mill Dam Co., 20 Maine, 353; *Rogers* v. *Kennebec & Portland R. R. Co.*, 35 Maine, 319.

2. A special remedy is provided for persons affected by doings of defendants under their charter §§ 1, 4, c. 204, Acts, 1836. — These exclude the idea of a general remedy.

3. The authorities of Hallowell were not liable to plaintiff for their acts complained of, nor are defendants liable. *Callender* v. *Marsh*, before cited; *Smart* v. *Corporation of City of Washington*, (decided in C. C., Sept, 1853.) Besides the Legislature, by Act of Aug. 10, 1846, provided the proper remedy for plaintiff in such a case.

Stinchfield, with whom was *Paine*, *contra*.

SHEPLEY, C. J. — It does not appear, that any of the plaintiff's land was taken for the construction of the railroad.

It is said, that his land extended to the centre of Winthrop street. If so, he might have had his damages, if any were suffered, assessed in the manner provided, when lands are taken. But he cannot maintain an action at law for such an injury.

If any person entertains the opinion, that he may not be exposed to injuries by legislative enactment without being enabled in all cases to obtain compensation, that opinion is an erroneous one. The constitution will not protect him against all injurious legislative enactments. *Cushman* v. *Smith*, 34 Maine, 247.

No provision has been made in this State for compensation for injuries occasioned by the lawful construction of railroads to any person, from whom no lands or materials have been taken.

For any lawful acts of the corporation in the construction of the railroad, although indirectly injurious to the plaintiff, he cannot recover damages. *Rogers* v. *Kennebec & Portland Railroad Corporation*, 35 Maine, 319.

It is stated in the bill of exceptions to have been "conceded by the plaintiff, that the defendants merely complied

with the orders of said County Commissioners in what they did to Winthrop street in the fall of 1850."

The statute c. 81, § 13, provides, that a railroad corporation, before commencing to raise or lower a way, may request the direction of the County Commissioners as to the mode of raising or lowering the same, and it shall be their duty to direct the mode of performing said work, "and their decision shall be final." This makes it legal and conclusive upon all parties. No one can allege it to have been unlawfully done, when the railroad crossing has been made in conformity to their directions.

But it is said, the County Commissioners had acquired no jurisdiction, because the petition requested them "to examine the subject and prescribe the best manner, in which said Winthrop street may be crossed by said railroad."

The County Commissioners had by statute jurisdiction of the subject, and the petition presented it in terms sufficiently extensive to enable them to decide "as to the mode of raising or lowering" the street.

If the corporation is not liable in damages for such a construction of its road, it cannot be liable for those subsequently occasioned by the acts of the officers of the city of Hallowell.

The instructions given were erroneous, and those requested should have been given. *Verdict set aside and New trial granted.*

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

STATE OF MAINE *versus* SPENCER.

Before a magistrate can issue a warrant to search for spirituous liquors, *a building*, part of which is used as a store and part for a dwellinghouse, it should *first* be shown to him by the testimony of witnesses, that there was reasonable ground for believing that such liquors were kept in such dwellinghouse or its appurtenances for illegal sale.

Without such preliminary testimony the warrant and proceedings thereon are void.

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

ON COMPLAINT. Sect. 11, c. 48 of laws of 1853, enacts that, "No warrant shall issue for the search of any dwelling-house 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 dwelling-house or its appurtenances, intended for unlawful sale in such dwellinghouse or elsewhere, which testimony the magistrate shall reduce to writing, and cause to be signed and verified by oath of such witnesses, and upon such testimony he may, upon complaint of three persons," &c.

Three persons complained to a magistrate, "that spirituous and intoxicating liquors are kept and deposited in a certain building, part of which is used as a store and part for a dwellinghouse, situated in Belgrade in said county, at South Belgrade, (so called,) occupied by Frederic Spencer, it being the building next north of Solomon Leonard's store."

Upon this complaint a warrant was issued, search made, and a large quantity of intoxicating liquors found in the premises searched. The defendant was arrested and tried before the magistrate and convicted and the liquors ordered to be destroyed. From this judgment the defendant appealed to the Supreme Judicial Court, where he was tried and convicted upon the complaint.

A motion was filed that the judgment might be arrested, "because it appears from the complaint that a part of the building to be searched was a dwellinghouse, and it does not appear that any part thereof was used as a shop, or for the purposes of traffic.

This motion was overruled and exceptions taken.

E. Fuller, in support of the exceptions.

Vose, County Attorney, *contra*.

CUTTING, J. — The statute of 1853, c. 48, § 11, provides that, "No warrant shall issue for the search of any dwelling-house 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 dwellinghouse or its appurtenances," &c.

The warrant, like the complaint, charges, "that spirituous and intoxicating liquors are kept and deposited in a certain building, part of which is used as a store and part for a dwellinghouse."

A building may constitute an entire block, consisting of separate and independent tenements, one of which may be occupied for a dwellinghouse and another for a store, and between which there may be no communication; spirituous liquors unlawfully kept in the latter, would not authorize a search in the former; whereas the warrant directs search to be made in both, that is, in the building. It does not appear, that a shop or other place is kept for the sale of liquors "*in*" that part of the building used as a dwellinghouse, without which allegation in the complaint, no warrant could be issued to search the dwellinghouse without the preliminary testimony having first been taken, as prescribed in the eleventh section. *Judgment arrested.*

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

WHITTIER *versus* SANBORN *& als.*,

The alteration by the town of the lines of a school district, whereby its school-house is left within the limits of another district, will not defeat or affect its right of property therein.

For the removal of such house, built under a license upon the land of another, the owner of the land can maintain no action of trespass, when no unnecessary damage is done to the freehold. And the district, when in actual possession, can authorize a third person to make such removal.

But a school district, unless its meeting is called and notified in conformity with the provisions of law, can, by its vote, confer no authority upon a third person to enter on the land of another and remove a school-house therefrom, although such district were the owners of the house.

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

Trespass, *quare clausum.*

The Court were authorized to draw such inferences as a jury might from the evidence legally admissible, and enter such judgment as the law applicable thereto might require. If the action were maintainable a default might be entered, but if the value of the school-house were not recoverable, then nominal damages only were to be assessed. If the action could not be supported, a nonsuit to be entered.

The facts found by the Court appear in the opinion.

O. L. Currier, for defendants.

Kempton, for plaintiff.

Rice, J. — Trespass *quare clausum* for breaking and entering the plaintiff's close and carrying away a building, known as the "old school-house." The evidence showed the plaintiff to be the owner of the fee of the *locus in quo*, and that the school-house removed by the defendant was erected in 1822, by school district No. 3, (now No. 2,) on the land of the plaintiff, with his consent, he at that time agreeing that the district might have the use of the land during the life of the school-house. There was no evidence that this license, which was by parol, was ever renewed.

The extracts from the records of the town of Vienna show that in September, 1847, a committee was chosen by the town to "make such alterations in school districts as they should think proper."

This committee subsequently reported modifications and alterations in the lines of several of the school districts in the town, and at the town meeting held on the 20th of March, 1848, the town voted, "to make the alterations in the several school districts and to define the limits according to

a report that a committee made in 1847, that was chosen by the town for that purpose."

By this alteration that part of District No. 2, on which the old school-house stood, fell within the limits of district No. 1, according to the newly established lines.

This action of the town simply altered and defined the limits of the several school districts therein; it did not abrogate the old corporations and create others in their place.

A school district is not divested of its property in its school-house by an alteration of the lines of such district, though by such alteration their school-house shall fall without the newly established lines. *School District No.* 1, *in Stoneham* v. *Richardson*, 23 Pick. 62.

The property in the school-house remained, after the alteration of the lines by the town, as before, in district No. 2. It also appears from the evidence that the actual possession remained in the district. The district might therefore authorize its removal from the land on which it stood, and if in such removal no unnecessary damage was done to the freehold, the plaintiff would have no legal cause for complaint.

The case finds that the defendants did no act unnecessary to be done, in taking down and removing the house. The only question is, whether the defendants were legally authorized by the district to enter upon the land and remove the house. Being a corporation with limited and defined powers, the district could only act legally within the scope of its authority, and according to the rules prescribed by law, and at a meeting legally called.

Section 5, of chapter 193, art 2, of the laws of 1850, provides that school district meetings, on the written application of any three or more of the legal voters of such districts, respectively, stating the reasons and objects of the proposed meeting, may be called by the selectmen of the town, containing such district; or by the school district agent or agents, if any have been appointed. Section 6, of same chapter provides that in case notice of such meeting is not published in some newspaper printed in the town, where

such district is situated, such notice shall be posted up in two or more *public* places within such district.

It does not appear that the meeting at which the vote was passed under which the defendants claim to have acted in removing the school-house, was either called or notified according to the provisions of the statute above cited. The defendants have therefore failed to show any authority for their acts emanating from a legally constituted meeting of the district, and are therefore liable in trespass for entering upon the land of plaintiff. But the school-house being neither his property, nor in his actual possession, he is entitled to nominal damages only. A default must be entered and judgment for the plaintiff for nominal damages.

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

LOWELL *versus* GAGE *& als.*

If a person, not the payee, writes his name without date upon the back of a promissory note, it is presumed to have been done when the note was made.

And *such person* is holden as an original promisor, although over his name was also written "without demand or notice."

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

ASSUMPSIT by the payee of a promissory note against the defendants as joint and several promisors. The note was signed by Jones, one of the defendants.

On the back were the words "without demand or notice," and the names of the other defendants below.

Jones was defaulted, and the other defendants pleaded the general issue.

The Court were to render such judgment as the law required.

Lancaster and *Baker*, for defendants, did not deny the general rule of law in Massachusetts, New Hampshire and Maine, that when a person's name appears on the back of a note, it is presumed to have been put there prior to its

delivery and he is held as an original promisor; but the adjudicated cases might be divided into two classes. One when there is a special promise written over the name on the back, as in 5 Mass. 358 and 545; 6 Mass. 519; 7 Mass. 518; and 9 Mass. 314. In all the other cases the indorsement was in *blank*, and the courts held that the payee had a right to fill this blank with such a contract as was consistent with the general scope of the transaction. Of this class are 3 Mass. 274; 11 Mass. 436; 4 Pick. 311; 3 Met. 275; 5 Met. 201; 13 Met. 262; *Colburn* v. *Averill*, 30 Maine, 310.

Not one of these cases supported the case at bar. There was no special promise written over the names of the defendants; and there was no *blank* indorsement which the plaintiff might fill to support this action.

The words there found are words of *indorsement* and of nothing else. They exclude and negative an original promise. The rule of law already decided obtains nowhere else but in two or three States in New England and ought not to be enlarged.

North & Fales, for plaintiff.

CUTTING, J. — It has been settled in *Colburn* v. *Averill*, 30 Maine, 310 that, "where a person, not the payee, writes his name in blank upon the back of a negotiable promissory note, at the time of its inception, it is to be regarded as done for the same consideration with the expressed contract, and he will be holden as an original promisor." And, "if made without date, it is presumed to have been made at the inception of the note."

According to that decision, supported by the numerous authorities there cited, the defendants, Gage and Baker, are jointly liable as original promisors with Jones, unless the words "without demand or notice," written over their signatures, be an exception to the general and well established rule.

A similar question was presented to the Supreme Court

of New York, *Luqueer* v. *Prosser*, 1 Hill, 256, and again to the Court of Errors, 4 Hill, 420, where it was decided, that such language did not change the principle. These two cases are cited by Judge Story, and approved by being incorporated into the text in his Commentaries on the law of Promissory Notes, § 468. *Defendants defaulted.*

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

HAM *versus* SAWYER.

By c. 124, § 8, of Acts of 1821, and c. 5, § 24, of R. S., the bounds of townships were to remain as before granted, settled and established.

The boundaries of towns are created, and may be changed by Legislative enactments, but no corporate acts by the inhabitants thereof can alter them.

No *prescriptive* rights can be claimed *against* existing statutes.

The exercise of municipal authority by one town over a portion of the territory of another, and the acquiescence of the latter for a period of more than twenty years, will not authorize the former to levy and collect taxes upon persons dwelling in *such territory*.

All that part of the town of Monmouth which was excluded therefrom by the new western boundary established by the Act of March 3, 1809, was included in, and became a part of the town of Leeds.

Of the damages in an action of trespass.

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

Trespass for taking the plaintiff's horse. The defendant justified as collector of taxes of the town of Monmouth for the year 1852, and a sale thereof under a warrant from the assessors of that town for that year. A tax was committed to defendant to collect assessed on the plaintiff's poll, real and personal estate to the amount of $10,94.

After the evidence was introduced, the case was taken from the jury, by consent, to be determined by the full Court, they having power to draw such inferences as a jury might from the testimony, and to enter such judgment as the law and justice may require.

From the evidence reported and the admissions of the

parties, the Court found that the plaintiff dwelt, at the time the tax was assessed, on territory, which at the time of the incorporation of Monmouth, was embraced within that town; that in March, 1809, the Legislature changed the western line of that town, whereby the territory above referred to became a part of the town of Leeds.

It appeared that Monmouth had claimed and exercised jurisdiction over this disputed territory for twenty-five years by taxing property therein, and establishing a school and highway district also; and that persons residing there had paid taxes on their property there, in Monmouth, and when they voted, voted there also. The residents had also been appointed surveyors in said town and discharged the duties as such, and had performed military duty therein.

The plaintiff gave in his valuation to the assessors of Monmouth in 1849, '50, and '51. Since 1850, both Monmouth and Leeds claimed this territory, and in 1852, the plaintiff was taxed in both towns for the same property.

The value of the horse taken by the collector was testified to be $100, another witness said he was passing the plaintiff's house the morning of the sale, when he told him his horse was to be sold, and wanted him to go into good hands. The witness bid him off for $50, and subsequently let the plaintiff have him for the same, but he did not purchase for him.

May, for defendant, maintained, 1st, that the true construction of the Act of March, 1809, left the disputed territory in Monmouth. The object of that Act was only to straighten the line between *Monmouth and Leeds.* That part of the western line between Monmouth and Greene is not touched.

2. The whole subsequent conduct of the towns for forty years shows this construction to be the true one. It had been acquiesced in by all parties. 15 Pick. 44.

3. The actual exercise of municipal jurisdiction over this territory by the town of Monmouth for more than twenty years makes that jurisdiction rightful just in the same way

and on the same principle that a disseizin for twenty years gives title to the soil.

4. Such jurisdiction actually exercised uninterruptedly for twenty years is sufficient to justify taxation and the enforcement of a tax. *Hathorn* v. *Haines*, 1 Greenl. 238.

5. We say the facts show that the plaintiff consented to be taxed and so the officer is not a trespasser, for what is done by consent, express or implied, is not a trespass.

6. If defendant is liable it is only for the actual damages. The plaintiff upon the facts has suffered only about $11.

Bradbury, for plaintiff.

1. The true construction of the Act requires its extension to the south line of Monmouth. The monument is named and there it was to terminate.

2. The right to tax is derived from the statute and cannot be *enlarged*, or *acquired* by the exercise of the power. The assumption of that power by Monmouth in regard to the plaintiff and its continuance for a series of years can confer no authority to continue the wrong. Towns exist only at the pleasure of the State. *Hooper* v. *Emery*, 14 Maine, 375; *Gorham* v. *Springfield*, 21 Maine, 58; *Rumford* v. *Wood*, 13 Mass. 193; R. S., c. 14, §§ 22, 23.

3. The bounds of Monmouth were established in 1809, and remain so to this day. Laws of 1821, c. 114, § 8. R. S., c. 5, § 24.

4. The towns cannot change their boundaries. *Freeman* v. *Kenney*, 15 Pick. 44.

5. Jurisdiction cannot be acquired by *user*, nor lost by *non-user*.

6. The defendant had no lawful authority to take the property, his warrant being void.

TENNEY, J. — By an Act of the Legislature of Massachusetts passed on March 3d, 1809, entitled an Act to rectify and establish the line between the towns of Monmouth and Leeds in the county of Kennebec, it was provided, that the line between those towns shall hereafter be as follows, viz;

beginning at a stake and stones about fifteen rods west of the Bog stream, so called; thence running south 9 degrees west to a beech tree on the south line of Monmouth.

It is admitted by the parties that prior to the passage of the Act referred to, the line between the territory of Monmouth and of Leeds was west of the line established by that Act, and was the west line of the Plymouth patent, was a crooked, irregular line, and included in Monmouth the disputed territory; and if the west line of Monmouth is to be run straight to the south line thereof, it will exclude from that town the plaintiff's land.

The town of Monmouth was incorporated on January 20th, 1792, and is bounded thus, "beginning at the southeasterly corner of Winthrop on the west side of Cobbossecontee great pond; thence running south southwest six miles to a heap of stones erected for a corner; thence west northwest about five miles to the westerly line of the Plymouth patent; thence northerly on the westerly line of said patent about six miles, until it intersects a line running west northwest from the southeasterly corner of Winthrop aforesaid; thence east southeast by the southerly line of Winthrop to the first mentioned bounds."

Leeds was incorporated on February 16th, 1801, and by the Act of incorporation is bounded on the town of Monmouth from the northeast corner thereof to the town of Greene. The northerly line of the town of Greene at its eastern extremity was northerly of the south line of Monmouth by the original Acts of incorporation, the town of Greene having been incorporated on June 18th, 1788.

The part of the town of Monmouth which by the Act of March 3d, 1809, was excluded therefrom, and was south of the south line of Leeds became a part of the latter, and not of the town of Greene.

By the Act of March 3d, 1809, the line thereby established was a straight line. Under that Act, and the admissions in this case, the farm of the plaintiff became a part of the town of Leeds.

It is however contended that the town of Monmouth in its corporate capacity, and the officers thereof, having extended their municipal authority over the territory in question for more than twenty years, and this authority having been acquiesced in by the town of Leeds in their corporate capacity, and by the inhabitants residing on this territory, it has established the legal right of Monmouth to treat it as a part of that town, and the inhabitants thereon as its citizens.

The boundaries of towns are created by Acts of the Legislature. The inhabitants thereof cannot by direct corporate Acts change those boundaries, and it is difficult to see in what manner the Acts and the acquiescence referred to, can produce a more effectual alteration.

By the statutes of 1821, c. 114, § 8, the bounds of townships were to remain as before granted, settled and established, and in R. S., c. 5, § 24, is a similar provision.

The Legislature has authority to change the boundaries of towns at pleasure. And the provisions referred to in the statutes of 1821, and in the Revised Statutes, have prevented the acquisition by Monmouth of the prescriptive rights contended for, if such could by possibility be in any manner obtained.

The plaintiff not being a subject of taxation in the town of Monmouth for his poll, his real estate or personal property, the tax was unauthorized and void. And the taking of his property was a trespass in the defendant.

The only criterion for the damages is the value of the property when it was taken. This is shwon to have been the sum of $100. But it appears that a balance of the avails of the sale of the horse remained, after the appropriation of a sum sufficient to discharge the tax against the plaintiff and costs, which was paid to him. This balance should be deducted from the value of the property taken.

Defendant defaulted.

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

KENDRICK, *Treasurer, versus* CROWELL *& al.*

A promissory note given to their treasurer, for the penalties belonging to a town upon conviction of the defendant, for a violation of § 6, c. 205 of the Acts of 1846, is for an illegal consideration and void.

ON EXCEPTIONS, RICE, J., presiding.

ASSUMPSIT on a note of hand for $174,50, dated March 29, 1850.

The general issue was pleaded.

Crowell, one of the defendants, was arrested and tried on twenty-one warrants, before a magistrate, for violations of "an Act to restrict the sale of intoxicating drinks," approved August 16, 1846, and was convicted and ordered to pay a fine and the costs on each complaint. From these judgments an appeal was entered and allowed.

Afterwards, the complainants and one of the selectmen of Gardiner, and said Crowell, (the offences having been committed in Gardiner,) met and agreed to settle said prosecutions. Crowell agreed to pay and did pay the fines and costs thus: — to the complainants, half of the fines, the costs to the magistrates; and the half of said penalties belonging to Gardiner, in and by the note in suit, all agreeing thereto. Crowell furnished sureties on the note.

The Judge instructed the jury that the note in suit was without a legal consideration and void, and this action could not be supported.

Verdict for defendants, and plaintiff excepted.

Danforth and *Woods*, in support of the exceptions, cited *Linscott* v. *Trask*, 35 Maine, 150; 4 Black. Com. 133; *Commonwealth* v. *Pease*, 16 Mass. 91; *Ward* v. *Allen*, 2 Met. 53.

The cases of *Jones* v. *Rice*, 18 Pick. 440; *Kingsbury* v. *Ellis & al.*, 4 Cush. 578, differed (as they said) materially from the case at bar.

Evans, contra. The note is in violation of public policy. It has defeated the object of the law. It cannot be consid-

ered as payment of a debt. It is an attempt to remit a *penalty*, for which there is no authority.

The statutes of the State, R. S., c. 175, § 1, provide in what cases, and what only, the note of a convict may be taken. It excludes all other cases.

All fines which may be imposed for offences against the statutes, must be paid to the magistrate or to the Court by whom they are inflicted, or to the officer.

They are authorized to receive them, and directed how to appropriate them. Nobody else can receive the amount, or discharge the delinquent. R. S., c. 152, § 18, as to Clerks; R. S., c. 152, § 22, as to Justices; R. S., c. 152, § 19, as to Officers.

CUTTING, J. — Assuming the signatures to the note to have been genuine, the plaintiff has made out a *prima facie* case, and is entitled to recover, unless the defendants have succeeded in establishing a legal defence.

It appears, that the note was made payable to the plaintiff in his capacity as treasurer of the town of Gardiner for its proportion of certain forfeitures either incurred or anticipated under the statute of 1846, c. 205, § 6; in which settlement, one of the selectmen assumed to act for the town, and the principal question is, whether such note is void for want of legal consideration.

In *Kingsbury* v. *Ellis*, 4 Cush. 578, it was held that a note taken by a *magistrate* under similar circumstances was void for such cause. Perhaps the reason assigned in that case, why the magistrate, being a judicial officer, was prohibited from receiving the note in discharge of the judgments, may not be applicable here. But the Court go farther and say, "a more important ground of defence is, that the consideration was illegal, being in violation of a public duty. The object of the law is to punish its violation; and the mode specially provided is by the actual payment of a fine, to be enforced by immediate imprisonment until its payment," &c. The complainant has as much of a public duty

to perform in his sphere as the magistrate in his, and he receives, as the statute remuneration, "one half the forfeiture *so recovered*." Neither the complainant nor the town can divide the judgment or in any way interfere with it, except when legally converted into money.

The object of our statute was not to raise a public revenue, or to put money into the pockets of private individuals; but was what its title imports, "An Act to restrict the sale of intoxicating drinks." And how to restrict? Certainly not by permitting persons to violate the law on credit, or to transact such business on borrowed capital. Such would be the result, if the note in suit were held to be valid. If a party interested have the right to take a note with surety, he has also an equal right to receive it without security; and let it once be understood that such judgments or claims can be so easily and readily satisfied, and the law to a large class of traffickers in intoxicating drinks would be shorn of half its terrors. In this case, as between the parties, "*portior est conditio defendentis.*"

There being no controversy as to the evidence the instructions of the Judge to the jury were correct, and the exceptions must be overruled.

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

CHASE *versus* JENNINGS.

A juror, whose brother is joined in marriage with a sister of one of the parties, is not disqualified to sit in the trial.

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

SLANDER.

After a verdict for plaintiff for nominal damages, a motion was made by his counsel to set it aside, because it was discovered that one of the jurors was disqualified by law to sit in the trial.

The brother of one of the jurors was the husband of a sister of the defendant.

The motion was denied, and exceptions taken.

Bradbury & Morrill, in support of the exceptions.

May, contra.

TENNEY, J.—The husband and wife, being considered in law as one, when the marriage took place between Peleg Hains and the sister of the defendant, he held the same relationship by affinity to her relatives, that she did; and she stood in the same relation to his relatives. But those sustaining a relationship to *him,* would not hold the same to her relatives; and those related to *her* would not hold the same relation to his relatives. 1 Bouvier, (5th ed.) 80. Under R. S., c. 1, § 3, rule 22, there was no disqualifying interest in the juror. *Exceptions overruled.*

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

HASSAN *versus* DOE.

Aiding the escape of a prisoner from jail, confined for a criminal offence, is punishable in the State prison, or jail, according to the nature of the crime for which he was imprisoned.

A reward promised by a jailer for information whereby a prisoner, who had escaped from his custody, might be recaptured, cannot be recovered by one who gave the required information, but *assisted in the escape,* and withheld this fact at the time the reward was offered.

ON EXCEPTIONS, RICE, J., presiding.

ASSUMPSIT to recover a reward for giving information where Horace Bonney, a prisoner escaped from the jail in Augusta, of which defendant was keeper, might be found.

Evidence was introduced tending to show that the plaintiff did give the information and was to be paid for the same. It also appeared that a long time before the escape of Bonney, the plaintiff was employed by one Varney and one Breed

to go to Augusta and procure the situation of turnkey at the jail, for the purpose of letting Bonney out, for which he was to be paid $300. He obtained the situation, let Bonney out of jail, but his employers refused to pay for the service.

The Court instructed the jury that if they were satisfied from the evidence, that the plaintiff, with the design and for the purpose of procuring the escape of Bonney from jail, did solicit and obtain from the defendant the employment and trust of turnkey, and while in the defendant's employment in that confidential capacity, and in pursuance of his original design and purpose, he procured the escape of Bonney, and concealed those facts from Mr. Doe, it would be such a fraud upon him as would vitiate any promise for a reward, if any such had been made by the defendant to the plaintiff, for giving information by which Bonney might be recaptured.

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

Lancaster & Baker, in support of the exceptions.

The real question is, whether a *particeps criminis* can recover a reward offered for the apprehension of the perpetrators of the crime? Or whether all accomplices are by legal implication excluded? Now we suppose, that, primarily, rewards are offered to induce such to disclose what they know; they are offered to such as have important knowledge on the subject, but none can be presumed to have this knowledge except those who have in some way participated in the commission of the crime. It is to such then that rewards must be presumed to be offered. Again, if all accomplices are to be excluded, the advertisements offering rewards should except them, but they never do; would not public policy require such a construction of these contracts as would give any one the benefit of them who would give the information wanted? If a different rule is to obtain, it will be in vain to offer rewards for the apprehension of criminals in a great majority of cases.

Vose, contra.

TENNEY, J. — The plaintiff claims a reward, which the defendant, who was the keeper of the jail in Augusta, offered for the purpose of obtaining information, in what place one Horace Bonney, who had escaped from his custody, could be found, he having given the information sought.

Under the instructions of the Court, the jury found, that the plaintiff, with the design and for the purpose of procuring the escape of the prisoner from jail, did solicit and obtain from the defendant, the employment and trust of a turnkey therein, and while so employed, and in pursuance of his original design and purpose, did liberate the prisoner, and concealed these facts from the defendant.

The prisoner obtained his liberty by the criminal act of the plaintiff. R. S., c. 158, § 25. The policy of the law forbids that he shall be compensated for that, which his own crime has made necessary. And it equally protects the defendant from liability, when he was induced to offer the reward to the plaintiff, who had caused the escape, and had withheld this fact from the defendant, when the reward was offered. *Exceptions overruled.*

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

WILLIAMS, *Judge of Probate, versus* MORTON *& al.*

A sale and conveyance of the real estate of his wards by their guardian, under a license of the Probate Court, without complying with the requirement of the statute as to giving a *bond*, will vest no title in the grantee; and the money paid for such a deed may be recovered back in an action upon its covenants, or for money had and received.

The bond given by a guardian on his appointment for the faithful performance of his duties, is no security for the sale and avails of real estate of his wards sold under license, nor will the *omission* to give a bond under *such* license be a breach of the conditions of his *general bond.*

The condition in a guardian's bond, that he shall render an account so often as required by the Judge of Probate, is not broken, where he has no personal estate of his wards, and had seasonably returned an inventory of their real estate, although he may have sold such real estate under a license, and been cited and neglected to render an account.

On Facts agreed.

Debt on a bond given by defendants, October 25, 1847, on the appointment of one of them as the guardian of the minor children of William Lewis, deceased, the other signed as surety.

The inventory was duly returned on the first Monday of November, 1847, but contained no personal property. It described only a small piece of real estate with two small dwellinghouses thereon, appraised at $350.

On the first Monday of November, 1847, the guardian petitioned the Probate Court for leave to accept immediately an advantageous offer he had for said real estate, and after legal notice on the petition, the prayer thereof, on the last Monday of the same November, was granted to sell, either with or without public notice, at his discretion, by acceptance of said offer; and to observe all the directions of the law in such cases.

In December of that year, the guardian made oath that he would faithfully execute, &c., but gave no bond under the said license.

The offer mentioned in the petition was made by the K. & P. R. R. Co., and on Dec. 6, 1847, said guardian accepted it and deeded said houses and lot to them for $400, which was paid.

In April, 1850, no account having been settled by the guardian, one of his wards and the creditor of another petitioned the Judge of Probate to cite him in to settle an account, give a new bond, or be removed.

He was cited, but did not appear, and was removed on June 10, 1850, and another guardian appointed in his place, who gave the required bond.

No account has at any time been settled by said Morton.

The Court is to render such judgment as the facts and the law will authorize.

Emmons, for defendants, maintained the following positions: —

1. The sale and conveyance by the guardian is void. R. S., c. 112, § 5; 7 Mass. 488; 5 Pick. 480; 2 Fairf. 251.

2. The title to the land is still in the minors. R. S., c. 81, § 5. The R. R. Co. could not take the houses without consent of the owners. A guardian is not the owner. He could give no consent without license duly obtained, and properly executed. The company have the right to recover back the money paid.

3. But if otherwise, neither the guardian nor his surety are liable on the bond in suit. R. S., c. 112, § 1, case 6th; 1 Met. 321. The guardian is not liable to pay this money over to the wards. 11 Mass. 192; 1 Greenl. 142.

4. The law of Feb. 1843, does not authorize a recovery on the bond in suit.

Lancaster & Baker, for plaintiff.

This bond is given for the faithful performance of the duties of the guardian, among which the law requires him, —

1st. To render an account as often as required by the Judge: —

2d. To pay over all moneys remaining in his hands.

He has received $400, and it is now in his hands, and he refuses to account. This is a violation of his bond. But it is said the title to the land did not pass, and could not without consent of the owner. The owners being minors, the defendant was their legal representative, and he having obtained the authority of the Judge of Probate, he *consented* in writing, and if the instrument is not valid as a *deed*, it is evidence of *consent*.

By § 7, of the same statute, the guardian of a minor whose land is taken, "may agree and settle with the corporation for all damages or claims by reason of the taking of such real estate, and may give valid releases and discharges therefor." This evidently means by force of his guardianship simply, without any authority from the Probate Court. If, therefore, all the authority the guardian had from the Court was void, he had a right to settle the damages and give discharges. This the guardian did, and his deed, although it may not convey a perfect title as a deed, is good as a settle-

ment and discharge of the damages for the taking, and as such is evidence of *consent.*

In one or the other of these modes the *consent* of the owners has been given. The company has acquired its easement, paid to the defendant the damages, and received a valid release therefor, and they cannot reclaim the money; but defendant rightfully received it, and now holds it for the wards, and ought to pay it over in this suit.

Even if the company have acquired no right at all under this deed, still they voluntarily paid this money, knowing all the facts, under a mistake of the *law,* if any thing, and therefore they cannot recover it back.

We therefore contend that the plaintiff has a right to recover in this suit, and for the $400 and interest.

TENNEY, J. — In the sale of real estate under a license from the Court authorized to grant it, "the requisites provided by statute, of bonds to account, of a previous oath, of advertisements, and of a public sale, are important to the interests of all concerned in the estate to be conveyed, as heirs at law, creditors and others."

"The rights of persons thus connected with the estate conveyed, and whose interests are affected by the authority to sell, are regarded by these provisions; and they, and any claiming under them, are not concluded by the exercise of the authority and license to sell in derogation of their rights, unless every essential requisite and direction of law has been complied with." *Knox & al.* v. *Jenks,* 7 Mass. 488.

In an attempted sale, similar to the one now under consideration, of *Williams* v. *Reed & Trustee,* 5 Pick. 480, where there was an omission to give a bond, and take the oath after the license to make the sale, the Court say, "there being no bond and no oath, the sale is void, or at least voidable, so that the parties to it are at liberty to vacate it, and consider it annulled." — The fee of the land remains in the wards, it not having passed from them by a sale authorized by the statute.

In *Moody* v. *Moody*, 2 Fairf. 247, a sale of real estate by an administrator was held void as against heirs, by reason of his neglect to give the bond required by law.

If the title of the heirs has not passed from them to the railroad company, and vested in the latter, the money has been paid without consideration, and it can be recovered back, of the guardian, upon his covenants in the deed, or in an action for money had and received by him for their benefit.

But if the guardian and the railroad company were disposed to treat the sale as valid, and the former had failed to account in any manner for the money received, as the consideration of the deed, are the defendants liable upon the bond in suit, for the omission?

Upon a guardian's appointment, he shall give bond with sufficient surety or sureties, conditioned for the faithful discharge of his trust, — To render a true and perfect inventory of the estate, &c. of his wards, — To render a just and true account of his guardianship as often as, and whenever by law required, — At the expiration of his trust to pay and deliver over all moneys, &c. on a final and just settlement of his accounts, &c. R. S., c. 110, § 15.

By the statute of Massachusetts, c. 38, § 6, vol. 1, page 136, of the statutes, guardians are required to give bond to the Judge of Probate in a reasonable sum with sufficient sureties, for the faithful discharge of the trust reposed in them, and more especially for the rendering a just and true account of their guardianship, when and so often, as they shall be thereunto required. This is substantially the same as the requirement in the R. S. referred to, excepting the last condition in the latter, which is immaterial for the present inquiry.

In the license provided for the sale of the real estate of persons under guardianship, that the avails thereof may be put out, and secured to them on interest, a bond is required of the person licensed with surety or sureties, conditioned for the observance of the rules and directions of law in the

sale of real estate by executors, &c. and to account for and make payment of the proceeds agreeably to the rules of law. Mass. Statutes of 1783, c. 32, § 5, page 121. This provision is similar to that contained in R. S. of this State, c. 112, § 5.

In *Lyman* v. *Conkey*, 1 Met. 317, the Court in Massachusetts have given a construction to the provisions of the statutes of 1783, c. 38, § 6, and of c. 32, § 5, and they say, "Whenever the object is to dispose of real estate of the ward, to raise a fund to stand in lieu of the real estate for the future use of the ward, or of any other person, who would have been entitled to the real estate, it is deemed a separate, special trust, for the due execution of which, a separate security is required, as a condition precedent to the validity of the sale; and therefore, the Court are of the opinion, that the accounting for the proceeds of the sale, made under such special license, to sell for the benefit of the ward, is not one of the general duties of guardianship for the performance of which, the sureties on the original guardianship bond are responsible."

It could not have been designed by the Legislature, that a bond given for the faithful discharge of the duties of guardian, which by his letters of guardianship he is bound to perform, should be the security for the observance of the provisions, in a sale of real estate, and the proper application of the proceeds, when the sale was under the authority of a special license only, and a special bond is required, that the duties to be done under that license, as the law prescribes, shall be faithfully performed. The proceedings under the license, as required by the statute, are not strictly speaking guardianship duties; but as matter of convenience, the change of the real estate of the ward into money, is to be done by him, who had the charge of the former, and who is to see that the latter is properly secured upon interest. It is very clear, that a breach of the special bond, under a license, does not constitute a breach of the general bond of guardianship; and consequently an omission to give the special bond, violates none of the conditions in the other.

It is contended, that the deed of the guardian is valid as a release under R. S., c. 81, § 7, and that the money received of the corporation may be treated as the consideration therefor.

The land attempted to be sold, had upon it two dwelling-houses, and by § 5, of the chapter referred to, houses cannot be taken without consent of the owner. The provision in the 7th section cannot be construed to authorize a guardian to agree with the corporation, to permit it to take dwelling-houses, and to settle the damages therefor; as this authority extends only to those cases, where the corporation *shall take any real estate as aforesaid*, of any minor, &c. referring clearly to § 2, of the same chapter, which gives the power to take real estate with the restriction contained in § 5.

The railroad company, however, in this case must be understood to have intended, what these acts clearly indicate. The case finds, that the corporation made the offer to *purchase* the estate. The consideration of a *transfer* of *title* was paid, there being no fact reported showing that any thing less was intended. The license was to *sell real estate*, and the deed was appropriate for an absolute conveyance.

The real estate being still the property of the minors, in an action upon the covenants in the guardian's deed, that he had pursued the steps to make the deed effectual, a defence, that the license was granted, without proof of any other fact, could not avail.

The provisions in the statutes of 1843, c. 1, cannot be so construed as to give to the plaintiff the right to maintain the action.

It is again insisted, that as one of the conditions of the bond in suit is, to render an account as often as required by the Judge, and as he omitted to do so, on being cited for that purpose, that condition has been broken. The case does not find that the wards were possessed of any property, excepting the real estate attempted to be sold, which was duly and seasonably inventoried. No delinquency was imputable, by reason of having settled no accounts, unless it

be for the omission in reference to the avails of the real estate supposed to have been sold. The bond required by law upon the license to sell, was conditioned, that he should account for the proceeds of the sale according to law. The law required, that the proceeds of the sale should be put out at interest; and when this was done, he had fulfilled his whole duty. It not appearing that any property was in his hands for which he was bound to render an account, the omission to render such, when cited, was not a breach of the general bond of guardianship. *Hudson* v. *Martin*, 34 Maine, 339. *Plaintiff nonsuit.*

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

DOLLOFF *versus* HARTWELL *& al.*

The record of a justice of the peace cannot be impeached by parol testimony.

An appeal from the judgment of a justice, without a recognizance by the party appealing, is nugatory and void.

On motion, such an action will be dismissed, and the costs of Court are recoverable by the party aggrieved.

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

ASSUMPSIT on a note of hand, tried before a justice, and the plaintiff recovered a judgment.

The defendants claimed an appeal and the action was entered in the Supreme Judicial Court and continued.

The record of the justice stated that the defendants appealed, that the plaintiff waived surety, and no recognizance was entered into by the defendants as principals, either in person or by attorney.

At the second term the plaintiff moved that the action be dismissed for want of an appeal.

The defendants objected to the record as untrue and extra-judicial, and offered to prove by witnesses, that the defendants appeared by attorney on the day the appeal was taken, and offered to recognize, and that the record was untrue.

The testimony was excluded, the action dismissed, and defendants excepted.

O. L. Currier, in support of the exceptions.

Kempton, contra.

TENNEY, J. — By the record of the justice of the peace, before whom the action was brought and tried, it appears, that from the judgment for the plaintiff, the defendants claimed an appeal, and sureties were waived; but no recognizance whatever was taken.

The record of the justice cannot be impeached in the mode attempted. *Gammon* v. *Chandler*, 30 Maine, 152. Litigation terminated upon the rendition of judgment in the justice court, which was conclusive between the parties for want of a recognizance. *Hilton* v. *Longley*, 30 Maine, 220.

All controversy having ended before the parties came into this Court, the plaintiff finally prevails, in the matter before it; and is entitled to costs, so far as they have accrued here. *Harris* v. *Hutchins*, 28 Maine, 102.

Exceptions overruled.

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

KNOWLES *versus* ATLANTIC AND ST. LAWRENCE RAILROAD COMPANY.

A bailee without reward is answerable only for *gross negligence.*

But where the bailor knows the habits of the bailee and the place and the manner in which the goods are to be kept, the law presumes his assent that his goods shall be thus treated, and if lost or damaged, he can maintain no action therefor.

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

This action was to recover for the loss of sixteen tons of hay.

It was stipulated that the Court might draw the same inferences from the evidence and admissions as a jury; and

if the defendants are liable in *any form* of declaring, they are to be defaulted; otherwise a nonsuit to be entered.

On July 15, 1851, the plaintiff hired two cars of the A. & K. Railroad Co. at $15 for each car, in which they were to transport his hay from Belgrade to Portland. The last part of the way was over defendants' road, and there was an arrangement between them and the A. & K. R. R., which authorized such a trade.

The plaintiff designed to ship the hay from Portland to Boston, and on the 16th of July it was transported to Portland, and the plaintiff was there and procured one Hamlen to arrange for its shipment to Boston. The cars were then standing on the freight track of the A. & K. Railroad at Portland, loaded with the hay; the plaintiff was notified by defendants that their risk had terminated; that there was the hay in good order, and that then it must be at his risk against any damage.

The track down on defendants' wharf and the one where the cars then stood were the only tracks from which freight could be shipped.

Plaintiff desired that the hay might remain on the cars until shipped, and asked if there was any place he could put it that would be out of their way, where it could remain a day or two. He was told that if it was going by a vessel, it would be best to put it on the wharf, for it would there be out of their way and convenient to ship.

It was in evidence that plaintiff assented that the hay should remain on the cars, and at his risk, till taken away.

The cars were run upon the wharf spoken of, but by whose order did not appear. The next morning the wharf fell and most of the hay was lost.

The wharf gave way from being overloaded with railroad iron which had been deposited there for about two months.

Paine, for defendants.

1. Defendants are not liable as common carriers, because their duty as such terminated two days before the loss. Story on Bailments, 541; 10 Met. 472; 11 Met. 509.

2. After the delivery of the hay at Portland, the defendants became the gratuitous bailees of the hay and responsible only for gross negligence. No such negligence appears. No prudent man would have hesitated to place his hay where this was placed.

3. All risks were assumed by plaintiff, the risk of carelessness alone excepted.

Lancaster & Baker, for plaintiff.

1st. The defendants are liable as common carriers, because the original contract was not completed until the hay was shipped at Portland, or the plaintiff had had a reasonable time to ship it, and a day or two was fixed upon by the parties as reasonable.

2d. They are liable as common carriers under the arrangement in Portland for all risks not comprehended in that arrangement, as that would be in law a hiring of the railroad upon the breastwork and upon the wharf for that particular purpose, for a valuable consideration, the consideration of the freight money for conveying the hay over defendants' road, which included this particular use of the road.

3d. Under the arrangement in Portland the defendants would be liable for a loss resulting from any defect in the wharf or railroad, or from the want of proper care, even if they were not held as common carriers, because it would then stand as a special agreement upon a valuable consideration that plaintiff should have the use of the railroad to aid in shipping the hay, and would imply a promise that the railroad should be safe and sufficient for that purpose. 2 Greenl. Ev. § § 218, 222, and cases cited.

4th. Defendants would also be liable either as wharfingers or warehouse-men, for the same reasons and upon the same grounds named under the last head.

5th. A point not made in the agreement, but we think abundantly supported by the proof, is that defendants would be liable in this case even as gratuitous bailees, for such bailees are liable for gross negligence. Story on Bailments, c. 3, § 213, and to the end of the chapter.

RICE, J. — The evidence in the case, shows that the original contract of the defendants, as common carriers, was fully executed, to the satisfaction of the plaintiff. Howe, the forwarding agent of the railroad company, in his deposition, states, that "I told Mr. Knowles that the hay was now delivered in good order; that that was an end of our contract, and that it must now be at his risk against any damage. He replied that he acknowledged he received it in good order." The defendants therefore, clearly, are not liable as common carriers.

The case provides, that if in the opinion of the Court, the plaintiff is entitled to recover in any form of declaring, the defendants are to be defaulted.

It is contended that they are liable as *bailees*, or *depositaries*. The hay was permitted to remain upon the defendants' cars, for the accommodation of the plaintiff, and at his special request. For this the defendant received no additional compensation, nor consideration. At most, therefore, they were naked bailees, or gratuitous depositaries.

The defendants contend that there was no responsibility upon them; that the whole risk of loss or damage to the hay was assumed by the plaintiff. Mr. Hamlin, who acted as agent for the plaintiff, testified that "Mr. Howe consented that the hay might remain on the cars, (until it could be shipped,) with the understanding that the whole risk should be on Mr. Knowles. Mr. Knowles asked at the time, "is there any risk?" or something like that. I told Mr. Knowles, Howe being present at the time, that there was a risk; that there was a risk in all cases. He asked what risk? I told him there was the risk of fire and water, or rain; and there were other risks which could not then be thought of; there were a thousand risks. After a little more conversation it finally ended in Mr. Knowles assuming the whole risk; * * * that it should remain on the cars and at his risk until it was shipped."

This witness further testified that the cars on which the hay then was, were on the principal track, from which they

must be removed to make room for other trains. The track down on the wharf, and the one where the cars then stood, were the only tracks from which freight could be shipped.

This was on the 16th of July, 1851. On the 18th of the same July, the cars on which the plaintiff's hay was transported, having been removed, but under whose direction does not appear, to the defendants' wharf, were precipitated into the dock, by the breaking down of the wharf, in consequence of its being overloaded with railroad iron. This risk, the plaintiff affirms, was not contemplated by the parties, nor assumed by him, but was the consequence of the gross negligence of the defendants, and therefore they should sustain the loss.

Being a bailee without reward, the defendants are bound to slight diligence only, and are not therefore answerable except for gross neglect. Story on Bailments, § 62; *Foster* v. *Essex Bank*, 17 Mass. 500.

The authorities do not concur in a uniform standard by which to determine what constitutes gross negligence in a gratuitous bailee, or depositary. Such a bailee, who receives goods to keep *gratis*, is under the least responsibility of any species of trustee. If he keeps the goods as he keeps his own, though he keeps his own negligently, he is not answerable for them. He is only answerable for fraud, or that gross neglect which is evidence of fraud. Just. Inst. Lib. 3, tit. 15, § 3; *Coggs* v. *Barnard*, 2 L'd Raymond, 909, 914; *Foster* v. *Essex Bank*, 17 Mass. 500; 2 Kent's Com. 561, 562.

Judge STORY, in his work on Bailments, § 64, says, "The depositary is bound to slight diligence only; and the measure of that diligence is that degree of diligence, which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractly considered, has no reference to the particular character of an individual; but it looks to the general conduct and character of a whole class of persons; and so Sir William Jones has intimated on some occasions." He

cites Jones on Bailments, 82, 83; *Tompkins* v. *Saltmarsh*, 14 Serg. & Rawle, 275; *Doorman* v. *Jenkins*, 2 Adol. & Ellis, 256.

Both of the above rules, which, on a strict analysis, will not be found in any essential point dissimilar, are subject, under some circumstances, to modification. Thus when the bailor or depositor not only knows the general character and habits of the bailee or depositary, but the place where and the manner in which the goods deposited are to be kept by him, he must be presumed to assent, in advance, that his goods shall be thus treated; and if under such circumstances they are damaged or lost, it is by reason of his own fault or folly. He should not have entrusted them with such a depositary to be kept in such a manner and place.

Applying these principles to the case under consideration, and whatever view we may take of the extent of the plaintiff's liability by reason of his special contract, the result cannot be doubtful. That it was the expectation of both parties that the hay was to be shipped from the defendants' wharf, is very apparent. That wharf was open to the inspection of the world. The plaintiff had the same opportunity to observe its condition as the defendants. The iron by which it was ultimately carried down had been deposited upon it months before. No additional incumbrance appears to have been placed upon the wharf by the defendants after the arrival of the hay, before it finally broke down.

In view of all the facts in the case, and independent of the special contract testified to by Mr. Hamlin, we are of opinion that the defendants are not liable. Therefore according to agreement a nonsuit must be entered.

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

WELLINGTON *versus* FULLER.

When a deed is void as to creditors.

Before making a levy notice to appoint an appraiser must be given to *the debtor* or *his attorney*, if living within the county where the land lies.

A return by the officer that the debtor was out of the State, and that he had left a notice at his last and usual place of abode within the county, his family still residing there, confers no authority on the officer to choose an appraiser for him.

Of allowing an officer to amend his return.

Of the construction of a deed.

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

ENTRY.

After the evidence was introduced the cause was taken from the jury, and brought up on *report*, it being agreed that the Court might draw such inferences as a jury might; and if in their opinion the action is maintainable, the tenant is to be defaulted; otherwise the demandant to become nonsuit.

The facts are stated in the opinion.

Bradbury & Morrill, for tenant.

Libby, for demandant.

APPLETON, J. — On August 31, 1848, Charles O'Conner conveyed to Daniel Gifford the demanded premises, by deed duly acknowledged and recorded. It appears from the evidence that Gifford took this deed for the purpose of obtaining security, for what was due him; but that nothing was paid therefor and no security surrendered, or discharged; that O'Conner left without completing his intended arrangements; that the creditors of O'Conner commenced suits and attached his real estate; that they were informed by Gifford that he had no claim upon it; that he acted as appraiser for one of those creditors when extending a levy; and that he commenced a suit upon his claims, obtained judgment and caused a levy to be made upon the real estate embraced in his deed. Under such circumstances the deed to Gifford must be regarded as a voluntary conveyance and void as to creditors.

The demandants claim under a levy in favor of Stephen Pierce against O'Conner. In his return the officer says, "and the within named Charles O'Conner being out of this State, I therefore left at his last and usual place of abode in Albion in said county, his family still residing there, notice in writing of my intention to make this levy more than twelve hours previous to proceeding so to do, and no one appearing legally authorized to choose an appraiser for said O'Conner I therefore appointed William S. Baker as an appraiser for him." By R. S., c. 94, § 4, if O'Conner had an attorney living in the county where the land lay, it was the duty of the officer to have given him notice before proceeding to make his levy. Such must be the construction of this section. The insertion of the words, "or his attorney," which are not found in the Act of 1821, on this subject, must have been for some purpose and with some design. Unless it was the intention of the Legislature, in case of absence of the debtor, that notice should be given the attorney if there was one, these words are utterly without a meaning. In *Roop* v. *Johnson*, 23 Maine, 336, WHITMAN, C. J., in commenting on this section, says, "there can, nevertheless, be no doubt but that it was in contemplation of the Legislature if the debtor did not live in the county and the attorney did, that he should be notified."

It should appear in a levy that the officer has complied with all the provisions of the law. It does not appear but that O'Conner might have had an attorney, who, had he received due notice, would have chosen an appraiser. The levy is, for this cause, defective, but as the rights of the creditors are to be preferred to those of Gifford and of all claiming under him with notice of this defective title, the officer may have leave to amend his return in accordance with the facts.

The levy of Pierce, under which the demandant derives his title, was first in order of time. In the subsequent levy of Gifford, the premises levied upon are described as "all that part of the O'Conner homestead not levied upon by

Stephen Pierce. The deed from O'Conner to Gifford, before referred to, embraces both these tracts. The deed from Pierce to the demandant was dated February 2, 1850, and recorded March 10, 1854. The deed from Gifford to the tenant bears date April 25, 1850, so that at this time the title of the Pierce levy was in the demandant though it had not been recorded. The description in the deed to the tenant, bounds him by the land of the demandant. If so, it was not intended to include it. As Gifford recognized the title of Pierce in his levy, and that his deed of the premises upon which he was extending his execution was void, there is no reason to believe he intended to convey any land not embraced in his levy, and to which by his own admissions he had no title. The tenant has shown no title to the demanded premises. *Defendant defaulted.*

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

KENNEBEC AND PORTLAND RAILROAD COMPANY *versus* WHITE *& al. Administrators.*

In an action where the plaintiff's right to recover rests on the ground that the defendant had violated his special agreement, the refusal to instruct the jury that a committee representing plaintiffs were *competent to complain* of the infraction of the contract is not open to exceptions, inasmuch as it is immaterial to the issue.

Where the defendant was the owner of a steamboat and one half of the boat of plaintiffs, and it was agreed to stock the gross earnings of both boats and divide their proceeds equally with the owners, at the termination of the season, and the defendant received the entire earnings; *Held*, that to entitle plaintiffs to recover in an action on an account annexed for their part of the earnings, they must show that defendant had some earnings of *both* boats, which of right belonged to them.

ON EXCEPTIONS, RICE, J., presiding.

ASSUMPSIT, to recover one half of the net earnings of the steamboat J. D. Pierce, for 1851.

It was in evidence that the plaintiffs purchased one half

of the steamboat in May, 1851, and that the net earnings for that year were $3664,83, which were paid into the hands of defendants' intestate, but $1000 thereof had been paid to plaintiffs.

In defence evidence was introduced tending to show that in 1850, the steamboat Lawrence was run on the Kennebec in opposition to the J. D. Pierce, and that a committee of the board of Directors of the K. & P. R. R., consisting of Reuel Williams and two others, met the owners of the Lawrence in May, 1851, when it was agreed that the plaintiffs should purchase one half of the J. D. Pierce, and the owners of the Lawrence the other half, (she being then owned by one Pinkham,) and to stock her gross earnings with those of the Lawrence, to be equally divided between their respective owners at the close of the season; the directors of the railroad to control as to the fare, the hours she should run, and the trains with which she should connect.

The Pierce was bought accordingly.

The two boats ran awhile alternately, between Augusta and Bath, but their earnings were not enough to pay their expenses, and in June following, it was agreed by all concerned that the Lawrence should be withdrawn and run elsewhere. Captain Kimball was to have the general charge of the Pierce.

One witness stated he had seen a letter among the papers of the intestate, written to him by Reuel Williams, which he once read, but could not state its contents. There was in it some complaint about the running of the Pierce. (Notice had been given to defendants' counsel to produce this letter, but they declined.)

The plaintiffs requested the instruction, that the writing and sending that letter, by the president of the board of railroad directors, was, in the absence of proof to the contrary, to be presumed to be the act of the whole board, or at least, in connection with the opinion of Henry Reed, (as testified to by him) on the same subject, it was to be presumed to be the act of said committee, and as that

committee were authorized to stipulate the terms of the said purchase of the Pierce, they were competent, as such, to complain, in behalf of the whole board, of any violation of those terms; and the Court was desired so to instruct the jury, which was not given; but the Court did instruct the jury that the plaintiffs would be entitled to recover the balance of one half of the net earnings of the Pierce (one thousand dollars having been paid,) unless they were satisfied that there was a contract entered into by them, by which the earnings of the Pierce were to be stocked with the earnings of the Lawrence. If they were satisfied that such a contract had been made, the plaintiffs would still be entitled to half of the earnings of the Pierce, provided they were satisfied that the owners of the Lawrence had violated the terms of that contract; but if such a contract existed, and had not been violated, then the plaintiffs would not be entitled to recover, unless it was made to appear that the defendants' intestate held in his hands funds, the proceeds of the earnings of both boats, which belonged to plaintiffs.

The verdict of the jury was for defendants, and the plaintiffs excepted to the instructions given, and the refusal to give those requested.

J. H. Williams, in support of the exceptions.

1. The instructions *asked for* by plaintiffs, were proper and important, in connection with the second clause of the instructions actually given, as to "violation" of the terms of the bargain as set up by defendants.

2. The third clause of the instructions given was wrong.

Plaintiffs had made out their case and rested. Defendants met it by setting up a *special* bargain, the operation of which they contended went to defeat plaintiffs' case.

The burden was on *them* to show in proof every thing necessary to exhibit such a result, fully and completely. 13 Pick. 77; 2 Denio, 616.

But there was no proof, in fact, of the earnings or losses of the Lawrence. And no presumption existed as to whether she earned or lost, or as to the amount of either loss or gain.

(The counsel also argued a motion, which was filed, to set aside the verdict as against evidence.)

L. M. Morrill, contra.

APPLETON, J. — The plaintiffs and Greenleaf White were the owners of the steamboat J. D. Pierce and this action is brought against the administrators on his estate to recover their share of her earnings.

From the testimony of Henry Reed, one of the directors of the plaintiff corporation, it appears that in 1850, the owners of the Steamboat Lawrence, of which the defendants' intestate was one, had run her in opposition to the J. D. Pierce, then owned by one Pinkham, and had lost money by the competition. The plaintiffs' railroad was so far completed in January, 1851, as to run one train a day from Richmond to Portland. A committee of the board of directors was raised to confer with the owners of the Lawrence, and in May following an arrangement was entered into between them, by which the plaintiffs were to purchase half of the J. D. Pierce and the owners of the Lawrence were to purchase half; and to stock her gross earnings with those of the Lawrence; to be equally divided between the owners of the J. D. Pierce and those of the Lawrence at the close of the season; the fare and hours at which she was to run and the trains she was to hit, to be subject to the wishes of the Railroad Directors. The Pierce was accordingly purchased. The defence is, that she was run under this agreement and that there was no balance due.

The plaintiffs claimed that the Pierce was not run in accordance with their interests and wishes. It seems that Reuel Williams was one of the directors who participated in making the contract referred to; that he was president of the board of directors; and that a letter was written by him to White, making complaints in reference to the running of the J. D. Pierce. The defendants were notified to produce this letter, but did not. All that is known of its contents appears in the testimony of E. G. Hedge, who, on

cross-examination, said that he had once read the letter, that it was some time ago; that he could not state its contents; that there was some complaint about the running of the J. D. Pierce. The counsel for the plaintiffs requested the Court to instruct the jury "that the writing and sending that letter by the president of the board of railroad directors, being also of the committee aforesaid, was, in the absence of proof to the contrary, to be presumed to be the act of the whole board, or at least in connection with the opinion of Henry Reed, (as testified to by him,) on the same subject, it was presumed to be the act of said committee, and as that committee were authorized to stipulate the terms of said purchase, they were competent as such to complain in behalf of the whole board, of any violation of the terms." This instruction was refused.

From the evidence as reported it does not appear that the letter was signed by Mr. Williams officially, or as acting in behalf of the board of directors, or by their direction. From this no inference could justly be drawn that he was acting in accordance with the directions of the committee, when it neither appears that he claimed to be so acting, nor that the committee ever gave him any directions whatsoever.

The specific acts in reference to which complaints were made, are not stated. The rights of the parties are not dependent upon the competency of the directors to complain but rather on the grounds of those complaints, whether well founded or not. The competency of the directors to complain was of no importance. The real issue was as to the violation of the contract by the parties thereto, and in relation to this, the plaintiffs have no just cause of complaint, that the instructions were not sufficiently favorable to them.

If there was such a contract as the defendants set up, the rights of the plaintiffs rest upon it, and their only remedy is in claiming, by due process of law, damages for its violation. The present suit is brought on no such contract, but is rather based on a denial of its existence. If a

suit had been brought on such contract, the burthen would have been on the plaintiffs to show the amount due, before they would have been entitled to recover. This they are none the less bound to do in the present aspect of the case, for they are not to be benefitted by ignoring a contract, which the jury have found to exist.

The instructions given afford no grounds of complaint.

There is no sufficient evidence to satisfy us that the verdict was so much against the weight of the evidence as to show that there was misconduct or intentional error on the part of the jury. *Exceptions overruled.*

Motion denied.

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

MOTLEY *versus* SAWYER.

The husband may lawfully transfer a promissory note to his wife, although the maker is at the time his creditor.

To defeat such a transfer, *inadequacy* of consideration is not sufficient. There must be an *intent* also to defraud existing creditors.

But inadequacy of consideration may be submitted to the jury for the *sole purpose* of ascertaining the *intent* of the parties.

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

ASSUMPSIT on a promissory note given in March, 1847, to Nathaniel Motley in part consideration of a deed of a parcel of real estate.

The defence was a failure of consideration.

There was proof tending to show that Nathaniel Motley was the husband of plaintiff, when the deed was made, and so remained until May, 1850, when she was divorced from him; that he gave to her the note in consideration of her signing the deed of said real estate to defendant, therein relinquishing her right of dower, at or about the time the deed was made, but it was not indorsed until the winter or spring of 1849.

There was evidence tending to prove, that at the time the note was indorsed to plaintiff, he (Motley,) was indebted to the defendant for about $60, due on a note Sawyer had taken of one Dennis, on an agreement with Motley that he would allow the same upon the note in suit.

Evidence was also introduced tending to show that Motley was at that time insolvent, and so remains.

At the time the deed was given there was an attachment upon said estate, a judgment afterwards obtained, and an execution levied upon the same, and the whole set off to satisfy the same, and Sawyer afterwards purchased the title of said levy, to protect his title from Motley. The estate was appraised on the execution at $342,65, and there was evidence that the real value of the property was between that sum and $500.

There was evidence that prior to the indorsement of said note, the plaintiff knew of the insolvency of Nathaniel, of his indebtedness to defendant, and that said estate had been levied upon.

The Judge instructed the jury that this action being in the name of an indorsee of a negotiable promissory note, and the defence being a failure of consideration, the first question to be determined, was, whether the defendant was in such a position as to be entitled to set up this defence.

That if the note was transferred and indorsed to the plaintiff by the original payee before it became due and payable, for an adequate consideration, without notice that there was any defect or infirmity in the note, then the defendant would be precluded from setting up this defence. But if the note was not transferred until after it was due, or if at the time of its transfer the plaintiff had notice that there was a defect in it for want of, or a failure of consideration, or if the transfer was made for the purpose of defeating the creditors of Motley, then the defendant would be let in to make the same defence against the note as if the action had been brought in the name of the original payee.

That an adequate consideration, means a valuable and fair consideration.

That in determining whether this transaction between Motley and the plaintiff was fraudulent or otherwise, they would look at the alleged consideration for the transfer of the note (the relinquishment of dower) as well as the other circumstances attending it, and if in their judgment there was a consideration so inadequate as to satisfy them that the transaction was colorable only — a mere sham — they might for that reason so far set aside the transfer, as to let in the defence set up.

That they would allow the amount of the Dennis note, if they were satisfied that at a time when Motley had the right to control the note in suit, he had agreed with the defendant to indorse said Dennis' note thereon in part payment.

The defendant requested the following instructions:—

1. That if Sawyer was a creditor, at the time of the indorsement and transfer, of Nathaniel Motley, the husband, he could not transfer said note to the plaintiff, she then being his wife.

2. That if they find that Motley had agreed to indorse the Dennis note held by Sawyer, upon the note in suit, before it was indorsed to plaintiff, that would constitute Sawyer a creditor of Motley to the amount due on said Dennis' note; and that if there was an attachment upon the estate deeded, at the date of the deed, which ripened into a judgment, and which judgment was levied upon said land, that would constitute an incumbrance on said estate, and the covenants of said deed against incumbrances would be broken, and that would constitute Sawyer a creditor of Motley.

3. That if Motley was insolvent at the time of the transfer of said note, he could not in law transfer and convey said note to his wife without adequate consideration.

4. That an arrangement between Motley and his wife, during coverture, that she should hold said note in consideration of signing said deed, is not an adequate consideration for signing the same.

5. That if the note was not transferred for adequate consideration, and Sawyer was a creditor at the time of the transfer, or that Motley was then insolvent, then Motley could not transfer said note to the plaintiff, she being his wife; that the transfer under such circumstances could not pass the interest and title to the note, so that she could maintain this suit against the defendant.

6. That if the contingent right of dower was of greatly less value than the note, it would not be an adequate consideration, though done in good faith; also that by an adequate consideration the law implies here, a full consideration.

The second and third of the foregoing requests were given, the others were withheld.

A verdict was returned for plaintiff, and the defendant excepted.

Morrill, in support of the exceptions.

1st. *Insolvency* is a disqualifying fact, and renders the husband incompetent to deal with the wife in relation to his estate, under the statute of 1847.

The power given to the married woman to take property in § 1, is declared in § 2, not to be an absolute power; but subject to the proviso "that it was not conveyed by husband, directly or indirectly, without adequate consideration, and so that the creditors of husband might not be defrauded.

Thus, if the husband had creditors, there must not only be *adequate consideration* for the conveyance, but as an additional security it must be done under such circumstances that creditors might not be defrauded. That creditors should not be subjected to the risk of being defrauded.

Any other construction would allow an insolvent husband to arrange with his wife in regard to his estate, to the great embarrassment of his creditors.

2d. Was there proof here of "adequate consideration, and so that the creditors might not thereby be defrauded?"

The legitimate tendency and inevitable effect of the transaction was to defraud the creditors of the husband; i. e., to

deprive the creditors of their rights in his property; their right to have their pay out of it.

Motley was Sawyer's debtor; his debtor on his covenants for the land for which the note was given.

There was an attachment on the land, by which Sawyer lost his title. That attachment was as much an incumbrance as an inchoate right of dower would have been, and this has been settled to have been an incumbrance.

The consideration for the note had failed by the incumbrance. Sawyer had a right to have damages assessed on Motley's covenants, and had a right to have that note held to meet those damages.

Any arrangement between husband and wife, which deprived him of that right, was defrauding him, in the sense of this statute; especially as the wife had knowledge of the facts.

3d. But adequate consideration was not paid for the note. Can the release of such right be regarded as adequate consideration? The right of dower, the husband being alive, is a mere contingent right, a possibility of dower.

But the jury was not permitted to consider whether there was adequate consideration. See 6th request.

And the Court expressly put the transfer on the ground that inadequacy of consideration would not invalidate the act, unless the consideration was so inadequate as to satisfy them that the transaction was colorable only, a mere show.

The defence was good, without regard to the purpose for which the transfer was made, if it appeared it was made without adequate consideration, for it could not have been made under the statute except upon such condition, there being creditors.

The jury should have been told that if consideration was not adequate, equivalent, sufficient, then no matter what the purpose was, there being creditors of the husband, the wife had no capacity to take, without that fact being made to appear, and so the note was never legally transferred.

Evans, contra.

CUTTING, J. — Some time prior to 1849, Nathaniel Motley, then being the plaintiff's husband, conveyed certain real estate to the defendant and received from him, in part consideration, the note now in suit, which was at or about the same time delivered by the husband to his wife to procure her release of dower in the estate so conveyed.

The general instructions given by the presiding Judge, were strictly in accordance with the law regulating the transfer of negotiable paper. The jury have found under those instructions for the plaintiff, and thereby have established these facts, viz; *that* the note was transferred before it was due; *that* at the time of its transfer, the plaintiff had no notice of a failure of consideration; *that* the transfer was not made for the purpose of defrauding creditors, and *that* it was done in good faith, the consideration not being so inadequate as to satisfy them that the transaction was fraudulent.

At common law this transfer would have been unauthorized and void, but it is sustained by the Act of 1847, c. 27, unless as provided in the second section, the note "being the property of the husband was conveyed by him to the wife directly or indirectly without adequate consideration and so that the creditors of the husband might thereby be defrauded."

The first requested instruction, if given, would have come in conflict with the Act of 1847, without some proof to bring the transaction within the proviso.

The fourth request presented a question of fact and was properly withheld.

The fifth request assumes, that if the note was not transferred for an adequate consideration, this action cannot be maintained against the defendant, who was a creditor of the insolvent husband.

We apprehend that the Legislature did not design, that inadequacy of consideration alone should invalidate a transfer, but to do so, it must be accompanied with an intent to defraud existing creditors; or in other words, inadequacy and intent should both combine to render such transfer or sale invalid; otherwise every contract between husband and

wife, though executed in good faith, might be inquired into and passed upon by the jury and set aside, if it should be found that the wife, in the legitimate exercise of her judgment, had demanded and received too liberal a consideration. The wife, like any other individual, possessed of property, is under no legal obligation to part with it except by operation of law, or by her own consent, and for a consideration fixed and determined by herself; otherwise she is deprived of free agency, is placed under guardianship and cannot be such a contracting party as is contemplated by the statute. The plaintiff may have received too much for her right of dower, but she was under no legal obligation to release it. It was an interest secured to her by law, and on which she might rely for support in widowhood and old age, and might reasonably consider it of more value than it would be estimated by a jury. So that the question returns, was the price demanded and received in good faith or was it so received for the purpose of defrauding creditors? If the latter, the transaction would be void, without regard to consideration, by the common law, which in no particular upon this point has been changed by the Act of 1847. And in this case inadequacy of consideration might have properly been submitted to the jury for the purpose of ascertaining the motives of the contracting parties and for no other purpose; but such was not the instruction here requested.

The same remarks are appropriate to the sixth and last request, adding only that it is difficult to perceive how a creditor can be legally defrauded by an act of his debtor, "done in good faith." Under certain circumstances fraud may be inferred from inadequacy of consideration, but such an inference is rebutted by the admission contained in the request.

Exceptions overruled, and
Judgment on the verdict.

TENNEY and APPLETON, J. J., concurred.

SHEPLEY, C. J., did not concur.

NOTE. — Other questions which arose in the case at a former trial, have been decided, and are reported in vol. 34, p. 540.

UNDERWOOD *versus* NORTH WAYNE SCYTHE COMPANY.

In a complaint for flowing land, damages can only be awarded for the effects of the dam described in the complaint.

The damages arising from other dams, although *auxiliary* to the *one* complained of, cannot be considered by the jury.

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

This was a COMPLAINT to recover damage for flowing the complainant's land by a mill-dam.

It contained two counts, but during the charge to the jury, the complainant withdrew the second count.

The remaining count alleged that the respondents "are occupants of certain water-mills, being and standing on their land in Wayne, in the county aforesaid, and on the stream aforesaid, which is not navigable; for the working of which mills, the said company, ever since the said fourteenth day of November, A. D. 1848, and now do, maintain a dam on their land and across said stream, by reason whereof twenty acres, part of the parcel first described, lying on the west side of said stream, and ten acres, &c., ever since said fourteenth day of November, and now are, overflowed, to the yearly damage of seventy-five dollars."

The general issue was pleaded, with a brief statement claiming that no injury was done; that they had a right to flow without any compensation; and also denying the seizin of complainant in the land described.

It was shown that the respondents occupied certain water-mills in Wayne, at the dam across the stream which was maintained to raise the head for working them.

That the dam for that purpose had been kept by them and those under whom they held, for more than forty years, at its present height. In the early part of its erection it was leaky, and in 1838 had been thoroughly repaired, and so kept ever since.

It appeared in evidence, that in 1821, the owners of the said dam and mills erected a dam across the same stream at the outlet of the pond, about one hundred and fifty rods

above the dam at the mills, for the purpose of stopping the water when making repairs on the lower dam. In the upper dam there was an open space in the thread of the stream, eight feet wide, and so remained for about two years when it was enlarged six or eight feet and was not afterwards repaired prior to 1838.

The complainant in 1824, made complaint of the dam at the outlet to the owners of the mills below, and the same was in part removed. In 1838, the dam at the outlet was repaired to stop the water to allow the repair of the lower dam. In the upper dam an open space of twelve feet in width was left and never closed except when repairing below.

In 1849 the respondents built a new dam on their land, about half way between that at the outlet and that at their mills, to enable them to repair the lower dam. In this new one was an open space of twenty-four feet wide which was never closed excepting in time of repairing below.

The respondents contended that the proof should be confined to the dam at the mills; that the other dams had been erected for different purposes; and that no damage from either of the upper dams could be considered in this complaint.

The complainant contended that all the dams had been erected and maintained for the purposes of raising water for working defendants' mills, and inasmuch as he had not been called upon to elect, during the trial, which dam he would rely upon as occasioning the damage, the proof might properly apply to all or either of the dams, and if either or all had caused the damage, such should be considered in this complaint.

The presiding Judge instructed the jury that they would not be confined in their deliberations to the proof relative to the dam at the mills, in ascertaining whether damage had been occasioned by overflowing complainant's land by that dam; but if they should find that the damage was occasion-

ed by the other dams, or by any one of them, as contended for by complainant, their verdict would be for him.

The verdict was for complainant, and respondents excepted.

Morrill, in support of the exceptions.

Paine, contra.

APPLETON J. — This is a complaint under the statute for flowing. The declaration originally contained two counts, but during the progress of the trial, all claim for damages under the second was abandoned.

The first count alleges, that the respondents are the occupants of certain water-mills, being and standing on their land in Wayne, and on a stream in said town; for the working of which mills, said respondents, since the 14th of November, 1848, had maintained *a dam on their land across said stream,* by reason whereof the land of the complainant was flowed.

It appears from the evidence, that there was one dam erected and maintained in Wayne for the working of the defendants' mills, and that this had been in existence for more than forty years. Subsequently, and in 1821, the owners of these mills and the dam, built a dam at the outlet of the pond, and about one hundred and fifty rods above the first mentioned dam for the purpose of stopping the water when making repairs upon the lower dam. In 1849, the dam built in 1821, having gone to decay, another dam midway between the dam at the outlet of the pond and that at the mills was erected to enable them to stop the water from the mills below, while the lower dam was being repaired.

Upon this state of facts, the presiding Judge instructed the jury, that "they would not be confined in their deliberations *to the proof relative to the dam at the mills,* in ascertaining whether damage had been occasioned by the overflowing of the complainant's land by that dam; but if they should find that the damage was occasioned by the

other dams, or by any one of them, as contended for by the complainant, their verdict would be for him."

The declaration, when the cause was submitted to the jury, referred to one dam only. The instructions given related to other dams than that of which complaint was made. The rights of the parties are only to be ascertained from the record. That discloses or should disclose, the grievances suffered and on account of which, damages are awarded. But the instructions permitted the jury to disregard the record, and to render a verdict for injuries resulting from causes in reference to which no complaint had been made. It is no answer to say, that the other dams were auxiliary to the main dam. If so, they were the subject of specific complaint if they were the occasion of any damage to the complainant. *Nelson* v. *Butterfield*, 21 Maine, 220. The judgment in this case would afford no protection against a complaint for injuries arising from other dams. The instructions given were erroneous, and the exceptions must be sustained. *Exceptions sustained and new trial granted.*

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

COUNTY OF SOMERSET.

WEBSTER *versus* HILL.

A levy on real estate, for one dollar more than is authorized by the precept on which it is made, is invalid.

The demandant in a real action, of property in the possession of another, can only recover on the strength of his own title; and not on the weakness of that of the tenant.

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

WRIT OF ENTRY.

The title of the demandant's grantor depended upon the

levy of an execution in his favor, against one Nathaniel D. Richardson, in January, 1846.

That levy, according to the record, was for an excess of $1,05, more than was authorized by the precept and all costs, by virtue of which it was made.

The tenant, at the time of the suing out of plaintiff's writ, had possession, adverse to the demandant, under a recorded title deed, and such title at the time of demandant's levy, appeared by the record to have been in the wife of Nathaniel D. Richardson. Evidence tending to show her inability to pay for property herself, and also her husband's occupation of the land, were produced on the trial.

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

Hutchinson, for tenant.

Webster, pro se.

SHEPLEY, C. J. — The demandant claims title by the levy of an execution in favor of Daniel Beale, jr., against Nath'l D. Richardson, made on January 14, 1846, and duly recorded, and by a conveyance of the same premises from Beale, jr. to himself, made on September 29, 1847, and recorded October 9, 1847.

The tenant claims title by conveyances from William King to Clarissa Richardson, the wife of Nathaniel D. Richardson, made on October 13, 1842, and recorded November 1, 1842. From Clarissa Richardson to Enoch Messer, made on November 21, 1846, and recorded November 4, 1850. From Enoch Messer to the tenant, made on March 24, and recorded on July 14, 1852. From Clarissa Richardson to the tenant made on March 12, and recorded on June 13, 1853.

Upon examination of a copy of the record of the levy it appears to have been made for one dollar at least more than the amount of the debt, costs, interest, fees for executions, and costs of levy. It is therefore invalid.

It is insisted, that the demandant may nevertheless recover; that Beale acquired a seizin by his levy which he conveyed to the demandant; that no one can take advant-

age of the defect in the levy and disprove the demandant's seizin, unless he claims under the debtor.

The tenant appears to have been in possession of the premises, when this action was commenced, under the deed from Enoch Messer duly recorded.

When a person is in possession of land, he may by a possessory action protect it against all, who do not represent a superior title.

When one is not in possession, if he would by a real action obtain possession from an occupant, he must recover upon the strength of his own title; not upon the weakness of that of the tenant. *Demandant nonsuit.*

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

LEISHERNESS *versus* BERRY.

A party, who is not allowed to prove a fact which could have no influence on the determination of the cause, has no ground for exceptions.

A person in possession of logs claiming them as his own, upon which there are lien claims, is liable for their value, if it does not exceed the lien claims.

But for those only will he be liable, which he holds by an *actual*, not a *constructive* possession.

Thus, where the defendant purchased a lot of logs lying in a place distant from him, took a bill of sale and under it obtained possession of a part, and designed to secure the residue; in an action of trespass against him by one having a lien claim upon them; — *Held*, that he was liable for the value of those *only*, which he had *actually* received.

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

TRESPASS. The writ was dated July 20, 1852.

Under a written contract, the plaintiff cut and hauled for J. W. Lary, a large lot of logs in the winter of 1850 and 1851, in the valley of Spider river, Lower Canada. They were landed upon the round pond in this State.

A part of the contract was in these words; "Said Lary does give to said Leisherness a good and perfect lien upon the logs for security for their pay in full for hauling the same."

The plaintiff introduced W. R. Leisherness, who was objected to on account of interest. He assisted to put in teams as one of the contracting parties, and so operated, but after the operation had ended, in the spring of 1851, he gave up to plaintiff all the interest he had therein, in consideration of a discharge from all liability in the matter.

A release was also executed by the plaintiff and delivered to the witness, and he was allowed to testify against the objection of defendant.

Some evidence was given that the logs were not cut into the lengths designated in the contract, but it further appeared that Lary was in the woods frequently during the winter, and directed as to the cutting, and was satisfied with the logs landed.

Evidence was produced, that the defendant stated in August, 1851, that he had traded with William Atkinson for the said logs and had taken a bill of sale of them at $9,50 per M.

The quantity cut and hauled was estimated by plaintiff's witnesses to be about 400 M.; by those called on the other side, much less.

It was in evidence by one witness that he drove a portion of them for defendant in the spring of 1852, that the defendant was afraid that Atkinson would not get them to the Forks, and had engaged another person to drive them with his.

The purchase of Atkinson was made in the fall of 1851. The quantity the defendant had actually received at the time of the commencement of this suit did not distinctly appear, but it was only a part of the logs cut by plaintiff.

The defendant offered in evidence a bill of sale of the logs from Lary to Atkinson, dated Dec. 1850, with proof of their delivery, of which plaintiff had no knowledge; and it was excluded by the Court.

Among the instructions given to the jury, were the following:— *that* if the defendant took a bill of sale of all the logs of Atkinson, hauled by the plaintiff, provided the lien

existed thereon, and before the date of plaintiff's writ, the defendant received considerable portions of the logs by virtue of the bill of sale, and claimed and intended to have all of the logs included in the description of the logs in the bill of sale, and he had the same possession which purchasers are required to have in such property, in order to vest in them the title against all others claiming under the vendor in any way; the jury would be authorized to hold him responsible for such amount, (if the plaintiff was entitled to recover in other respects,) as would be equal to the sum to which the plaintiff was entitled from Lary, and was covered by the lien also, but not to exceed the value of the logs so received by the defendant.

The defendant requested several instructions, some of which were withheld, but it becomes unnecessary to state them.

The verdict was returned for plaintiff. The defendant excepted to the rulings and instructions given.

J. S. Abbott, for the exceptions.

Foster, contra.

CUTTING, J. — The plaintiff claims to be the owner of the logs in controversy, by virtue of a lien created by the contract between himself and G. W. Lary. That the logs were cut and hauled by the plaintiff under the contract, there appears to be sufficient evidence, and the testimony introduced by the defendant to show a substitution of a verbal for the written contract, so as to vacate the lien, is wholly insufficient for that purpose.

The plaintiff then traced the logs, or some of them, into the possession of the defendant, who must account for the same to the plaintiff in this action, unless he can show the superior title.

Waterman R. Leisherness, a witness introduced by the plaintiff, was objected to, on account of interest. It appears that he was a member of the firm of William Leisherness & Co., who, as it was originally contemplated, were to be associ-

ated with the plaintiff as a party to the contract, but subsequently refused so to do, and the signatures of the members of that firm are only found on the back of the contract as assignors of that in which they apparently had no interest. If the witness subsequently acquired any interest in the concern *aliunde*, his release to the plaintiff operated to discharge it, and to make him competent to testify.

The defendant attempted to establish title in himself from Lary through one Atkinson, and if such attempt had been successful, it is difficult to perceive how it could have affected the rights of the plaintiff, whose interest was superior to that of Lary, and more especially, if the plaintiff had no knowledge of, and gave no consent to, the transaction.

But the instructions embraced in the general charge to the jury present the question as to the extent of the defendant's liability at the time this action was commenced, or in other words, whether he was liable for more logs than he had then taken into his actual possession, although he claimed and was in diligent pursuit of the whole lot.

In determining what constitutes a sufficient delivery under a bill of sale, in order to vest the property in the vendee as against all other persons claiming in any way under the vendor, the nature of the property to be delivered and its situation at the time are to be considered, whether it be a vessel at sea, logs in a river, or merchandize on land. The delivery may be actual, symbolical or constructive. And it is the reception of property under an actual delivery, that renders the vendee liable to the true owner in an action for the wrongful taking and conversion. It does not appear when the defendant purchased the logs of Atkinson, whether they were in the river or on the shore, in one or in separate lots, and the instructions must be considered as having relation to the logs in controversy.

In *Shurtleff* v. *Willard*, 19 Pick. 210, the Court, in their opinion, use this language; "But the defendant's counsel, while they admit the rule, (a delivery of a part for the whole,) deny its application to chattels scattered as these

were, in different and distant places. They contend that it is limited to the same parcel or mass of goods, as the cargo of a vessel or the stock of goods in a particular store or place. But we know of no such limitation. It would nearly destroy the utility of the rule and essentially embarrass and obstruct constructive deliveries."

So, in *Boynton* v. *Veazie*, 24 Maine, 286, it was held, that the delivery of a raft of boards, in the dock at Bangor, constituted a sufficient constructive delivery of all the logs of the same mark included in the bill of sale, and said to be in the boom at Oldtown.

According to this well established rule of law, the defendant might have a perfect title to the logs as against his vendor and all others in any way claiming under him, although he might never have taken possession of the larger portion except by construction, and was according to the instructions a trespasser *by construction.*

Without doubt, the defendant, at the time he took his bill of sale, designed to purchase all the lien logs, and intended to take actual possession of the same as fast as practicable, but suppose with all due diligence, he had not, and could not, receive into his actual possession more of the logs than had been run to him at the date of the writ, they might have been taken by other persons, perhaps by the plaintiff himself; and notwithstanding, the instructions would make him accountable for the whole, and thus render a person liable as a trespasser, when in fact the proof shows that he only entertained the design to commit a trespass. But in this case there was not even such an intention, the defendant took the bill of sale with the full belief that the vendor had a perfect title, and if, under the circumstances, he is made to pay for those logs actually delivered to him, or which came into his actual possession, he would satisfy all reasonable requirements of the law.

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

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

JACKSON *versus* NASON.

A judgment, after the lapse of twenty years, is supposed to be satisfied by presumption of law.

If that presumption is attempted to be overcome by evidence of the continued insolvency of the judgment debtor, from the fact, that soon after its recovery he failed in business, no legal inference will arise that his insolvency continued afterwards.

If the creditor in an execution would revive a judgment, once satisfied by levy on real estate, it must be shown by *legal proof* that the levy was invalid.

For this purpose, *office copies* of deeds, purporting to show that the title of the land was not in the judgment debtor at the time of the levy, are not admissible.

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

DEBT on a judgment. Plea, *nul tiel record*, and brief statement, that the cause of action did not accrue within twenty years; and that it was paid and satisfied more than twenty years before the commencement of plaintiff's writ, which was dated on March 4, 1852.

The plaintiff sought by this suit, to revive so much of a judgment recovered in 1826, as purported to be satisfied by a levy made on land in May, 1826.

That judgment was recovered against William Kelsey, Abraham Nason and Robert Thompson, jr. Thompson died some years before this present suit, and since it was commenced, the death of Kelsey had also been suggested.

A small part of the judgment did not appear by the record to have been satisfied. The plaintiff, at the trial, abandoned all claim for *such balance*, and claimed to recover that which appeared to have been paid, upon the ground that nothing passed by the levy.

The plaintiff showed, that a part of the land levied on had since been in the occupation of John Butler, 2d, and part of it in the occupation of Daniel Hilt.

He also introduced copies of two judgments, for costs against the plaintiff, by John Butler, 2d, and Daniel Hilt, rendered on nonsuit at Sept. term in Lincoln, in 1846, which

suits were commenced by plaintiff in 1840, for the recovery of land described in the writs like that in plaintiff's levy.

He also showed by the deposition of J. Bulfinch, Esq., who was counsel for Butler and Hilt, in the suits Jackson against them; *that* Jackson was unable in those suits to show any title to the land sued for, and that he, the counsel for the said defendants, showed at those trials that the plaintiff took nothing by his levy on the land as the property of Robert Thompson; and that it appeared in evidence, that Amos Barrett, who formerly owned the land levied on, never conveyed it to Thompson, for whose land it was taken.

By the deposition of D. F. Harding, Esq., it appeared that the defendants in the original judgment were in company, and failed in 1825; that Thompson was considered poor from the time of that failure to his death, which was about 1850. Kelsey remained insolvent, and emigrated to Illinois, and was reported to have there died a few years ago; that Nason moved away to Hampden, whose condition as to property was unknown to the witness; that the land described in the return was supposed to be the property of Robert Thompson, but it turned out otherwise; and that the plaintiff never occupied it or any one under him.

From Amos Barrett's deposition, it appeared that Amos Barrett, deceased, had not given a deed to Thompson, one of the judgment debtors, as had been supposed; that it was expected that a deed could have been proved, but it was proved that the deed was never delivered.

The plaintiff produced another deposition from Daniel Hilt to the same effect.

The plaintiff also produced and read *office copies* of the following deeds: — Amos Barrett to George Bowley, dated August 6, 1825, and recorded the next day; George Bowley to Robert Thompson, jr., dated and recorded May 23, 1827; from said Thompson to Gorham Butler, May 1, 1830; and proved by a witness that the land described in the first named deed was the same levied upon by the plaintiff, and that John Butler, 2d, occupied the same which was deeded by

Thompson, jr., to his father, Gorham Butler, who was dead, leaving a wife by name of Almira, and a son by name of Wesley.

He also put in the deed of the same land from Almira and Wesley to John Butler, 2d, dated May 15, 1840, and recorded in 1853.

The defendant specially objected to the reading of the depositions as incompetent to prove the facts stated therein, and also the copies of the deeds as incompetent to prove the facts attempted to be shown.

The cause was taken from the jury and submitted to the whole Court, to decide the facts as a jury might from the evidence which is admissible, there being a general objection by the defendant to all the evidence as well as a *special* objection to a part, the case to be determined as the law and facts may require.

Hutchinson, for defendant.

1. This judgment is fully satisfied by presumption of law. R. S., c. 146, § 25.

2. If the presumption of payment can be removed, it can only be done by clear and conclusive evidence, which is legally admissible. 26 Maine, 330; *Joy* v. *Adams*, 2 Met. 26; 12 Mass. 379; Greenl. Ev. 46, and note.

Office copies of deeds, except in well defined cases touching the realty, are not admissible as proof. Poverty of parties cannot be admitted to control the statute presumption of payment. Judgments of nonsuit in actions to recover possession of real estate cannot, by their own force, operate as proof that the levy on real estate is void for want of title in the judgment debtor.

3. The facts attempted to be proved by the depositions, cannot in this way be established.

Abbott, for plaintiff.

The copy of the judgment introduced makes out the plaintiff's case under the plea. It remains to consider the statute of limitations and payment.

1. No statute of limitations was in force prior to R. S.

which could apply to this case, and as the judgment was rendered before the enactment of R. S. they cannot apply. But if otherwise, then it is believed there is now no statute of limitations applicable. The provision, c. 146, § 25, is merely reiterating the common law doctrine of presumptions. *Brewer* v. *Thomes*, 28 Maine, 81.

2. The question then may be whether the presumption of payment is rebutted by the proofs offered. It is claimed that nothing passed by the levy on the piece of land referred to. It was right and legal in its forms, but from the suits brought, from the deeds and from the testimony of the witness on the stand and from the depositions, it clearly appears that no title was acquired to the parcel of land under consideration by virtue of the levy, and that the plaintiff never derived any benefit from the same, and that the grantees under the sundry conveyances extending back to the deed from Amos Barrett to George Bowley have an indefeasible title to the land. It is clear that there has been no satisfaction by the levy, but a failure.

3. It appears without any conflicting testimony that the three judgment debtors failed in business in 1825. Thompson, one of them, remained insolvent till his death; that Kelsy remained so also and went off to a distant State, where he died; that Nason, the last, moved into Hampden, and it does not appear that he acquired any means to pay this debt. The plaintiff brought suits for possession in 1840, but failed. Thus the presumption of payment is completely rebutted by the insolvency of the debtors, and the mode in which the execution was supposed to have been satisfied is shown to have failed.

But it is believed that no presumption of payment can arise in a case where the very transaction, which constituted the supposed payment, is clearly proved.

As an answer to the limitation Act, and as to the sufficiency of the proofs in this case, *Brewer* v. *Thomes*, before cited, is good authority. Also *Dennie* v. *Eddy*, 22 Pick. 533.

4. The objections "specially" to the depositions and deeds can have no more force, than the general objections. The depositions were taken and filed in all respects legally, upon due notice, and no objection lies to them on those grounds. No objection was made at the time they were taken and none is noted in the depositions, and I can discover now no valid objection to the evidence offered.

RICE, J. — The judgment which the plaintiff now seeks to revive, in part, was recovered in April, 1826, and satisfied by levy (the part sought to be revived,) in May, 1826.

In defence, payment and the statute of limitations, are relied upon.

After the expiration of twenty years, by the provisions of § 25, c. 146, payment or satisfaction of a judgment shall be presumed. But this presumption may be repelled; it is not conclusive. *Brewer* v. *Thomes*, 28 Maine, 81.

For the purpose of repelling the presumption of payment, evidence has been introduced tending to show, that Thompson and Kelsey, who, with the defendant, were original judgment debtors, have been poor and insolvent from 1825, up to the time of their decease, within two or three years. There is, however, nothing in the case, except the failure of his firm, in 1825, tending to show what have been the circumstances of the defendant since that time. But from this circumstance, without other evidence, the law does not raise the presumption that he has continued poor and insolvent to the present time. There are no admissions from either of the original debtors, inconsistent with the legal presumption of payment.

The copies of deeds in the case are not legally admissible. *Hutchinson* v. *Chadbourn*, 35 Maine, 189; *Doe* v. *Scribner*, 36 Maine, 168.

There is therefore, no legal evidence in the case, that Bowley, Thompson and Hilt, or the Butlers ever had any title to the land originating in Barrett. Nor does it appear, by legal proof, that the title was not in Thompson,

senior, at the time of the levy. The nonsuit of the plaintiff in his action is against Butler and Hilt not so connected by competent evidence with this levy, as to give it any binding force.

Thus the plaintiff failing to invalidate the levy, its introduction established what the law would otherwise have presumed from lapse of time; to wit, the fact that the judgment had been satisfied. The plaintiff failing to show either that the levy was invalid, or to overcome the presumption of payment, a nonsuit must be entered.

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

DAVIS *& al. versus* MUNCEY.

Where the plaintiff's grantor, being owner of a water privilege, conveyed to the defendant one half the flume connected with the gristmill, with the privilege of drawing water from the mill-dam to carry certain machinery, when the water was not needed for the gristmill; — *Held*, that the plaintiffs were restricted to the use of the same power required to drive the gristmill at the time of defendant's grant, if necessary to the enjoyment of his rights; that they might use another kind of wheel or wheels, but no more water in *quantity* could be *used* or *lost* through the newly constructed wheels than was required for the use of the mill at the time of the grant.

But the plaintiff's right to recover damages of defendant for using the water when wanted for the gristmill, and *while the water was running over the dam*, cannot be defeated, by showing leakage in another flume connected with the same head, but not connected with the gristmill flume, although one of the plaintiffs had actual control over it.

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

TRESPASS. The charge alleged was for diverting the water from plaintiffs' gristmill, whereby they were deprived of its use and profit.

The right of plaintiffs, to maintain the suit, so far as possession or ownership was concerned, was not disputed. The defendant had no right to the use or control of the gristmill.

A dam was built across Sandy river, and by means of the water so held, a sawmill and gristmill were propelled, and

the machinery in defendant's shop. David Graffan formerly owned the privilege.

Through Graffan, in 1845, the defendant obtained the right to "one half of the flume leading to said shop, with the privilege of drawing water from the mill-dam to carry small circular saws, turning lathe, planing machine, &c., *when the water is not needed for the gristmill.*"

The shop of defendant was just below the gristmill, and his wheel was supplied with water from the flume connected with that which supplies the gristmill.

Between the gristmill flume and the main stream was a ledge over which the water flowed into the gristmill flume in such way, that when the gristmill was in operation, if the defendant's gate was raised, the speed of the gristmill would be much retarded, notwithstanding the water would continue to run over the dam.

Evidence was introduced that there was grinding for about one quarter of the time, and that between October, 1849, and November, 1852, when the gristmill was running, the defendant had his gate up, drawing water from the flume; that thereby, when the water was running over the dam, the speed of the gristmill was diminished so as to render it difficult to grind, and in some instances preventing grinding; and that in numerous instances when the plaintiffs wanted the water to propel their gristmill, on request being made to defendant to shut his gate, he refused.

At the time of Graffan's deed to defendant, the gristmill was propelled by means of *tub wheels;* afterwards other wheels, called "Kendall or centre vent wheels," were put in instead of the tub wheels. The evidence was contradictory as to which kind of wheel required the more water. Some evidence tended to show that the Kendall wheels were not put in the best mode, and that water was wasted by reason of too large a space being left between the wheel and the curb, and by reason of the stop water occasionally being off.

It also appeared that the sawmill flume, which was under the control of one of the plaintiffs, but was not connected with the flume of the gristmill, leaked somewhat.

Several instructions were given to the jury, among which were these; *that* if by reason of unusual leakage and defects, enough water ran to waste, through want of ordinary care on the part of plaintiffs, to propel defendant's wheel, the plaintiffs could not recover; *that* if the Kendall wheels in the manner in which they were used did not require or draw, including the leakage, more water than the tub wheels, then so far as this part of the case was involved, the plaintiffs might recover; but if the leakage from the saw-mill was occasioned by neglect and want of ordinary care on part of plaintiffs, that they could not throw on defendant losses occasioned by their neglect, or that of either of them, provided he used and wasted enough in the whole to equal the amount required for the full enjoyment of the mill in 1845.

The verdict was for defendant, and the plaintiffs excepted to the instructions.

J. S. Abbott, for plaintiffs.

J. H. Webster, for defendant.

CUTTING, J. — As nearly as it can be ascertained from the evidence reported, and the three deeds only exhibited, it appears that David Graffan originally owned the whole water power, and having built the dam and gristmill, subsequently, on Dec. 27, 1845, conveyed to the defendant, "the land whereon the east half of the shop stands, situated below his gristmill, with one-half of the flume to said shop, with the privilege of drawing water from the mill-dam to carry small circular saws, &c., "*when the water is not needed for the gristmill, &c.*"

That Davis N. Graffan, claiming under David Graffan, on June 23, 1849, conveyed to the defendant one undivided fourth part of the shop and land on which it stands, &c., "*reserving the preference of the water for the gristmill.*"

That the plaintiffs by deed or otherwise were in possession of, and jointly occupied the gristmill, claiming either directly or indirectly under David Graffan.

That the defendant's shop is situated just below the gristmill; his wheel is propelled by water from a flume, below,

but connected with the gristmill flume; that between the latter flume and the main stream is a ledge, over which the water flowed into the gristmill flume in such way, that when the gristmill was in operation, if defendant's gate were raised, the speed of the gristmill would be much retarded, notwithstanding the water would continue to run over the top of the dam; and it was for the defendant's use of the water under such circumstances that this action was brought.

That the gristmill, on Dec. 27, 1845, the date of the deed from David Graffan to the defendant, was operated by means of a tub wheel; that afterwards the Kendall wheel was substituted, and there was evidence tending to show that the former drew less water than the latter, and the contrary. And that in 1849 the dam was carried away and subsequently rebuilt, and the expenses, by a reference, was apportioned among the several interests, and seven per cent. was awarded as the defendant's share.

The foregoing are the principal facts that elicited the rulings of which the plaintiffs complain.

By the deeds from David and Davis N. Graffan, the defendant acquired the privilege of drawing water from the mill-dam to carry small circular saws, &c., when it was not needed for the gristmill; and it is not pretended that he used the water for any other purpose than that mentioned in the deeds, but it is alleged that he used it when needed for the gristmill. If the defendant was restricted in the use of the water, so also were the plaintiffs' grantors, who could not afterwards make use of that which they had previously conveyed, and they could not use, to the detriment of their grantee, more power than was necessary to propel the tub wheel in use at the time of the grant, although they might use the *same quantity* in operating the gristmill by any other wheel or wheels; otherwise, the gristmill might exhaust the whole water in the flume and leave none for the shop. And it was incumbent on the plaintiffs so to have constructed their wheel and its curbs, that no more water

should pass through or by it, than when the defendant obtained his grant. If the plaintiffs in either mode diminished the water in the flume, to the amount conveyed to the defendant, they have in this suit no reason to complain, and such in substance was the ruling of the Judge in that particular.

It does not appear that the sawmill flume, controlled by Davis, one of the plaintiffs, had any connection with that of the gristmill, or that it was not entirely distinct and separate from it, and from the plan exhibited to us, it is so situated. Such being the fact, while the water was continually flowing over their common dam, it is difficult to perceive how any leakage from Davis's flume could diminish the quantity of water in that used in common by these parties. But the case finds that "it appeared that the sawmill flume, which was under the control of Davis, one of the plaintiffs, leaked some; upon this fact and the foregoing evidence, the Court instructed the jury that if the leakage from the sawmill was occasioned by neglect and want of ordinary care on part of plaintiffs, that plaintiffs could not throw on defendant losses occasioned by their neglect, or that of either of them, provided he used and wasted enough in the whole to equal the amount required for the full enjoyment of the mill in 1845."

According to this instruction the plaintiffs are made accountable for all the water which leaked through the Davis mill, when there is no evidence that if his flume had been perfectly tight, it ever would have found its way into the gristmill flume, but rather, like a portion of the common mass, would have been obstructed by the ledge; consequently the plaintiffs were no more liable for such leakage, than they were for the water that passed off over the dam.

The exceptions are sustained, verdict set aside and a new trial granted.

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

TOWLE *versus* BLAKE.

Of the conditions under which the book of a party, with his suppletory oath, is admissible.

In an action for services rendered, if from the nature of the services, better evidence than a book charge may reasonably be supposed to exist, the party's book with his suppletory oath, is not competent evidence.

Nor is the plaintiff's book-charge competent to show the *price* of his services.

Thus an entry in plaintiff's book for making certain rods of fence, and the price per rod, is incompetent evidence to support the charge.

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

ASSUMPSIT upon an account.

The plaintiff offered his book, with his suppletory oath, to support the account. It contained this charge only against the defendant; "May 10, 1851, to building 92¾ rods cedar fence at 75 cts. $69,56."

It was objected to as incompetent evidence, but the presiding Judge admitted it.

On cross-examination, the plaintiff testified that he was about two months building the fence, with his two sons assisting him a part of the time.

The plaintiff also introduced a letter from the defendant, admitting that he had contracted with plaintiff to build that length of fence at fifty cents a rod, and that it had been built.

A verdict was returned for plaintiff.

The defendant excepted to the ruling of the Judge.

D. D. Stewart, for defendant.

1. This species of evidence is to be resorted to only when other proof cannot be obtained. *Holmes* v. *Marden*, 12 Pick. 171; *Dunn* v. *Whitney*, 1 Fairf. 13; *Windsor* v. *Dilloway*, 4 Met. 222; *Ames* v. *Wilson*, 22 Maine, 120.

2. The labor of plaintiff and others for two months in a single transaction is not a proper subject of book-charge. *Henshaw* v. *Davis*, 5 Cush. 145; *Earl* v. *Sawyer*, 6 Cush. 142; 1 Greenl. Ev. § § 118, 119.

3. Whether other testimony was introduced by plaintiff upon this point is of no sort of consequence, because this

Court cannot presume that the jury disregarded the plaintiff's book and oath, which the Judge ruled to be competent to prove the charge. It cannot be known *judicially* whether the verdict was for the 75 or 50 cents per rod. But as it may have been under the ruling (and in point of fact was) for the defendant, the verdict should be set aside.

Hutchinson, for plaintiff.

1. The testimony of plaintiff, drawn out on cross-examination, shows, that the work was accomplished by a succession of days work, and was admissible within the rule of law giving discretion to the presiding Judge. *Cogswell* v. *Dolliver*, 2 Mass. 117; *Prince* v. *Smith*, 4 Mass. 455; *Amee* v. *Wilson*, 22 Maine, 116.

2. But there was other testimony to show that the fence was built, and evidence sufficient to support the verdict, without the book, so no injustice has been done, and in such cases a verdict will not be disturbed. No authorities need be cited to this position.

CUTTING, J. — The presiding Judge admitted the plaintiff's book supported by his suppletory oath to go to the jury as competent evidence to prove the following charge: — "May 10, 1851. To building 92¾ rods cedar fence, 75 cts, $69,56." In examining the question presented, it becomes immaterial to consider the effect of the subsequent testimony, since the evidence, if legally admitted, was sufficient to justify the jury in rendering their verdict for the plaintiff.

It is also unnecessary here to narrate the rise, progress, application and extent of the rule of law admitting account books and the suppletory oath of the party as competent evidence. Curiosity can be abundantly gratified upon that point on examining the following cases. *Cogswell, Ex'r*, v. *Dolliver*, 2 Mass. 217; *Prince, Ex'r*, v. *Smith*, 4 Mass. 455; *Faxon* v. *Hollis*, 13 Mass. 427; *Smith* v. *Sanford*, 12 Pick. 139; *Hancock* v. *Cook*, 18 Pick. 31; *Winsor* v. *Dilloway*, 4 Met. 222; *Henshaw* v. *Davis*, 5 Cush. 145; *Earle* v. *Sawyer*, 6 Cush. 142; *Dunn* v. *Whitney*, 10 Maine, 9;

Leighton v. *Manson*, 14 Maine, 208; *Clark* v. *Perry*, 17 Maine, 175; *Mitchell* v. *Belknap*, 23 Maine, 475; *Eastman* v. *Moulton*, 3 N. H., 156; *Cummings* v. *Nichols*, 13 N. H., 420.

From all which it is deducible, that the rule had its origin in *New England* from necessity, has extended into other parts of the Union, is of a dangerous nature and should be limited as the necessity diminishes; it should appear that the book is the original book of entries, and the charges made therein at or near the time of the delivery of the articles or performance of the services, and of such a nature that they could not ordinarily be proved by other evidence; that the "rule is contrary to the policy of the common law, and which courts have always been disposed to restrain within the limits prescribed to it by the usage in which it was founded."

It was decided in *Henshaw* v. *Davis*, that "the book-charge of three months service as one item, was inadmissible according to all the authorities."

In *Earle* v. *Sawyer*, that the book containing the charge, "To stairs, $57," should not have been admitted.

In *Leighton* v. *Manson*, the delivery of a large quantity of beef, charged in two items on the same day, could not be proved by the book and oath, for the reason "that the person making the entries, could not reasonably be supposed to have delivered them without assistance, and that better evidence of delivery might be produced."

In *Clark* v. *Perry*, the Court say, "in admitting the plaintiff to testify, that the price charged was a fair one, a greater latitude may have been indulged, than the necessity of the case required."

Also in *Mitchell* v. *Belknap*, "no contract as to price, or statement of the value of the goods has been allowed to be given in evidence by the one, who offers his book in his own favor."

Now, can the ruling of the Judge, in the case under consideration, be reconciled with the principles and authorities before cited? The evidence ruled admissible proved the

price as well as the materials and labor, for they were all embraced in "the charge."

If the plaintiff had entered into a special contract to build the fence for a specified sum, it would not be pretended, that he could prove such contract by his book and oath; and if no such agreement had previously been made, and he understood that his compensation was to be a *quantum meruit*, he would naturally and ordinarily have charged his labor each day; but from aught that appears, and very probably from what does not appear, there was a special contract, which accounts for his neglect to make the daily charges, and that the subsequent charge in gross was the result of an afterthought and made for the purpose of realizing more than the contract price, and thus far, under the ruling, he may have succeeded.

To sustain the ruling would be to establish a most dangerous precedent; it would be no less than an inducement to special contractors to deny the contract price, charge in one item both labor and price, and then, by their book and oath, to attempt to recover such charge. If in the plaintiff's account, the word house be substituted for fence, and any number of cyphers be added on the right of the dollars, the ruling would be as pertinent and appropriate in the one case as in the other. The result of the admission of such testimony would be to extend the rule to its utmost limit and permit a party to manufacture testimony for himself when the truth might be shown by other evidence. In this case, to say the least, it was no more difficult for the plaintiff to show by other evidence, that he built the fence, than it was for Leighton to prove that he delivered the beef. And to permit the book and oath to prove the price was still more objectionable. It will not be pretended, that no other person ever saw the fence, or that the plaintiff could not have sent some one to examine and measure it, even after the suit was commenced, who could have given disinterested testimony as to its value. *Exceptions sustained, verdict set aside, and a new trial granted.*

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

EMERY *versus* FOWLER.

Where the owners of two adjoining lots of land, agreed in writing to submit the determination of a disputed line between them to referees; and after such agreement, and before the decision of the referees, one of them sold and deeded his land to a third person having no notice of the agreement; an award afterwards made is not admissible in evidence in a suit, involving the same line, between one of the parties to the agreement, and the grantee of the other.

Although a deed describes precisely the quantity of land therein conveyed, yet, if it was made soon after the location of the tract, by the parties interested, by monuments, and was intended to conform thereto, it will embrace the *tract* described by the *monuments*, without regard to the *quantity* described in the deed.

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

TRESPASS. Plea general issue.

Both parties claimed the land where the alleged trespass was committed, and the question was as to the line between them.

The title on both sides was derived from John C. Freeze, who on July 2, 1832, conveyed to Stephen Nye, (under whom defendant claims,) the following tract: — "beginning at the southwest corner of said lot of land this day sold and conveyed to me by said Stephen and Heman Nye; thence across said lot to the Rolfe road, (so called,) on such a course as that a line extended across said lot to said road, and thence on said road northerly to a point in said road where it is intersected by the head line of said lot; and thence on the head line thereof to the place of beginning, shall contain *exactly one acre and a half.*"

Freeze conveyed to T. Boutelle, (under whom the plaintiff claims,) on the same day, a certain tract of land embracing in its description the land conveyed to Nye and a larger tract, in which was this reservation; "excepting and reserving from the lot hereby sold two small lots of land lying at the head of said lot, containing one acre and a half, as by reference to my deed of said two lots to Stephen Nye of even date will appear, reference thereto being had."

Boutelle conveyed to the plaintiff, April 25, 1835. Nye conveyed by quitclaim to one Benjamin F. Wing, February 14, 1837, and Wing conveyed to the defendant, April 24, 1847.

While the adjoining lands were owned by plaintiff and Wing a controversy arose about the line, and they agreed in writing to submit the determination of it to two referees. Before the time appointed for a hearing, Wing sold the land to the defendant, and it did not appear that he had any knowledge of the agreement of his grantor. The referees notified the parties to the submission and made an award.

This submission and award were offered in evidence by the plaintiff, but, being objected to by defendant, were excluded by the Court.

Evidence was offered by defendant tending to show that on the day the deeds were made by Freeze to Boutelle and Nye, a claim was made on Freeze for some improvements upon the lots by Nye and another; *that* that controversy was referred to two persons to determine it, who awarded that Freeze should convey to Nye one acre and one-half from the lot; *that* they located the land upon the earth by the consent of Freeze, Boutelle and Nye; *that* those referees put up stakes upon the line run by them; *that* the deed was written immediately after this location, and delivered; *that* Nye went into possession under the deed and so continued until he conveyed. There was other evidence in the case.

On this part of it, the jury were instructed, that they would look at all the evidence touching the location and conveyance of this parcel of land, and although the deed described only one acre and one-half, still if the grantor therein located the same by adopting and consenting to the line made by the referees, and the deed was made immediately after such location, the boundaries being assented to by the parties to the deed and said Boutelle, who took conveyance of the residue of the Freeze lot, if such was the fact, those boundaries and monuments were controlling,

notwithstanding it might be found afterwards that they embraced more or less, than the quantity specified.

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

J. S. Abbott, for plaintiff.

Evans and *J. H. Webster*, for defendant.

APPLETON, J. — The plaintiff and defendant are owners of adjacent land, deriving title through various mesne conveyances from John C. Freeze. The question in controversy relates to the boundary line between their respective lots.

The plaintiff and Benj. F. Wing, under whom the defendant derives title, on June 9, 1846, entered into bonds to refer the dispute which had arisen in relation to the lines between their lots, to Samuel Taylor and Joseph Burgess, jr. and bound themselves, their executors and administrators, in the penal sum of one hundred dollars to abide by the decision of the arbitrators thus appointed. On the 24th of April, 1847, Wing conveyed the lot, the boundary line of which is in controversy, to the defendant. There is no evidence that the defendant, when he received his conveyance, had any notice of the agreement to refer, into which his grantor had entered. It is unnecessary to consider what would have been the effect of an award made before his title accrued. It is obvious, that he acquired the land discharged from all contracts, which his grantee had made, of which he had no notice, actual or constructive.

It seems, that on July 17, 1847, the referees, after notifying Wing and Emery, proceeded to adjudicate upon the matters in controversy and made their award. The hearing was *ex parte*, Wing not being present. The defendant had no notice of these proceedings, nor did he assent in any way to the doings of the referees. The award made under these circumstances, was offered by the plaintiff and rejected by the Court, and as we think, rightfully rejected. At the time of the hearing Wing had no title to the land, and could

not by his acts or omissions to act, affect the rights of his grantee. The award must be regarded as a transaction between other parties and having no binding force whatever upon the defendant.

John C. Freeze originally owned the lot embracing the land of the plaintiff and the defendant. The plaintiff derives his title by deed from him to Timothy Boutelle, dated July 2, 1832, and the defendant by deed from him to Stephen Nye of the same date. In the deed from Freeze to Boutelle, reference is made to the deed to Nye, and the tract conveyed to the latter is excepted from the operation of the deed to the former. Before these deeds were made, the lots to be conveyed were located upon the face of the earth, fixed monuments established by referees mutually agreed upon, and the parties to these several conveyances assented to and adopted such location.

Deeds were then executed by the parties intended to conform with the location thus made. The respective grantees entered under their deeds, built fences and occupied in conformity with the location of 1832, till 1847, when a dispute arose. It seems that more land is contained within the limits of the defendant's land, as originally located upon the face of the earth, than is specified in the deed. The Court in substance instructed the jury, that if they found the facts to be as above stated, "that these boundaries and monuments were controlling, notwithstanding it might be found afterwards that they embraced more or less than the quantity specified."

Whether monuments are erected upon the face of the earth by the mutual agreement of parties, and a deed is given intended to conform thereto, or whether they are subsequently erected by them with intent to conform to a deed already given, those monuments must control, notwithstanding they may embrace more or less land than is mentioned in the deed. The quantity of land is always deemed of secondary importance when compared with fixed and determined boundaries. The instructions given are in accordance

with the entire weight of authority, and the exceptions must be overruled. *Waterman* v. *Johnson*, 13 Pick. 261; *Kennebec Purchase* v. *Tiffany*, 1 Greenl. 219.

Exceptions overruled.

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

FROHOCK *versus* PATTEE.

A replication to a special plea in bar, which presents *new matter*, should conclude with a *verification*.

But if it concludes with tendering an issue, and that issue is joined, its *materiality* is then to be determined.

In order to make the statute of limitations available in a penal action to defeat it, the general issue or the limitation bar should be pleaded.

Of penal statutes.

Chapter 148, § 49, R. S., is a *remedial* and not a *penal* enactment.

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

CASE, founded upon § 49, c. 148 of R. S., for aiding and assisting Joseph Pattee, jr., on December 25, 1848, in fraudulently transferring certain real estate, to prevent its attachment by his creditor.

The writ was dated on March 27, 1852. The defendant put in two special pleas in bar, which are described in the opinion of the Court, together with the rejoinder and issue.

On the issue presented by the pleadings, the plaintiff showed by several witnesses that the farm conveyed to defendant, by the debtor of the plaintiff, was worth $1500, when conveyed. His note against Pattee dated November 3, 1846, of $36,67, was also exhibited.

The defendant introduced a copy of the judgment and papers referred to in his pleas, J. S. Tenney *v.* defendant.

The plaintiff called J. S. Tenney, who testified that in his suit at the trial, he offered to take debt, interest and cost.

A juryman, who tried that case, also testified on the call of the plaintiff, that they rendered a verdict for single dam-

ages, and something for indemnity; and that the land being of much greater value than the amount due, they did not estimate it. The evidence was all received subject to legal objections.

Upon so much of the evidence as was legally admissible, the Court were to render such judgment as the legal rights of the parties should require.

J. H. Webster, for defendant, presented a written argument of great length. Among the points argued, after alluding to the pleadings and showing that the replication should have concluded with a verification, and how the issue in one view was immaterial and in another material, were —

1. That this was a penal action, under which head the case of *Quimby* v. *Carter*, 20 Maine, 218, was examined, and denied to be sound law.

2. He showed wherein it differed from a remedial statute. The conclusions to which he came were, that if penal, one judgment against the defendant is a bar to any other for the same offence, 4 Mass. 431, and that it should have been brought within one year after the cause of action accrued, and that in penal actions it is unnecessary to plead the statute. 5 Maine, 490; 2 Saund. 63, a. N. 6.

3. But if the Court should hold this to be a remedial and not a penal action, it was nevertheless highly penal, and there was no distinction in the manner of the construction of such statutes. 1 Maine, 139; 22 Maine, 541; 6 Conn. 567.

The language of the section under which this action is brought, limits the action to one creditor and to one recovery.

4. That, under this view of the proper construction of the law, it became immaterial whether the evidence offered proved the issue or not.

5. He maintained also under the second issue that the testimony of Judge TENNEY and that of the juror was inadmissible.

6. That the verdict and judgment rendered in the action, Tenney against defendant, shows conclusively that it was for double the amount of the property fraudulently conveyed, and that no evidence can be admitted to change its legal meaning.

J. S. Abbott, for plaintiff.

CUTTING, J. — This action is founded on R. S., c. 148, § 49, which provides, that "Any person, who shall knowingly aid or assist any debtor or prisoner, in any fraudulent concealment or transfer of his property, to secure the same from creditors, and to prevent the seizure of the same by attachment or levy on execution, shall be answerable in a special action on the case, to any creditor who may sue for the same, in double the amount of the property, so fraudulently concealed or transferred; not, however, exceeding double the amount of such creditor's just debt or demand."

The plaintiff in substance alleges, that on December 25, 1848, one Joseph Pattee, jr., then being indebted to him fraudulently conveyed to the defendant, knowingly aiding and assisting, certain property to prevent its being attached or seized on execution.

The defendant, instead of denying that allegation, pleads specially in bar. — *First*, in effect, that John S. Tenney, being at the same time a creditor of Pattee, had sued the defendant for the same cause and recovered a judgment against him, without stating that the verdict was equal to double the amount of the property fraudulently conveyed.

To which the plaintiff, instead of demurring and thereby raising the question, designed to be raised, it is presumed, by the defendant, whether or not the statute was strictly a penal statute, and if so, a former was a bar to a subsequent recovery, or instead of traversing that or any other allegation, assigns new matter, to wit, "that the property so fraudulently received, concealed and held by this defendant, was on said December 25, 1848, and ever since has been, in value far exceeding the amount of said Tenney's debt

and the amount of the plaintiff's debt against said Joseph Pattee, jr., viz, twelve hundred dollars," and instead of concluding with a verification, tenders an issue to the country. And this replication, instead of being demurred to specially was joined by the defendant.

Secondly, the defendant pleads the recovery of Tenney's judgment as in his first plea, and further adds that the verdict was for a sum just double the amount or value of the property fraudulently concealed or transferred and not equal to double the amount of the debt due and owing from Jos. Pattee, jr., to said Tenney, and for an amount very much larger than the single amount of said debt, and further, that this plaintiff, Tenney and one Daniel R. Frohock had commenced at the same time their several actions against the defendant, in consequence of the same fraudulent conveyance, and had combined to aid each other to produce a favorable result.

Here again the plaintiff, instead of meeting and denying the material averment, that Tenney's verdict was just double the value of the property, upon which issue, that question of fact being settled, the law of the case might be raised and determined, after certain protestations as to immaterial allegations, again assigns new matter; to wit, that the property at the time of the transfer was of a value exceeding the amount of the three individuals' demands against their debtor Pattee, and again tenders an issue to the country, which is as inconsiderately joined by the defendant. And since, by the rules of pleading, a wrong conclusion, whether by a verification or to the country, can be taken advantage of by special demurrer only, (Arch. Plead. 248,) which was omitted to be done, the question is presented whether the issues be material, and not whether they are as important as other traversable allegations tendered by the defendant. The special pleas in bar admit the truth of the declaration, and allege special matter in avoidance of it, (Gould's Plead. c. 6, Part 2, § 70,) to wit, the value of the property concealed compared with the amount of the creditor's claims

in suits pending or terminated. The issues then become material as to the comparative value of the property; that is, whether after paying the verdict already rendered, there will be any thing left to satisfy in whole or in part that which may be obtained by this plaintiff, and we are of opinion, that there will be sufficient remaining for that purpose, it being on the evidence only a matter of computation. But whether the property was sufficient to satisfy the three demands, as alleged in the second replication, is uncertain, for there is no proof as to the amount of Daniel R. Frohock's claim, and perhaps it is immaterial, inasmuch as one of the issues is found for the plaintiff.

How then does the case stand? Neither the general issue or the statute of limitations was pleaded, under one of which only could the lapse of time be given in evidence to defeat the action, even if it be brought on a penal statute, and barred at the expiration of one year, and one of the issues is found for the plaintiff.

But since, perhaps, the parties may expect that the Court should decide this action upon the evidence submitted, without regard to the pleadings, and it is said in argument, that another suit is pending to abide the event of this, it may be expedient to consider the effect of the recovery of the former judgment for a sum much less than the value of the property. And hence the question, whether the law under which this action is brought, be what is denominated a penal or remedial statute, for if the former and not the latter, the defendant, as ably contended by his counsel, should prevail.

That question has already been before this Court on the construction of a similar statute, in *Quimby* v. *Carter*, 20 Maine, 218, and of this statute, in *Philbrook* v. *Handley*, 27 Maine, 53, and again, in *Thatcher* v. *Jones*, 31 Maine, 528, and they have invariably come to the conclusion that it is not a penal statute. In addition to the reasons there given for coming to such a determination, the defendant's argument here may also be added, which is, that in a penal action one offence is punishable only by one suit; that this

is a penal action and therefore barred by a former verdict. His conclusion is correct, if his *premise* be right, and if so, then would follow the subsequent conclusion, that a person might cover property to any amount, and a recovery of a small judgment would shield him against all other defrauded creditors, thus transforming the statute by construction into one neither penal nor remedial. As to what the Legislature considered to be penal statutes, we infer something from R. S., c. 146, § § 15, 16, and to be such only as would authorize the commencement of a suit, indictment or information in the name and for the use of the State at any time within two years, unless previously a prosecution had been commenced within one year by any individual. Now, under the statute, c. 148, it is apprehended, that no suit, indictment or information could be maintained in behalf of the State for the transaction on account of which this action is brought.

It being therefore a remedial statute and twice the value of the property fraudulently conveyed not as yet being exhausted by former judgments, the plaintiff is entitled to recover double the amount of his note, and for that sum the defendant must be defaulted.

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

WARREN *versus* MILLER.

Parol evidence that the delivery of a deed was to be void, on the fulfilment of a verbal condition, is inadmissible.

By pleading the general issue only to a writ of entry, the *disseizin* by the tenant is admitted.

And under *such plea*, the tenant cannot offer evidence of a present title of the premises in a third person, superior to that of the demandant.

Where the tenant was allowed in such case to show that the demandant had been decreed a bankrupt, it was competent for demandant to prove that his title had been restored.

Sect. 8, of late Bankrupt Act of the United States, does not limit the assignee to two years, in which to make conveyances of the real estate.

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

WRIT OF ENTRY.

The tenant pleaded the general issue.

The demandant relied upon a deed from defendant to himself of the premises demanded, dated November 23, 1838, and recorded August 2, 1844. It was in the usual form with a covenant "to warrant and defend the same from all incumbrances as made by me, but not otherwise."

The tenant read a deed of the premises to himself from one Knox, dated in 1830. He then offered a deed of the premises from himself to Stephen Hilton, dated Dec. 7, 1843, and recorded on Dec. 11, of the same year.

This deed was objected to and excluded.

The tenant then offered an attested copy of a judgment in favor of the same Hilton against the demandant, in a writ of entry brought by him for the same premises. On objection this was ruled out.

He then offered to prove that when the deed put into the case by demandant, was made and delivered, the delivery was to be void upon the fulfilment of a verbal condition that the horse which defendant had of plaintiff was returned to him, and that it was returned. This testimony was rejected.

The tenant then put into the case, against demandant's objection, a decree in bankruptcy of the plaintiff, under the U. S. Bankrupt Act, together with his petition and schedule, dated Nov. 16, 1842.

Demandant then put in copies of the proceedings in bankruptcy, and a deed from his assignee in bankruptcy to himself of sundry parcels of real estate, and among them the premises demanded, which deed was dated Nov. 9, 1849.

Upon so much of this testimony as was legally admissible the Court were to draw such inferences as a jury might, and render such judgment as the law warranted; unless the parol evidence should be held admissible and material, in which event, the action was to stand for trial.

Stewart, for tenant.

1. The title of Stephen Hilton to the premises, to rebut

and disprove the actual seizin of the demandant, was admissible. *Walcot & al.* v. *Knight & al.* 6 Mass. 419; *King* v. *Burns*, 13 Pick. 28; Stearns on Real Actions, 381; *Rollins* v. *Clay*, 33 Maine, 140.

2. The record of the judgment of Hilton v. demandant should also have been received. It shows that the *constructive seizin* must be in him. There can be no concurrent seizin of lands. It is immaterial how Hilton came by his title. It rebuts the seizin demandant claims in the premises.

3. It is apparent that it was never the intention of the grantor to make a direct and unconditional delivery of the deed; and the evidence offered to show that it was conditional, was competent and material. *Rhodes* v. *School District No.* 14, *in Gardiner*, 30 Maine, 110.

4. But if the deed to demandant is held valid, then the defendant became his tenant at will. *Sherburne* v. *Jones*, 20 Maine, 70; and that tenancy has not been terminated. R. S., c. 95, § 19; *Matthews* v. *Demerritt*, 22 Maine, 317.

5. The deed from assignee of demandant to him conveyed no title. The assignee had none at the time of its date to convey. After the interval of seven years from the decree, he had no power to grant a title in bankrupt's lands. § 8, of the U. S. Bankrupt Act.

Warren, pro se.

SHEPLEY, C. J. — The report states, that the demandant introduced a deed dated November 3, 1838, and recorded August 2, 1844, from the tenant to himself of the premises demanded. The execution and delivery of it must have been first proved or admitted. The tenant offered testimony to prove "the delivery was to be void upon the fulfilment of a verbal condition stated." This testimony was properly rejected. The case cited for the tenant, of *Rhodes* v. *School District in Gardiner*, 30 Maine, 110, does not decide that a deed delivered to a grantee may become void by parol proof of a condition subsequently performed; only that parol proof may be received that it passed from

the grantor without delivery, and subject to be delivered upon a condition to be performed.

The general issue only having been pleaded, the disseizin was thereby admitted; and a *prima facia* case was presented for the demandant.

The tenant offered as testimony, a deed of the premises from himself to Stephen Hilton, dated December 7, and recorded December 11, 1843, which was properly excluded. The counsel for tenant insists, that it should have been received to disprove the seizin of the demandant; and professes an inability to perceive the distinction between cases, which decides that the tenant under a plea of the general issue cannot introduce proof that a third person has a present title superior to that of the demandant; and that he can introduce proof of such a title to disprove his seizin. The distinction is plain. The tenant may prove such a title to show that the demandant never was seized within twenty years, as alleged in his declaration, and thereby defeat his suit. When he cannot disprove such seizin, he cannot prove that he has subsequently been deprived of it by a conveyance to a third person; for the tenant has made no such issue with him, and has no interest in such a question. *Stanley* v. *Perley*, 5 Greenl. 369; *Cutler* v. *Lincoln*, 3 Cush. 125.

A copy of the record of a suit between the demandant and Stephen Hilton, appears to have been offered for the same purpose, and to have been properly excluded.

The testimony introduced under the general issue, to prove the bankruptcy of the demandant, might have been excluded as tending only to prove an outstanding title in a third person.

The proceedings in bankruptcy, and the conveyance from his assignee to the demandant were properly admitted to prove a restoration of the title. The eighth section of the Bankrupt Act relied upon, does not apply to conveyances.

Tenant defaulted.

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

DUNLAP *versus* BURNHAM.

Judgment on a review will be rendered, as the merits of the case, upon law and evidence may require, without any regard to the former judgment, except as provided in c. 124, R. S.

Where the party against whom a judgment has been rendered, on review obtains a verdict, the judgment rendered on that verdict is a *substitute* for the *former* judgment, and thereby makes it a nullity.

Upon a judgment thus *nullified*, no action can be maintained to secure a lien for his costs, by the attorney who obtained it.

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

DEBT on a judgment.

The plaintiff obtained a verdict and judgment against the defendant at the May term of the District Court, 1849, in Somerset, for $37,97, damages, and costs, $40,36, a copy of which was introduced.

J. H. Webster, Esq., his counsel in that case, claimed his lien upon that judgment in this action.

The defendant obtained a supersedeas upon the execution issued upon that judgment, and duly prosecuted a review of the action, and at the May term of the same Court, in 1851, a trial was had and a verdict returned for the original defendant, and judgment rendered for his costs taxed at $75,47.

It was stipulated that the Court might draw such inferences from the facts as a jury might and enter such judgment as the law and facts may require.

Foster, for defendant.

Webster, for plaintiff.

The judgment that shall be rendered in an action of review is prescribed in R. S., c. 124, § 9. If the judgment on review is rendered "without any reference to the former judgment," what becomes of the former judgment? It is not annulled, reversed or satisfied. It must then be a good, perfect and outstanding judgment.

The supersedeas has no effect longer than the pendency of the review.

There is no provision either in c. 123, or c. 124, R. S., authorizing the Court either to annul, remove or satisfy the first judgment. Before the enactment of R. S. there was statute law that the former judgment might be reversed in whole or in part. And if the Legislature intended the Courts should have retained that power, they would not have repealed the only enactment by virtue of which the power was exercised.

An attorney's lien attaches as soon as a judgment is rendered and can only be avoided by reversing that judgment by a writ of error.

TENNEY, J. — The plaintiff obtained a verdict and judgment against the defendant, in the original action. Upon a review of the same, a verdict was returned for the defendant, on which judgment for costs was rendered. The present suit is an action of debt, upon the judgment first obtained. It is insisted for the plaintiff, that it remains in full force, (notwithstanding the judgment upon the review against him,) for the full amount; — or if not for the whole sums awarded, it is effectual, so far as to protect the ordinary lien of an attorney, which is claimed in this case.

All former statutes, touching reviews, were repealed at the time the Revised Statutes were enacted; hence we are to look to the provisions of the latter alone, upon this subject, for direction in the proceedings.

By R. S., c. 124, § § 8 and 9, it is provided, that the cause shall be disposed of by verdict, nonsuit, default or otherwise, as if it were an original suit. And judgment on the review shall be given, as the merits of the cause upon law and evidence shall require, without any regard to the former judgment, excepting as is herein after mentioned. The exceptions referred to, are where the damages of the former judgment are reduced to a smaller, or increased to a larger sum, than that awarded on the review. § § 12 and 13. These sections provide the manner in which judgments shall be

rendered, or offset, so as to do final and complete justice between the parties.

In those cases, not falling within the exceptions, we are not to presume that the Legislature either provided an imperfect or uncertain remedy; or omitted to make provision, so that the purpose of the party obtaining the review, and succeeding therein on the final trial, should ever be defeated, unless the language employed will admit fairly, of no other construction. It is manifest, that it was designed that the judgment to be rendered, "as the merits of the cause upon law and evidence shall require, without any regard to the former judgment," was to be such as also to do final and complete justice between the parties, and to be substituted for the former judgment, making the latter a nullity; and if annulled, no basis for the lien of an attorney can remain.

According to the agreement of the parties, the plaintiff is to become *Nonsuit.*

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

ELLIS, *Administrator, versus* SMITH.

In a suit prosecuted by the administrator of an insolvent estate, a note against the intestate, held by the defendant as *indorsee,* may be filed and allowed in set-off. The provision in regard to set-offs, in c. 115, R. S., does not apply in such cases.

Where a bond owned by the intestate, had in fact been by him assigned as security to his creditor, but was inventoried among the assets of his estate, and the *obligor* presented and was allowed a much larger claim against the estate, before the commissioners of insolvency, the bond is not affected by such proceedings. The commissioners had no authority over the bond.

Where such bond was assigned to *several* creditors of the intestate, but only *one* of the assignees knew of its transfer, or accepted of its provisions, as to all who had not previously assented to it, the assignment was revoked by the death of the assignor and was wholly inoperative.

To an action by an administrator of an insolvent estate, upon a judgment which had been assigned by the intestate for security to a creditor, any lawful claims against the intestate which defendant had at the time of his death,

may be filed and allowed in set-off, after the debt for which the judgment was assigned has been first paid and the costs of the suit; and if the amount in set-off exceeds the balance due in the suit, the defendant is entitled to a judgment for the excess, and to have the same certified to the Probate Court as his claim against the estate.

Chap. 98, of Acts of 1854, is *prospective* in its operation.

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

Debt.

The general issue was pleaded and two brief statements of defence filed, in which payment and an account in set-off was set up, and also an adjudication and settlement of the judgment by proceedings before the commissioners of insolvency on the estate represented by plaintiff.

After the evidence was introduced, it was agreed, that upon so much of the testimony as was legally admissible, the full Court should render such judgment as the law may require.

Benjamin H. Ellis, the plaintiff's intestate, had a bond given to him by defendant in 1841, for the payment of $1500, which he assigned to certain of his creditors for security. Of the assignees, only Bradbury and Rice appeared to have any knowledge of the transfer, or assented to it before his death.

In 1850, Ellis recovered judgment on that bond, and died soon after. This suit is upon that judgment. The costs only have been paid.

In set-off was filed a promissory note or obligation given to William Weston & Co. and by them indorsed to defendant, signed by said Ellis and Joseph and Peter S. Ellis, the intestate's *administrator*, payable in 1843, and of much larger amount than the judgment.

The allowance of this note was objected to because the defendant was indorsee and because the partnership of Weston & Co. was not proved.

Joseph Ellis had also deceased, and both his and Benjamin's estate were in fact insolvent, on which commissioners had been appointed and this note had been presented and allowed against both estates.

One half of the judgment sued in this action was included in each inventory of those estates, and under license obtained from the Probate Court, so much of this demand as belonged to plaintiff's intestate, was sold at auction to J. S. Abbott.

J. H. Webster, for defendant.

1. The fact that defendant is indorser does not deprive him of the right of filing this note in set-off. The estate is insolvent, and the principles applicable to such estates must govern this case. A similar statute to ours has been in force in Massachusetts for a long time under which many decisions have been made which show this defence is tenable. *McDonald, Adm'r,* v. *Webster,* 2 Mass. 498; *Knapp, Adm'r,* v. *Lee.* 3 Pick. 452; *Jarvis, Adm'r,* v. *Rogers,* 15 Mass. 389; *Bigelow, Adm'r,* v. *Folger,* 2 Met. 225; *Phelps, Adm'r,* v. *Rice,* 10 Met. 128.

2. Under our statutes our Courts have followed a similar rule of decision. *Fox, Adm'r,* v. *Cutts,* 6 Maine, 240; *Lyman, Adm'r,* v. *Estes,* 1 Maine, 182; *Medomac Bank* v. *Curtis,* 24 Maine, 236.

3. The matter in suit here has been settled by the commissioners on the estate and no action can be maintained thereon. The amount allowed against the estate is nearly three times the amount of this judgment, but not the whole amount of the note. It was the duty of the administrator to present the claim of the estate.

4. But it is said this judgment was assigned, and therefore the commissioners had nothing to do with it. The evidence is wanting to establish it. And it has always been treated as belonging to the estate.

5. If the assignment was real, the bond was not negotiable, and the assignees took it subject to the equities between the parties.

6. But if the assignment is sustained, it should be for no more than is due the assignees.

J. S. Abbott, for plaintiff, argued at length the following positions: —

1st. The general issue being to the Court, and not to the country, no brief statement is admissible, nor any special matter in defence. R. S., c. 115, § 18.

2d. The general issue admits the capacity of plaintiff to sue as administrator. *Clark, Adm'r.* v. *Pishon,* 31 Maine, 503.

3d. No payment is proved. *Smith, in equity,* v. *Ellis & als.,* 29 Maine, 423.

4th. The note is not available in set-off, being held by defendant assignee. *Smith, in equity,* v. *Ellis,* 29 Maine, 426; *Call* v. *Chapman,* 25 Maine, 128.

5th. The proceedings in the Probate Court constitute no defence. There were no appropriate pleadings under which such proceedings are receivable, there being no special plea, and the general issue being to the Court and not to the country, no brief statement is receivable. R. S., c. 115, § 18; *McDonald, Adm'r.* v. *Webster,* 2 Mass. 500; *Knapp* v. *Lee,* 3 Pick. 460.

No evidence is in the case that the judgment sued was considered by the commissioners, but rather that the whole amount of the note was allowed, just as presented and claimed by the defendant.

6th. The cause of action was assigned before the defendant purchased any interest in the note of Weston & Co., and hence that note cannot be available in the defence.

7th. The proceedings in the Probate Court defeat and overthrow the defence. For if the defence should be sustained, he would in effect obtain his pay twice.

8th. The Act to amend c. 120, R. S., approved April 19, 1854, § § 3 and 4, is applicable and conclusive against the defendant. *Thayer* v. *Seavey,* 11 Maine, 284.

APPLETON, J. — The right of the plaintiff to recover being established by the production of a copy of the judgment declared on, the material inquiry presented for consideration, relates to the claim in set-off, upon which the defence entirely rests. The note of the plaintiff's intestate payable

to William Weston & Co., and by them indorsed, was seasonably filed, and upon representation being made that the estate of Benjamin H. Ellis was insolvent, and the appointment of commissioners, the same was duly presented for their consideration, and by them allowed to this defendant.

The note was shown to have been in the hands of defendant before the decease of Ellis, and has remained his property to the present time. Under the statute of this State regulating the right of set-off, it could not have been filed as against the plaintiff's intestate, but death and insolvency having ensued, it remains to consider how far these facts may have changed the relative rights of parties.

The right of compensation, as set-off is termed in the civil law, is of the highest equity. "It is established upon the common interest of the parties between whom it is made; it is clear that each of them had an interest to compensate rather than to pay what they owe, and to have an action to recover what is due to them." Evan's Pothier, Part 4, art. 3, c. 4. The equity of this principle is peculiarly manifest in case of mutual and reciprocal claims between an insolvent estate and a solvent creditor. It would be in the highest degree unjust to compel the solvent creditor in his capacity as debtor, to pay the entire debt he may owe the estate and to receive back by way of dividend such fraction of the money paid, as the insolvency of the estate may permit.

The creditor of an insolvent estate cannot commence a suit against the administrator, without having first presented his claim before commissioners, and if disallowed, the statute then gives him a right of action. The statute regulating the distribution of the assets of insolvent estates, contemplates a fair adjustment of all demands existing between the parties at the time of the death of the insolvent, and that a creditor of the estate should be compelled to receive a dividend only upon such balance as may be due him. In making this adjustment, the statute of set-off, as between the original parties, has not been regarded as applicable.

The statutes of Massachusetts are substantially the same as those of this State, as regard the settlement of insolvent estates and the right of set-off, and the decisions of their Courts on these subjects are entitled to the highest consideration. In *McDonald* v. *Webster*, 2 Mass. 498, the Court say, "that by force of the statute for the distribution of insolvent estates, all the mutual demands subsisting between the insolvent and his creditors were to be liquidated and balanced. If the balance be against the estate, it must be laid before the commissioners, and by them reported to the Judge, that the creditor may receive his dividend." In *Lyman* v. *Estes*, 1 Greenl. 182, the doctrine of *McDonald* v. *Webster*, was reäffirmed, and it was then held that an equitable claim against an insolvent estate, though never presented to the commissioners, may be shown by way of set-off to an action of assumpsit by the administrator. "Strict principles of the common law, and the technical rules of pleading must not be applied," remarked MELLEN, C. J., "to cases where the parties have not mutual remedies at law, which they can enforce, as in cases of insolvency." In *Knapp* v. *Lee*, 3 Pick. 452, the Court held that a demand not presented before the commissioners might be pleaded in set-off, and the judgment rendered for either party, as the balance should appear. In *Bigelow* v. *Folger*, 2 Met. 255, it was decided that a debt of the insolvent intestate not yet due might be set-off in a suit brought by the administrator. In *Phelps* v. *Rice*, 10 Met. 128, a claim against an attorney for professional neglect, which had been presented before the commissioners and by them been disallowed, was permitted to be pleaded in set-off to a suit brought by the administrator of the negligent attorney. The Court expressly recognize this as a claim not within the statute regulating set-off. "But the demand sued in this case," says HUBBARD, J., "being that of an administrator of an insolvent estate, the right of set-off is not limited to cases provided by the statute of set-off. It extends to all cases where mutual demands exist which survive the death of the party, and a

defendant, therefore, when sued, may set up in defence, claims not liquidated, as well as those, the amount of which are ascertained." To give effect to the principles involved in the statute providing for the settlement and distribution of insolvent estates, the creditor is permitted to plead his counter claims, whether they were presented before the commissioners or not, and whether they could have been filed in set-off or not in a suit by the deceased intestate.

The defendant insists, that by virtue of R. S., c. 109, the commissioners were bound to report only the balance due from the estate to the defendant, that the claim by them allowed is such balance, and that consequently the judgment in suit is to be regarded as having thereby been extinguished.

The evidence reported satisfactorily proves, that the original demand which resulted in the judgment in suit, was on Jan. 14, 1842, assigned to Messrs. Bradbury & Rice to secure the sum of about seventy dollars due from B. H. Ellis to them. The demand having been assigned as security, to the extent of the interest of those accepting such assignment, the rights of the assignees must be protected. By the assignment the control of the demand vested in the assignees subject to the right of the assignor upon payment by him of the amount due, to be restored to his original title. As no suit could be maintained in the name of the assignee, the assignment conferred authority to use the name of the assignor, and in case of his death, that of his administrator or executor, to enforce by suit the payment of the demand. The demand having been assigned, it is immaterial whether the amount to be secured was great or small. In either event the control of the demand passed from the assignor. The commissioners were not a tribunal by whom the validity of the assignment, the amount due, or any other facts affecting the interests of the assignee were to be determined. As the whole demand was assigned for security, they could not diminish that security by canceling any portion of the demand assigned. The assignee, then, was the legal

owner of the demand for the purposes for which the assignment was made, and as such, was under no obligation to present his claim before the commissioners, and if it was not presented, he would be in no way affected by their determination in relation thereto.

The assignment having been drawn by Messrs. Bradbury & Rice, it is obvious they must have known its terms, and as it was beneficial to them, their assent may be presumed. From the testimony of Ballard, the attesting witness, it appears, that no other creditors who were to be secured by this assignment were present. There is no evidence, that it was made at the instance of any creditors, save that of Messrs. Bradbury & Rice. Indeed the fair inference from the proof is, that it was made without the knowledge of the other creditors at the time. They do not appear subsequently to have been apprised of its existence. Without knowledge of that fact, they could not have assented thereto. Without their assent it remains a mere proposition, for nothing is clearer than that to constitute a binding contract, there must be the assent of the minds of the contracting parties to its terms.

The death of Ellis operated as a revocation of the assignment, except as to those who had previously assented thereto, and left his remaining interest in the demand a part of the assets of the estate to be distributed among all the creditors, so far as the same could be legally enforced. As no assent appears previously to have been given, so none subsequent would be of any avail.

The attention of the Court has been called to the Act of 1854, c. 98, § § 2, 3, as having a bearing on the questions here presented for adjudication. The contracts of the parties, out of which the present litigation has arisen, refer to a period of time as early as 1842. The present suit was commenced in 1851 and the report of the case was drawn up two years subsequently. The statute changes the law as it existed at its passage, but the change is prospective in its effect, and nothing indicates an intention that it should

in any way affect or alter rights which had been acquired under prior laws.

The assignees, Messrs. Bradbury & Rice, hold the entire demand as security for what may be due them. Upon and after payment to them of their debt and the costs of this suit, the remainder of the judgment is to be set off against the defendant's claim. Judgment will be rendered for the balance thus found and certified to the Judge of Probate as the claim upon which a dividend is to be paid. *Bigelow* v. *Folger*, 2 Met. 255.

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

CLARK *& al., Executors, in review, versus* METCALF, *Administrator.*

By § 8, c. 195, of the Acts of 1835, it was provided that the bond, given by a poor debtor for relief from arrest, should be in double the sum for which he was arrested.

And by c. 250, of the Acts of 1836, that the officer levying an execution should collect lawful interest upon the debt from the rendition of judgment.

A relief bond, given subsequently to these provisions, in which the *interest* due upon the debt in the execution, formed no part of the *amount* therein, is not a *statute* bond, but is good at common law.

In fulfilling the conditions of *such a bond*, the debtor is to perform no other *statute provisions* in relation to poor debtors, than are *recited in the bond.*

The record of the justices of the peace and quorum, as to hearing the disclosure of, and administering the oath to a poor debtor, is not affected by the granting merely of a writ of *certiorari* to bring it before the Court.

Evidence that on such bond the debtor disclosed notes of hand which were not appraised, is not a breach of its conditions, and is inadmissible.

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

On March 13, 1839, one Ira Searle, represented by defendant, having an execution against Samuel H. Hilton, caused him to be arrested, and he gave a bond running to the creditor of double the amount of execution and officer's fees, but no *interest* was reckoned although the judgment had then been in force for five months. On giving that bond, signed

by plaintiff's testator and one Benjamin Hilton as sureties, Samuel was discharged from the arrest. The condition of the bond was as follows: — "If the said Samuel shall in six months from the date hereof cite the creditor aforesaid before two justices of the peace *quorum unus*, and submit himself to examination and take the oath or affirmation as prescribed in the seventh section of an Act supplementary to an Act for the relief of poor debtors, passed April 2, 1836, or pay the debt, interest, costs and fees arising in said execution, or be delivered into the custody of the keeper of the prison and go into close confinement within said six months, then this obligation to be void."

On September 10, 1840, Ira Searle commenced an action of debt on said bond against plaintiffs' testator, to which he pleaded the general issue and a brief statement of the performance of one of the conditions of the bond by the debtor. The debtor did cite the creditor within the time limited in the bond and made a disclosure before two justices of the peace and quorum, and took the oath then prescribed by law in such cases on the third day of August, 1839. Several notes were disclosed by the debtor but they were not appraised.

While that suit was pending, the creditor petitioned for a writ of *certiorari* to quash the proceedings of the justices, and the writ was ordered to issue. See *Metcalf, Administrator*, v. *Hilton*, 26 Maine, 200. But the *writ* was never in fact issued.

At the next term after the promulgation of the opinion upon the petition, the plaintiffs' testator was defaulted in the action on the bond, and judgment rendered thereon, June term, 1847.

At the June term, 1848, the petition for this review of that action was entered and subsequently granted, and finally tried at the September term, 1853.

The bond, the certificate of the justices that they administered the oath, and the fact that no appraisal was had of

the notes disclosed, if such fact was admissible, were all admitted.

It was stipulated that upon the legal testimony, if the original plaintiff, now defendant in review, cannot prevail, he is to be nonsuited and costs to be awarded the plaintiffs in review. If he is entitled to prevail, and to have the statute judgment as to debt or damages, such judgment shall be entered. If he is entitled to prevail, and the plaintiffs in review have the right to have the bond chancered, or the damage assessed by the Court or jury, then the Court are to make up the judgment.

J. S. Abbott, for defendant in review.

1. The certificate of the justices of the quorum is no defence to the original suit. The proceedings under the petition for *certiorari* are an answer to it. *Metcalf, Administrator*, v. *Hilton*, 26 Maine, 200.

2. But without those proceedings, that defence fails. *Harding* v. *Butler*, 21 Maine, 191; Laws of 1839, c. 412, § 2; *Batchelder* v. *Sanborn & al.*, 34 Maine, 230; *Clement & al.* v. *Wyman*, 31 Maine, 50; *Fessenden* v. *Chesley*, 29 Maine, 368; *Robinson* v. *Bunker*, 28 Maine, 310; *Call* v. *Barker*, 28 Maine, 317; *Wingate* v. *Leeman*, 27 Maine, 174; *Butman* v. *Holbrook*, 27 Maine, 419.

3. The bond is a statute bond. The objection made that it is not double the execution cannot avail. The execution is not made part of the case. The amount is only to be gathered from the bond. Nothing is recited in the bond that any interest was due or collectable.

4. The damages cannot be assessed under Act of 1848, c. 85, as that only refers to bonds given since the R. S. The judgment should not be restricted to the penalty, but should include interest on the penalty from date of the bond. 1 Mass. 308; 2 Mass. 118; 15 Mass. 154, and cases cited in note to Rand's edition.

Leavitt, for plaintiffs in review.

TENNEY, J. — This is a review of an action of debt against Samuel Searle, the testator of the plaintiffs in review, on a bond given by him and one Benjamin Hilton as the sureties of Samuel H. Hilton, to obtain his release from arrest on an execution in favor of the intestate of the defendant in review.

The bond on which the original suit was brought makes a part of the case, and bears date March 13, 1839; and by the condition thereof, it appears that the arrest was made on that day, upon an execution which issued on Oct. 5, 1838, upon a judgment rendered at the Supreme Judicial Court, which was begun and holden in and for the county of Somerset, on the last Tuesday of September, A. D. 1838, for the sum of $474,64, debt, and of $12,39, costs. It appears further, that the fees for one execution issued upon that judgment, and of the officer, who made the arrest, amounted to the additional sum of $8,34. The bond was taken for just double the amount of these several sums.

The statute of 1836, c. 250, which continued in force, till the general repealing Act, approved Oct. 22, 1840, took effect, and which was reënacted in the Revised Statutes, c. 115, § 107, provided that in all executions issued on judgments in civil actions, lawful interest should be collected on the debt, by the officer who should serve or levy the same, from the time of the rendition of the judgment.

When the bond in this case was given, the judgment had been standing for more than five months, and interest during that time had accumulated upon the debt of the same. Nothing in the case shows that any thing was paid, or that the officer was not required by the law and the execution, in the performance of his duty, to collect the interest on the debt, as well as all the other sums, referred to in the execution. For the failure of the debtor to pay all these sums, including the interest, the debtor was arrested and gave a bond in a sum considerably less than double the amount of these sums, when, by the provisions of the statute of 1835, c. 195, § 8, it should have been for precisely that amount. The bond, there-

fore, was not a statute bond, but was valid at common law. *Clapp, Adm'x,* v. *Cofran,* 7 Mass. 98; *Freeman* v. *Davis & al.,* 7 Mass. 200; *Burroughs* v. *Lowder & al.* 8 Mass. 373; *Howard* v. *Brown,* 21 Maine, 385; *Barrows* v. *Bridge & al.* 21 Maine, 398.

The case of *Metcalf, Adm'r,* v. *Hilton,* 26 Maine, 200, which was a petition for a writ of *certiorari,* to quash the proceedings of the justices of the peace and of the quorum, who administered the oath to the obligor in the bond now under consideration, and to save the condition thereof, is not an authority adverse to the views here expressed. In the proceedings under that petition, the bond does not appear to have been presented to the Court in any manner, and the opinion in that case is manifestly predicated upon the assumption that was not suggested to have been erroneous, that it was a statute bond. The question, whether it was according to statute provisions or not, was not considered, and consequently was not decided.

The bond, according to its condition, was to be void, if the debtor should in six months from the date thereof, cite the creditor before two justices of the peace, *quorum unus,* and submit himself to examination, and take the oath or affirmation as prescribed in the seventh section of an Act supplementary to an Act for the relief of poor debtors, passed April 2, 1836; or pay the debt, interest, costs and fees arising in said execution, or be delivered in custody of the keeper of the prison, &c.

It was at the election of the debtor, which of these three alternatives, mentioned in the condition of the bond, he would perform; and if he has performed the one attempted, no breach has occurred. And the case finds that the condition was performed of the alternative first named.

In support of the defence, a document was introduced as proof without objection, and makes a part of the case. No attempt was made in the argument of the case, to show that this document was not competent evidence, and it was not denied at any stage of the proceedings to be admis-

sible. This purports to be signed by two justices of the peace and the quorum, and it is admitted on the part of the defendant in review, that they were, on the 3d day of August, 1839, duly commissioned and qualified. It is a certificate in the form prescribed by the statutes then in force, as evidence, that the debtor therein named, had properly taken the poor debtor's oath, and all the facts therein recited is in this case legitimate evidence. This certificate by its terms shows, that on Aug. 3, 1839, all which was required by the first alternative named in the condition of the bond, had been done by the debtor, who was the principal obligor therein. *Hathaway* v. *Crosby*, 17 Maine, 448; *Ware* v. *Jackson*, 24 Maine, 166; *Fales* v *Dow*, 24 Maine, 211.

The bond having no validity as a statute bond, created no obligation in the debtor to comply with statutory provisions, further than the terms used in the condition provided. The condition had no reference to any statute, which might thereafter be enacted, but only to such as was then in force. He was to take the oath or affirmation, prescribed in the 7th § of the Act of 1836, expressly named. There could have been no condition, that he should do what was required of poor debtors by the statute of 1839, c. 412, where the bond was given ten days before the passage of that statute. The omission to have an appraisal of certain notes of hand, disclosed by him, agreeably to that Act, constituted no breach of the bond; and the evidence of those facts for such a purpose was not admissible.

This judgment of the justices of the peace and of the quorum, and their certificate, remain in force, and are effectual. The attempt to have the judgment annulled upon a writ of *certiorari*, proceeded no further than the order of the Court, that the writ might issue, for the purpose of bringing the records before it. No writ was issued. If the record had been brought before the Court, and the bond had been examined in connection therewith, it is not perceived for what error in the record or proceedings of the justices

of the peace and of the quorum they could have been annulled. The writ was allowed under the erroneous belief, that the bond conformed to the provisions of the statute, and the debtor had not complied with all the requirements of the statute of 1839, c. 412, approved March 23, 1839, in order to save the condition. The proceedings before the justices of the peace and of the quorum not having been quashed, they are to be regarded as valid, and the record stands in full force, and whatever order was made by the Court under the petition for the writ of *certiorari*, can in nowise prejudice the plaintiffs in review.

According to the agreement of the parties, the original plaintiff, now the defendant in review, is nonsuit in the original action upon the bond, and judgment to be entered for the plaintiffs in review for their costs, in the original action, and in the action of review.

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

MARSTON *versus* SAVAGE *& al.*

On mesne process for indebtment on contract to the amount of ten dollars, upon the *oath* of the creditor, his agent or attorney, that he has reason to believe and does believe that his *debtor* is about to depart and reside beyond the limits of the State, *he* may be arrested and imprisoned unless he gives the bond or makes the disclosure as provided in c. 148, R. S.

When he has given *such bond*, and the conditions have been broken, and no fraud is imputable to the creditor, it cannot be avoided by showing, that the debtor was not *in fact* about to depart and reside beyond the limits of the State.

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

DEBT, on a bond given by one of defendants, to free himself from arrest on a writ sued out against him by plaintiff upon contract, in which the debt exceeded $30.

Upon the back of the writ was the certificate required by § 2 of c. 148, R. S., and the debtor gave the bond provided for in § 17 of the same chapter. Judgment was rendered in

that suit and execution issued in April, 1852. The conditions of the bond were not fulfilled and this action was commenced in June, 1852.

The defendants introduced evidence tending to show that the debtor was not about to depart, &c., and in fact did not reside out of the State. There was evidence tending to show on the other side that it was so reported.

Upon so much of the evidence as was admissible, the Court were authorized to render judgment by nonsuit or default as the law required.

Foster, for defendants.

1. The creditor's certificate is not conclusive to authorize an arrest. R. S., c. 148, § 2.

2. The evidence is not sufficient to justify creditor in making his certificate. It should have been as to his acts and not rumors.

3. The arrest was consequently illegal, and bond void.

4. But if legal the bond is not a statute bond.

Stackpole, for plaintiff.

TENNEY, J. — A creditor upon contract, which creates an indebtedness to the amount of ten dollars, has the right upon mesne process, to arrest his debtor when the latter is about to depart and reside beyond the limits of this State, with property or means exceeding the sum required for his own immediate support. The proof of the facts necessary to the exercise of this right, is the oath of the creditor, his agent or attorney, that he has reason to believe, and does believe, that they exist. R. S., c. 148, § 2.

The right to give the bond, whether a bail bond or such as is required by § 17, and similar to the one in suit, is provided, that the debtor may be relieved from the arrest and imprisonment.

When the creditor has the legal power to hold his debtor in prison, if he fail to provide a bond, with no other evidence of his intention to take up his residence in another State, and of the amount of his means than his own oath, it

cannot be supposed that the Legislature designed, that in a case, where no fraud was suggested, the obligors can avoid the bond, by showing that the debtor was not in fact about "to depart and reside beyond the limits of this State," &c.

The arrest of the principal obligor in the bond, was made in pursuance of the provisions of law, and the action is maintainable, it not appearing that the conditions have been performed. *Defendants defaulted, —*

and to be heard in damages.

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

ROBINSON *& al. versus* BUNKER.

The lien which a party has on all logs and lumber for personal services performed thereon, may be secured by *attachment* of the property.

But where judgment has been rendered on *such claim*, and the attachment *lost* by lapse of time, no *lien* claim can be enforced by an *alias* execution issued thereon.

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

REPLEVIN for a quantity of spruce logs.

After the evidence was out, it was agreed that the case should be reported for the consideration of the full Court, with authority to draw such inferences from the evidence legally admissible or not objected to, as a jury, and enter such judgment as the law required.

The Court found the defendant, as an officer, seized the logs replevied, upon an *alias* execution issued upon a judgment which was recovered for a *lien* claim upon them. The plaintiffs were the owners of the logs, but not the debtors for the lien.

Since the commencement of this action, the execution on which the property was seized had been discharged by the creditor.

J. S. Abbott, for defendant.

Marshall, with whom was *Webster*, for plaintiffs.

APPLETON, J. — The defendant justifies the taking of the logs replevied, as an officer, by virtue of an *alias* execution in favor of A. A. W. Boynton against Wright Pinkham & al. The judgment upon which the execution issued was on a claim for work and labor done by the plaintiff therein, on the logs in controversy. The general property is conceded to be in the plaintiffs in this action, and the defence rests upon the provisions of the Act of 1848, c. 72, "giving to laborers on lumber a lien thereon."

The execution under which the seizure was made has been discharged since the commencement of this suit. It is therefore apparent, that the defendant is not entitled to a return.

But the counsel for the defendant while admitting this, insists, that the original taking was legal, and that consequently, the defendant is entitled to costs. The right to attach and sell for a lien claim is given by the statute of 1848, to which reference has been made, and the party seeking to enforce it, must pursue his remedy in the mode therein provided. He can have no other, for the lien exists only by statutory enactment. By c. 72, § 1, the lien is given the laborer on all logs and lumber he may aid in cutting, hauling or driving, "for the amount stipulated to be paid for his *personal* services and actually due." It is provided by § 2, "that any person having a lien as aforesaid, may secure the same by attachment. The lien consequently, can only be enforced in a suit brought for *personal services*, and by pursuing such suit to final judgment and seizing and selling on the execution issued thereon the logs or lumber attached, before the attachment thus made shall have been lost by lapse of time. The lien given by the statute has once been secured, but the creditor permitted the execution which he obtained to expire without any attempt to enforce it.

The question now presented for consideration is, whether the lien can be enforced on an *alias* execution issued on a judgment rendered on a lien claim, when an attachment was originally made, but subsequently lost by the neglect of the

creditor. When judgment has been rendered, the claim and the attachment, by which the lien might have been secured, is lost, the claim ceases to be for an "amount stipulated to be paid for personal services." The judgment, as in this case, may have been rendered upon a lien claim, but it is now a judgment of a Court of record.

The creditor cannot enforce a lien by attachment, in a suit upon such judgment, because he is a judgment creditor, his claim for personal services being merged in his judgment. The costs incident to the enforcement of his lien might have been collected in the suit in which they accrued. Not having been then collected, they become a component part of the new judgment recovered, which being for another and greater claim than that due for personal services, ceases to be within the meaning or spirit of the Act. *Bicknell* v. *Trickey*, 34 Maine, 273.

But if no attachment of the logs on which the labor was done could be made to secure the lien, neither can they be seized after the expiration of thirty days on the first or any subsequent execution. The lien is only to be *secured* by attachment in the first instance and when thus secured it must be perfected by seizure on the execution within thirty days. That an attachment has been made and lost, is as though it never had been. The statute gives no security to a judgment creditor, as such, though the judgment may have been rendered on claims for personal services. The creditor, in a judgment rendered upon a lien claim, having seasonably attached the logs upon which he has such claim, and having obtained judgment and execution, must enforce it before the expiration of his attachment, by seizure and sale on execution; because, in this way alone, his original lien can be continued and perfected. *Defendant defaulted.*

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

Moor *versus* Towle *& Trustee.*

An *action* upon a judgment may be maintained, although an *alias* execution was *subsequently* issued thereon, on which the debtor was arrested and committed to prison.

In foreign attachment, the supposed trustee is under no obligation to disclose transactions disparaging his title to real estate.

Although in such process he may declare that he has no goods, effects or credits of the principal in his hands, yet if he state *facts* which are inconsistent with the truth of that declaration and outweigh it, he is lawfully chargeable.

This was an action of debt upon a judgment.

The principal defendant pleaded in abatement, that since this action was commenced, an alias execution was taken out on the original judgment, on which execution he was arrested and committed to prison, and there remained.

To this plea there was a general demurrer and joinder. And it was agreed that upon the pleadings *final* judgment might be entered.

The trustee also made a disclosure, upon which he was charged by Tenney, J., presiding.

To that adjudication the trustee excepted.

J. S. Abbott, for principal and trustee.

D. D. Stewart, for plaintiff.

Rice, J. — The plaintiff, having obtained a judgment against the principal defendant, was authorized to take out an execution thereon at any time within one year from its rendition. R. S., c. 115, § 104. This course he was entitled to pursue, notwithstanding he had, before he took out his execution, caused an action to be commenced upon the same judgment. *Cushing* v. *Arnold,* 9 Met. 23. The commitment of the defendant on the execution did not discharge or annul the judgment on which it issued, nor discharge the action pending thereon.

The questions raised upon the pleadings, do not therefore become material. The trustee in his disclosure, stated very distinctly, that he was not in any way indebted to the prin-

cipal defendant on account of real estate conveyed to him. By our statute a trustee is chargeable only for goods, effects or credits, in his hands or possession; which provisions do not include lands. He is under no obligation to answer interrogatories to the disparagement of his title to his real estate, and is not chargeable simply because he declines to answer such interrogatories.

The unqualified declaration of a trustee, that he has no goods, effects, nor credits of the principal defendant in his hands or possession, will discharge him, unless there are such facts stated by him, or proved by other competent evidence, inconsistent with his declarations, as will be sufficient to overcome them. His declarations are entitled to a degree of weight equivalent to an answer in a bill in equity. *Page* v. *Smith*, 25 Maine, 256.

In this case we think the facts disclosed by the trustee, and inconsistent with his declarations outweigh and overcome those declarations, though often repeated, and that for that reason he was rightfully charged.

The exceptions are therefore overruled, and according to agreement, the principal defendant is to be defaulted.

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

COUNTY OF LINCOLN.

KENNEDY *versus* PHILBRICK.

Thirty hundred of hay for the use of a cow, and two tons for the use of ten sheep, are exempted by statute from attachment and execution.

This exemption is unrestricted as to time.

Thus the owner of such stock may claim the full amount exempted, although a part of the winter has passed.

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

TRESPASS.

The defendant seized two tons of English hay and two tons of salt hay belonging to the plaintiff, on Jan'y 10, 1853, and sold the same on Jan'y 17, 1853, on an execution against him.

The plaintiff claimed it as exempted from attachment.

He introduced evidence tending to show, that he owned ten sheep, one cow and one heifer, also one horse.

Some evidence was produced by each party as to the quantity and quality of the hay left. About three and half tons were left, one half of which did not appear to be merchantable.

The jury were instructed, that the plaintiff would be entitled to have exempted from attachment, two tons of hay for his ten sheep and thirty hundred for the use of his cow, and for the heifer so much as would be necessary to keep the same during the rest of the winter, provided they should find he was the owner of them; and that the plaintiff would be entitled to have that amount exempted, although part of the winter had at that time passed.

A verdict was returned for plaintiff, and the defendant excepted to the ruling, and also filed a motion to have the verdict set aside as against the evidence.

Hubbard, in support of exceptions.

Ingalls, contra.

APPLETON, J. — There was evidence tending to show that the plaintiff, at the time of the seizure and sale of the hay, to recover compensation for which this action is brought, was the owner of a cow, ten sheep, a heifer about a year old, and a horse. By R. S., c. 114, § 38, the debtor is allowed to hold, exempt from attachment and execution, "thirty hundred of hay for the use of said cow, and two tons for the use of said sheep, and a sufficient quantity of hay for the use of said heifer, according to its age." The instructions given varied from the statute only in limiting the quantity for the heifer "to so much as would be necessary to keep the same during the winter." This limits the plaintiff in the quantity by the time during which it might be needed, and is more restrictive than the statute. The defendant consequently has no just ground of complaint.

The instruction that the plaintiff would be entitled to have the two tons and thirty hundred of hay exempted, although part of the winter had at that time passed, is in strict accordance with the statute. The language is general in this part of the section and without limitation or restriction.

The kind, quantity and value of the hay owned by the plaintiff, and taken by the defendant, were subjects peculiarly fitted for the consideration of the jury, and there is no such evidence of misapprehension of the facts, palpable error or wilful violation of duty on their part, as would authorize or justify the setting aside the verdict they have rendered.

Exceptions overruled and motion for new trial denied. — Judgment on the verdict.

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

PARSONS *versus* HUFF.

A verdict will not be set aside, because one of the jurors, without being in the charge of an officer, was permitted by the Court when not in session, to absent himself temporarily from the panel, before the verdict was agreed upon, unless some prejudice appears to have been suffered by the moving party.

But if *such permission* of the Court were objectionable, a party with knowledge of the proceeding, who waits for the verdict to be rendered, *before* making his objections, will be considered to have waived them.

Of *leading* questions to witnesses.

Whether a *leading question* shall be propounded to a *witness* is solely within the discretion of the presiding Judge.

Objections to questions as being leading must be *specifically* stated at the time of the caption. A *general* objection to the question cannot be entertained.

The statute requires a deponent to be sworn but *once*, and that *before* giving his deposition.

If the certificate of the magistrate states that the deponent, *after* giving his deposition, was *duly sworn* according to law, it will not remedy any omission in complying with the statute requirement *before* giving his deposition.

The caption must show, that *before* giving his deposition, the deponent was sworn to testify the truth, the whole truth, and nothing but the truth, *relating to the cause for which the deposition is to be taken.*

An omission of the *latter clause* renders the deposition inadmissible.

ON EXCEPTIONS to the rulings of TENNEY, J., presiding at *Nisi Prius*, and also on motion to set aside the verdict.

TRESPASS *quare clausum*. Plea, soil and freehold of defendant.

Plaintiff offered the deposition of Quincy A. Parsons, which was objected to, on account of the insufficiency of the caption.

The part objected to was in these words; "the aforesaid deponent was examined and cautioned, and before testifying was sworn to testify the truth, the whole truth and nothing but the truth, and after giving the aforesaid deposition was duly sworn according to law to said deposition," &c.

The deposition was admitted.

Several depositions, taken on interrogatories, were offered by plaintiff, to some of the direct questions in each the defendant objected, as *leading*.

They were worded thus:—"Do you, or do you not, recollect," &c. "Did you and said Parsons agree to the boundary as shown you by him?"

At the taking, under all such questions, was minuted, "objected to by defendant."

The Judge overruled the objections. A verdict was returned for plaintiff and defendant excepted to the rulings.

While the jury were out, after the Court had adjourned for the night, one of the jurors was allowed by the Court to leave the jury room for a short time and go to his lodgings, without being accompanied by an officer. In the morning the remainder of the jury separated by consent of the parties to obtain their breakfast; after which the entire panel came into Court and received additional instructions. For this supposed irregularity the motion to set aside the verdict was made.

Gould, in support of the exceptions.

1. The caption of the depositions was insufficient. The requirements of the statute were not complied with. c. 133, § 15. To entitle the testimony of a witness to be received, he must be so sworn as to make his testimony *perjury*, if false. The witness would escape that charge here, however false may have been his testimony. He must be sworn according to law *before* giving his deposition.

2. The questions objected to as leading should have been excluded although the reasons were not entered upon the deposition. c. 133, § 20, provides that objections to the *propriety* of questions may be made when the deposition is produced, &c. The questions were objected to; the statute does not require the cause of the objection to be stated. When an objection is made the party is bound to see that his question is unobjectionable. The *reason* of the objection is unnecessary. *Cleaves* v. *Stockwell*, 33 Maine, 341.

In support of the motion:—

1. It is not any misconduct on the part of the juror of which we complain, but the illegal proceeding of the Court. There could be no occasion for the juror to go unaccompanied by an officer. Such a separation of the panel is never permitted; it vitiates the verdict. *Com.* v. *McCobb*, Vir. Cases, 271. If this juror had gone away without leave, he would have been liable to a fine. Can the Court allow the same thing? As the common law is understood such a proceeding vitiates the verdict. *Lester* v. *Stanley*, 3 Day, 287, also note; *McLain* v. *State*, 10 Yerger, 241; *Offit* v. *Vick*, Walker, 99; *State* v. *Shurburn*, Dudley, (Geo.) 28; Year Book, Hil. T., 15 Hen. 7, fol. 1.

2. The permission was not given when the Court was in session. Exceptions to the act would not therefore lie; a motion is our only available remedy.

Ingalls, with whom was *Lowell, contra.*

APPLETON, J. —It appears that one of the jurymen, being very ill, was permitted by the Court during its adjournment, to leave the jury room for a short time, and retire to his lodgings; that upon the coming in of the Court at the hour of adjournment, the remainder of the jury, by consent of parties, separated for the purpose of obtaining breakfast; that they then, with the absent juryman, returned into Court, and after receiving additional instructions retired to their room and found the verdict which the counsel for the defendant now moves to set aside, on account of the absence of a sick juryman, under the circumstances already stated.

It has sometimes happened that a juryman, through ignorance and misapprehension of his duty, has separated from his fellows without the permission of the Court. In *Burrell* v. *Phillips*, 1 Gal. 360, an application was made to set aside a verdict for this cause, but the Court held it as being a matter of discretion, and that where no misconduct appeared on the part of the juryman, and his absence was the result of mistake, that a verdict should not be set aside

for such cause. In *Smith* v. *Thompson*, 1 Cow. 221, two jurymen separated from their fellows and were absent some hours, but returned and joined in the verdict. As there was no misconduct shown on the part of the jurymen, save that of leaving, and no imputation on the successful party, the Court refused to interfere with the verdict. In *Cram* v. *Ayer*, 1 Hals. 110, the Court say, "a verdict is never to be set aside for a juror's misbehavior to the Court, unless it is prejudicial to one or the other of the parties, and no such thing appears in this case." In *People* v. *Douglas*, 4 Cow. 26, SAVAGE, C. J., remarks, that "in a civil suit at this day, it is perfectly clear that a separation of the jury without, and even contrary to the direction of the Court, would not of itself warrant us in setting aside their verdict." In *Ryland* v. *Willis, Adm'r*, 6 Leigh. 1, it was held when two jurymen had separated from their fellows without consent of Court, that it afforded no cause for setting aside the verdict. An elaborate opinion was given by CARR, J., in which all the antique lore of the law was thoroughly explored, and the question most thoroughly discussed. The result of all the authorities is clearly expressed by Tucker, President of the Court of Appeals, in the following language:—"When the parties have not misbehaved, there seems no good reason why they should be exposed to the expense and vexation of a new trial on account of the misbehavior of the jury, if there is nothing in the transaction which gives reason to suspect the purity of the verdict." In *Newell* v. *Ayer*, 32 Maine, 334, it was held to be misconduct on the part of a juryman to leave the panel without consent of the Court, but that if no injury resulted therefrom, the verdict should not be disturbed.

The ground upon which the Court refuse to act in cases of this description, is, that the losing party is not known to have suffered in any respect. In this case no wrong is imputed to the juryman or to any one. If a juryman, from sickness, but with the permission of the Court, should leave the jury room for a short time, it is not easy to perceive

why a more stringent rule should be adopted, than when his absence is without such necessity or permission and is the result of ignorance. If the grounds assumed by the counsel for defendant were correct, that the Court had no legal right to grant leave of absence except in open Court, and that the juryman must leave in charge of an officer, then this must be regarded as the case of a juryman's having absented himself without authority, and upon the decisions already referred to, the motion cannot prevail.

But the objections arising from the temporary absence of the juryman, must be regarded as having been waived. After he had left the jury room, and while he was absent, the remander of the jury came into Court and by consent of parties temporarily separated. Upon their return, being joined by the absent member, additional instructions were given. The jury then retired, and after a short absence returned and rendered their verdict. All this was done by consent expressed or implied, and without the interposition of any objection. If the counsel had intended to have relied on the ground now taken, it should have been seasonably disclosed. He should not be permitted to lay by, and run his chance for a verdict, and then finding it adverse, claim to have it set aside. If the objection has any foundation, it is taken too late.

2. Any question by which the fact is made known to the witness, which the interrogator wishes to find asserted in and by his answer, is a leading question. It is none the less leading because the alternative form of expression is used, as "did you, or did you not?" &c. *People* v. *Mather*, 4 Wind. 247; *Hopper* v. *Commonwealth*, 6 Grat. 684. The questions proposed in numerous depositions are liable to this exception, and the question arises whether this furnishes any sufficient ground for setting aside the verdict.

The end proposed in extracting testimony, is to obtain the actual recollections of the witness, and not the allegation of another person, adopted by the witness and falsely delivered as his. It is obvious that suggestive interrogation

leads to the despatch of business, and that sometimes it may be absolutely necessary to recall the attention of the witness to facts which had passed from his memory. This is objectionable mainly when on the part of the interrogator there is a disposition to afford information for the purpose of eliciting a false answer, and a corresponding design on the part of the witness to make use of it for such sinister purpose.

The accidental presence of an individual at a transaction, which subsequently becomes a matter in litigation, and the consequent necessity of calling him as a witness, would hardly seem to afford any sufficient reason to believe that he would be under any bias which would affect the trustworthiness of his testimony. The rule that a party shall not propose leading questions to his own witness, rests principally upon a loose use of the possessive pronoun; for if the witness is without prejudice in favor of either party, and if there be any serious evils likely to arise from suggestive interrogation, they would, in such case, equally occur, whether this mode of examination were adopted by the party calling him or by his antagonist. The rule "was based," says Purple, J., in *Greenup* v. *Stokes*, 3 Gil. 201, "upon the supposition that witnesses were inclined to favor the party by whom they were called, and to testify in his favor if they could but receive an intimation of his wishes. It would be but charitable to conclude that the necessity which introduced the doctrine has for a long time ceased to exist."

It cannot but happen that the witness called may frequently be adverse in feeling or interest to the party by whom he is called, or that if not thus adverse, a suggestion may be necessary to bring back to his recollection a true matter which was really there before. The rule is, therefore, not without its exceptions, and the Court in their discretion allow more or less latitude as to the questions proposed and the suggestions made, as the witness is willing or unwilling, is spontaneous or evasive in his answers, is forgetful or of a tenacious memory.

The appearance and manner of the witness, the readiness or reluctance of his answers, his relation to the parties as apparent from his examination, afford a basis to determine. They may justify or authorize the allowance of interrogations *ex adverso* by the party producing him. If. then, leading questions are allowed, as their allowance is a matter of discretion on the part of the presiding Judge, it is no ground for a new trial. *Stratford* v. *Sanford*, 9 Conn. 284; *West* v. *State*, 2 Zab. 212. In *Greenup* v. *Stokes*, 3 Gilman, 211, the Court remarks, that "seldom if ever has it been considered that a mere practical error in this respect, would afford even the slightest grounds for a new trial, or to reverse a cause for error." The same question arose in *Hopkinson* v. *State*, 12 Verm. 582, and a similar doctrine was affirmed. In *Woodin* v. *The People*, 1 Park. Cr. Cases 465, the form of a question was a matter of discussion with the Court, and with a similar result.

In *Blevins* v. *Pope*, 7 Ala. 371, ORMOND, J., says, "that when a witness manifests a leaning, &c., the Court will permit leading questions to be put. It is clear that this is a matter within the discretion of the Court, from the impossibility in most cases of putting the facts on the record so that they may be reviewed. It results from this that the presiding Judge need not state his reasons for permitting a leading question to be put upon the examination in chief, as they would be mere conclusions and not facts susceptible of revision." "In general," remarks Lord ELLENBOROUGH, "no objections are more frivolous than those made to questions as leading." *Nichols* v. *Downing*, 1 Stark. 81. "It is in the discretion of the Judge how far he will allow the examination in chief of a witness to be by leading questions, or in other words, how far it shall assume the form of a cross-examination." *Regina* v. *Murphy*, 8 C. & P. 297.

Indeed, the only case where it has been distinctly and fully determined that it was a good cause for a new trial, because a leading question was proposed and answered, is *Turney* v. *State of Mississippi*, 8 S. & M. 104. But upon

a careful examination of the authorities, the conclusion is, that the permission of a leading question by the presiding Judge, being a matter resting purely in discretion, affords no ground for a new trial.

3. But the question is somewhat different when the testimony is in depositions. It is true the bias of the witness may be then perceived, but not so readily as when his examination takes place in the presence of the Court. It has, nevertheless, been held in *Cope* v. *Sibley*, 12 Barb. 521, that the same discretion exists on the part of the Court, to receive or reject the answers to leading questions as in that of a personal examination at the trial. The rights of the parties in this case, however, depend upon statutory provisions.

The twentieth section of R. S., c. 133, is not clearly expressed, and there is an apparent contradiction between its different parts, which it is not easy to reconcile. "Objections to the *competency* of a deponent, or the *propriety* of any *questions proposed* to him, or *answers given by him*, may be made when the deposition is produced, *in the same manner as if the witness was personally examined on the trial;* but when any deposition is taken on *written interrogatories*, all objections to any interrogatory, *shall be made before it is answered;* and if the interrogatory *be not withdrawn*, the objection shall be noted thereon; otherwise, the objection shall not *afterwards be allowed.*"

It was not the design of the Legislature, that there should be any conflict between the first and last clause of this section, and such a construction should be given to the whole as will reconcile all its parts. In the first clause, the "questions proposed" equally with "the answers given," must be reduced to writing, else the Court would not be able to determine their propriety. In the latter clause, they are expressly designated "written interrogatories." Now where the statute says that "all objections to any interrogatory shall be made before it is answered," it cannot relate to *all questions proposed*, because, by the first clause, there is a

class of questions to which objections may be made where the deposition is produced "in the same manner as if the witness were personally examined on the trial." To the questions referred to in the first clause, no objection, special or otherwise, is required. It is clear that the party proposing interrogatories must be present, else he could not know the objections taken, and withdraw and modify them, if he should see occasion for so doing. As to certain questions, no objections need be taken — as to others, all objections must be taken. It is obvious that the latter clause in this section refers to a class of objections not included in those referred to in the first clause. — There are questions, then, which need not be objected to, till the deposition is produced in the trial, and there are objections which must be taken and noted at the caption of the deposition, else the right to object is regarded as lost.

The objections referred to in the first clause, must refer only to such as are matters of substance — the competency of the witness, the legal propriety, the legal admissibility of the subject matter to which the question relates, as whether relevant or not to the matter in issue, as whether hearsay, &c. The objections in the latter refer to such as are purely technical and formal — as whether they are leading questions or not. In the case at bar, the specific ground of objection does not distinctly appear. All that we know is, that they were objected to, but why or wherefore, the objection to the inquiries was taken, the deposition is silent. In *Cleaves* v. *Stockwell*, 33 Maine, 341, the question objected to was stricken out, because it was leading. Whether the specific ground of objection as leading, was taken at the time of caption, does not distinctly appear. But it should appear, so that the party examining, may, if satisfied the objection is well founded, withdraw, or so modify it, that it shall no longer exist. Such was the law before the R. S., and we cannot believe it was the intention of the Legislature to make any changes in this respect. *Rowe* v. *Godfrey*, 16 Maine, 128; *Polleys* v. *Ocean Insurance Co.*, 14 Maine, 141;

Potter v. *Ladd*, 1 Pick. 308. As the objections taken were general, they cannot now avail the party taking them. They should have been sufficiently clear and precise to enable the adverse party to remove the ground of objections, if it was one of form merely.

4. By the certificate of the magistrate, it appears that Quincy A. Parsons, "*before* testifying, was sworn to testify the truth, the whole truth, and nothing but the truth, and *after* giving the aforesaid deposition, was duly sworn, *according to law*, to said deposition," &c. If the certificate of the magistrate is correct, the witness was sworn twice — once before and once after giving his testimony. The R. S., c. 133, § 15, require but one oath, and that before the testimony is delivered. The fact, therefore, that the witness was sworn after giving his deposition, cannot enlarge the rights of parties, or make that legal, which otherwise would be illegal. *Atkinson* v. *St. Croix Man. Co.*, 24 Maine, 171; *Erskine* v. *Boyd*, 35 Maine, 511. The oath, as administered, varies from the requirements of the statute, by omitting the words "relating to the cause or matter for which the deposition is taken." The magistrate, by his own showing, has not complied with the requirements of the statute. He has sworn the witness to testify to the truth generally, and in reference to all matters, not specially to the cause or matter for which the deposition was to be taken. The oath required by the statute is so framed as particularly to direct the attention of the witness to a single or specific subject matter — "the cause or matter for which the deposition is to be taken." The oath, as administered, entirely fails in doing this.

Chapter 188, § 19, of the Revised Statutes of New Hampshire, regulating depositions, provides that every witness "shall make oath that such deposition contains the truth, the whole truth, and nothing but the truth, *relative to the cause for which it was taken.*" In *Fabyan* v. *Adams*, 15 N. H., 371, a certificate of the magistrate in the caption, that the witness, after being duly cautioned, and sworn to

tell the truth, the whole truth, and nothing but the truth, subscribed and made oath to the foregoing depositions," was held defective, because of the omission of the words, "*relative to the cause for which they were taken.*" The Court in that case, held that the certificate of the magistrate failed to show that the oath required by the statute had been administered.

Nor is this all. The certificate of the magistrate has been deemed sufficient proof of the administration of the oath, as set forth therein, to sustain an indictment for perjury. "The Courts," remarks ABBOTT, C. J., in *Rex* v. *Spencer*, 1 C. & P. 260, "always give credence to the signature of the magistrate or commissioner, and if his signature is proved, that is sufficient evidence that the party was duly sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that he was sworn at that place." The same doctrine is affirmed in *Regina* v. *Turner*, 2 Car. & Kir. 735, where it was held by ERLE, J., that proof of the handwriting of the party sworn, and of the officer authorized to administer the oath, was sufficient evidence that the affidavit was sworn before him, and that he was so properly sworn.

Now in an indictment for perjury, a material allegation is, that the witness was duly sworn and took his oath before A. B., &c., to speak "the truth, the whole truth, and nothing but the truth, *touching the matters in issue on the said trial*," the indictment having previously set forth the parties litigant, and the court before whom the trial was had, in which the offence was committed. Davis' Precedents, 20. The English precedents allege the oath to have been taken to speak "the truth, the whole truth, and nothing but the truth, *touching and concerning the matters then in question between the two parties.*" 2 Chit. Cr. Pl. 351; 3 Arch. Cr. Pr. 601. It must not only appear that the magistrate had competent jurisdiction to administer the oath, but that it was duly administered. So if the indictment were for perjury in a deposition, the indictment should allege that the

deponent was sworn to testify the truth, the whole truth, and nothing but the truth, "relating to the cause or matter for which the deposition is to be taken."

To constitute the crime of perjury, it is essential that the testimony in relation to which the perjury is charged, should be material in the cause in which it is alleged to be committed. But if it does not relate "to the cause or matter" tried, it cannot be material. If the oath taken does not apply to the "cause or matter" tried, and in which the perjury is alleged, it is difficult to perceive how the offence has been committed, or how the person, though testifying falsely, can be punished.

It is apparent, therefore, that the certificate of the magistrate would not afford proof sufficient to sustain an indictment against a deponent for perjury.

In accordance with the decision of this Court, in *Brighton* v. *Walker*, 35 Maine, 132, as the certificate of the magistrate does not show that the oath required by statute, has been administered, the deposition of Parsons must be regarded as having been improperly admitted, the objection having been particularly pointed out at the time, and the attention of the Court having been called to its consideration.

It is to be regretted that a verdict should be set aside for an error of the magistrate, which might have been amended at the trial, but the requirements of the statute cannot be disregarded. *Exceptions sustained.*

New trial granted.

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

THEOBALD *& al., Admr's, versus* STINSON, *Adm'r.*

The plaintiff, to show charges made against him within six years from the commencement of his action upon an account, cannot give in evidence a set-off made up and filed by the *attorney* of the defendant, which was withdrawn by leave of Court, before the trial of the action.

But, *it seems*, that if such set-off had been *personally* filed by defendant, or the items had been made out in his *handwriting*, the act done, and the contents of the paper might be admissible.

Where the limitation bar has attached to all the items in the plaintiff's account, he cannot revive it, by showing some acts of labor performed by defendant for him within six years from the commencement of his action, unless there was some *account* made of it.

Of what constitutes an account.

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

ASSUMPSIT on an account annexed. The writ was dated May 24, 1850. The pleadings filed were the general issue and the statute of limitations.

The account of the plaintiffs' intestate, commenced Dec. 29, 1815, and terminated on Aug. 27, 1843.

The counsel for defendant's intestate filed an account in set-off, commencing in October, 1844, and ending in Sept. 1845. This account was withdrawn by leave of the Court before the action came on for trial.

Plaintiffs gave notice to defendant to produce the book of original entries of his intestate, and the original of the account in set-off, which he declined.

They then offered in evidence an attested copy of the account in set-off, and further offered to prove, that the account in set-off was filed by defendant in this case, and the contents of the same.

This evidence was rejected.

The plaintiffs then called witnesses, by whom it appeared, that the minor children of defendant's intestate performed labor for plaintiffs' intestate in his field some portion of the months of May, August and October, 1844. They worked with the team and tools of said defendant.

The case was then taken from the jury, and it was stipulated that a copy of the defendant's account in set-off, with

the filing thereon, if admissible under the circumstances, might be considered in the case, and the Court to draw such inferences as a jury, and to render such judgment as the law requires.

Foot, jr., for defendant.

1. The plaintiff could not introduce a copy of the account in set-off in evidence, because the *original* had no *validity* or existence, and the filing was no admission on the part of defendant, and a copy could be no better.

2. No services at all are legally shown, (or established by competent evidence,) as having been performed by defendant by way of set-off to plaintiff's demand.

3. If services are shown, they do not create mutuality as is contemplated by the statute and authorities.

Ingalls, for plaintiffs.

1. The account between the two intestates was "a mutual and open account current" and the last item proved was within six years before the date of the writ. *Davis* v. *Smith*, 4 Greenl. 337; *Penniman* v. *Rotch*, 3 Metc. 216; *Chamberlain* v. *Cuyler*, 9 Wend. 126; *Tucker* v. *Ives*, 3 Cow. 193; Angell on Lim. pp. 132, 134, 138, 139.

2. It is immaterial whether the item in such account is in the plaintiff's or defendant's account. R. S., c. 146, § 9.

3. If the defendant does not file an account in set-off, it is competent for the plaintiff to prove an item of charge of defendant as he would any other fact. 3 Metc. 216, before cited.

4. Proof that defendant filed an account in set-off, and the contents of it, is competent evidence to establish a mutuality of dealings between the parties, notwithstanding the account may have been withdrawn by leave of Court. This was a production of his account to the opposite party; an admission that cannot be withdrawn.

CUTTING, J. — The plaintiffs in this action seek to recover the amount of certain charges for professional services as a

physician, contained in their intestate's book of accounts, commencing December 29, 1815, and ending August 27, 1843.

The defence relied upon, is the statute of limitations, the date of the last item being more than six years prior to the commencement of the suit; which is a sufficient answer, unless the plaintiffs, taking upon themselves the burden of proof, shall show that the action was "brought to recover the balance due upon a mutual and open account current," and that "the time of the last item proved in the (defendant's) account," was within six years before the date of their writ. R. S., c. 146, § 9.

They attempt to do so:—*First*, by offering in evidence a copy of defendant's intestate's account originally filed in set-off, which in *Theobald* v. *Colby*, 35 Maine, 179, was permitted to be withdrawn.

Before the trial the plaintiffs had given due notice to produce the book of original entries of the defendant's intestate, and the original account in set-off, which they offered to prove had been filed by the defendant; and neither having been produced at the trial, they offered in evidence an attested copy of the original account, and also proof of its contents, and neither was admitted. Was this evidence rightfully excluded?

If the defendant (then Colby,) had personally filed his account in set-off, or proof had been offered that it was in his handwriting, perhaps no good reason can be given why evidence of those facts, as well as the contents of that paper, under the circumstances, should not have been admitted; but inasmuch as we are to determine the rights of these parties, upon the whole evidence in this case, and perceiving that the original account was not so filed by the defendant's intestate, but by his attorneys, we must come to the conclusion, that the proof offered, if admitted, would have failed to establish a fact shown to have been otherwise by the copy, which is made a part of the case. Was the set-off filed by the attorneys, after the same had been withdrawn, admissible for the purpose of showing an in-

debtedness to their client? We think not. Whatever might have been its effect, if suffered to remain on the files of the Court up to the time of, and during the trial, the attorney's act of withdrawal counteracted that of the filing, and rendered such a paper inadmissible for any purpose. Suppose that the attorneys, instead of filing the account, had demurred to the plaintiffs' declaration, (which would have admitted their claim,) and afterwards, by leave of Court, had withdrawn the demurrer and filed the general issue; would it be contended, that the plaintiffs under the latter could have introduced evidence of the former plea? With no more propriety can they show the prior, but subsequently nullified proceeding of the defendant's counsel.

Secondly, the plaintiffs contend, that they have proved labor performed by the defendant's intestate for their intestate in May, August and October, 1844, thereby showing "a mutual and open account current" between the parties. And assuming such facts to have been established, the question arises, as to what constitutes an "account." Lexicographers define it to be "a sum stated *on paper;* a *registry* of a debt or credit; an entry in a book of things bought or sold, of payments, services, &c." And the learned Chancellor (in *Renss. Glass Factory* v. *Ried,* 5 Cow. 593,) "a list or catalogue of items, whether of debts or credits." In this case, there is no evidence, that the defendant's intestate kept any books, or made any charges whatever, and the presumption would be, in the absence of proof to the contrary, that he received payment when the services were performed. If the defendant's intestate then kept no account, the question of mutuality becomes immaterial.

This construction does not conflict, but is rather in harmony with that given in *Penniman* v. *Rotch,* 3 Metc. 216, cited by plaintiff's counsel, where it was in proof that "the defendant said there is an unsettled *account* between me and Penniman," thus admitting a most material fact, which

the plaintiffs here have failed to prove, and according to the agreement of the parties, a nonsuit must be entered.

Plaintiffs nonsuit.

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

HUGHES, *Appellant from a decree of Judge of Probate, versus* DECKER *& als.*

DECKER *& als., Appellants from same, versus* HUGHES.

On an appeal from the decree of a Judge of Probate, the question of his jurisdiction in the case, cannot arise in the absence of fraud, unless it is embraced in the reasons assigned for the appeal.

The estate of an intestate must be distributed according to the laws in force at the time of the death.

If, *after* the death of the intestate, and *before* the sum to be distributed is collected, the law as to the *distribution* of the estate is changed, such change cannot affect the rights of the distributees at the time of the death.

The § 19, c. 38, of laws of 1821, providing "that if there be no *kindred* to the intestate, then she, (the widow,) shall be entitled to the whole of said residue," meant *lawful* kindred only.

Under that statute, the *mother* of an illegitimate child cannot claim to be of *lawful* kindred with her child.

ON FACTS AGREED.

APPEAL from a decree of the Judge of Probate.

George Hughes, the intestate, was the illegitimate son of Sarah Holbrook, wife of one Richard Holbrook, who, at the time of the birth, and for a long period before, was and had been absent from the country.

The said Richard and his wife never co-habited together after the birth of said George Hughes, but no legal divorce was had by either party.

Sarah Holbrook afterwards married again and died in 1835, leaving heirs, viz.:—Nancy Decker and Abigail Babson, her sisters; John Baker, Daniel Baker, Abner Baker, and Betsey Decker, children of a deceased sister.

Richard Holbrook died in 1851, leaving heirs. George Hughes died in 1832, leaving no children. Mary Hughes, the administratrix, is his surviving widow, and her marriage was in 1826.

In 1851 the administratrix received a sum of money from the government of the United States, upon an award made by the board of Commissioners on claims against Mexico, under the treaty between the United States and that government, for injuries and damages sustained by said intestate in his lifetime.

The amount thus received was more than sufficient to pay all the debts of the intestate, and the charges of administration, and a sum of above $15,000 remained to be disposed of according to law.

Mary Hughes claimed the whole as the widow of the intestate.

The before named heirs at law of Sarah Holbrook, afterwards Sarah Cutter, claimed together one moiety of the whole.

On these facts, at a Probate Court held in October, 1852, the Judge directed distribution of the estate as follows:—

To the *widow* of the deceased, one-half thereof. And to the widow as *heir at law*, under the Act of chapter 260 of Laws of 1852, one-fourth, and to the heirs of the mother of intestate, the remaining fourth.

Both the administratrix, and the heirs of intestate's mother appealed from this decree to the Supreme Judicial Court.

The reasons filed by the administratrix were as follows:—

1. Because the said decree is contrary to, and unauthorized by the laws of the State and the statutes directing the distribution of intestate estates.

2. Because the said George died intestate leaving the said Mary his widow, and leaving no children, nor kindred, whereby the said Mary is by law entitled to the whole of the said estate remaining after the settlement of administration accounts, and said decree should have been made accordingly.

3. Because the said decree orders a portion of said remaining estate to be distributed and paid to certain persons, (naming them,) the said several persons not being by law entitled to any share in the estate of said George Hughes.

The heirs of intestate's mother filed the following reasons for their appeal:—

1. Because the items of credit in said administration account were unreasonable, improper, unjust and illegal, and ought not to have been allowed.

(The basis of this objection was the allowance of $4000, for the commissioner who prosecuted the claim of the intestate before the board of commissioners.)

2. Because said decree is against law.

3. Because said decree is against the laws regulating the descent of the estate of deceased illegitimate intestate estates.

4. Because by the laws regulating the descent and distribution of such estates, the widow is entitled to no part of said estate either as heir or otherwise, and said appellants are entitled to the whole of said estate.

5. Because if said widow is entitled to any part of such estate, she is entitled to only one half part thereof after the payment of the just debts against said estate, and charges and expenses, and no more either as widow, heir or otherwise, and that said appellants are entitled to the other one-half of said estate to be distributed as follows, to wit; to Nancy Decker and Abigail Babson, each one third part of said one half, and said John, Daniel, Abner and Betsey the other third part of said one half in equal proportions.

6. Because said decree is erroneous in not allowing and according to the said appellants one half of such estate to which by law they are entitled.

After the appeal from the decree of the Judge of Probate, some testimony was taken by the supposed heirs, tending to show that the residence of George Hughes was in New York at the time of his death. The memorial of the widow to the board of commissioners alleged his residence to be

there. The deposition of John Babson tended to show the same. There was also a statement of Mrs. Mann which rather showed his residence to be in Wiscasset.

If additional testimony was admissible, this was to be received at the hearing.

Ingalls, for Decker & als.

1. The heirs are not estopped from proving that the residence of the deceased at the time of his death was in New York. Estoppels are not to be favored. There has been no binding admission of residence by the heirs or their attorney. It is not one of the facts agreed. 1 Greenl. Ev. § 186, 204.

There can then exist no reason why the proof offered should not be received.

2. The evidence offered establishes the fact that the intestate belonged to New York when he died.

3. The domicile being established in New York, the personal estate of the deceased must be distributed according to the laws of that State. The like rule prevails in the ascertainment of the person who is entitled to take as heir or distributee. Story's Conflict of Laws, § 481, a. By the laws of that State the widow is entitled to one half of the personal estate and the heirs mentioned to the other half. Statute of New York.

4. There is good authority to sustain the Court in distributing the estate according to the laws of the domicile. 11 Mass. 256; 3 Pick. 128; 2 Kent's Com. 7th edition, p. 536, and notes.

5. The 2d, 3d, 5th and 6th reasons of appeal cover this case. The terms "law" and "laws," used in those reasons of appeal, refer to and mean the law and laws applicable to this case. They refer to the laws of New York, and point out the distribution now claimed. The decree of the Probate Court should have given to those heirs one half of the estate.

6. The appearance of the heirs in the Probate Court and in this Court, and claiming to have the property distributed

according to the laws of New York, cannot affect this question of domicile, or the laws which govern it. Nor can the fact that administration is had in Maine be conclusive upon the parties as to residence.

7. But if the estate be administered according to the laws of this State, the heirs are entitled to one half. R. S., c. 93, § § 4, 18.

8. If it is urged that the above sections and the Act of 1838 in relation to illegitimate intestate estates are not retrospective, the answer is, that the property in this case is peculiar and had no existence till after the passage of those Acts. The treaty itself, giving the administratrix a claim against the United States, was not made till long after those Acts, for it was made as late as February 2, 1848.

As to the law of New York on the distribution of such estates, the council subsequently, on leave, furnished the Court with the following authorities: — Wendell's Blackstone, vol. 1, p. 459, foot note; 1 R. S., 753, § 14, edition of 1829; Kent's Com. vol. 2, p. 213, (p. 220, 7th edition;) vol. 4, p. 413.

Evans, for Hughes. The rights of the parties are to be determined by the statute of distributions, in force in 1832, at the death of the intestate. The Act then in force was c. 38, § 19, of laws of 1821. The same provision is incorporated in R. S., c. 93, § 19. The intestate died without issue. Did he leave any kindred? If not, the whole residue goes to the widow. The mother is not in law "of kindred."

An illegitimate *has no kindred*, other than his own lawful issue; nor has he parents — the son of nobody. This is abundantly established.

"The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs but of his own body; for being *nullius fillius* he is therefore of kin to nobody, and has *no ancestor* from whom any inheritable blood can be derived." 1 Black. Com. 459. 2 Kent's Com. 212, uses the same language and cites Co. Litt. 123, a,

and adds, "Selden says that not only the laws of England, but those of all other civil states, exclude bastards from inheritance, unless there was a subsequent legitimation."

"Nor can they transmit by descent, except to their own offspring, *for they have no other heirs.*" 4 Kent's Com. 413.

On the same page, Kent comments on the Laws of Maine and other States, and considers that the disabilities of bastards by the English common law, exist *in their full extent here.*

They have since been mitigated in some degree, by an Act passed in 1838, incorporated into R. S., c. 93, §§ 3, 4. *Cooley & al.* v. *Dewey & al.*, 4 Pick. 93, is directly in point.

The word "kindred" or "next of kin" must mean *lawful* kindred, as the word "child," whenever used in the statute, means "lawful" child.

Bouvier, Law Dict. title Parent, defines "parents" to be the *lawful* father and mother of the party spoken of. *Barwick* v. *Miller*, 4 Desau., to the same effect.

In *Priestley & ux.* v. *Hughes*, 11 East, 1, it was held, that the words "father, mother," in a statute requiring consent to the marriage of a minor daughter, meant "*lawful*" father and mother, and that the marriage of a minor illegitimate daughter, though *with the consent of the natural mother*, was void.

1 Coke Litt. § 188, b, says:—"And for the same reason, where the statute of 32 H. 8, of Wills, speaketh of children, bastard children are not within that statute, and *the bastard of a woman is no child within that statute*, where a mother conveys lands unto him."

The R. S. of Maine recognize the same doctrine, c. 1, § 3, No. 9. "The word "*issue*," as applied to the descent of estates shall be construed to include all the *lawful* lineal descendants of the ancestor."

The statutes of Maine, therefore, in giving to the "mother" or to the next of "kin," mean always *lawful* mother or kin.

The rights of the parties must then be determined by the Act of 1821, and not of 1838. *Hastings* v. *Lane*, 15 Maine, 134; *Smiley* v. *Walker*, 31 Maine, 544; *Stuart* v. *McLeod's Ex'ors*, 2 McCord Ch. R. 354.

If the Act of 1838 is to be construed as retrospective, it is unconstitutional and void. *Bank* v. *Freeze*, 18 Maine, 110; 24 Maine, 530; 2 Greenl. 275; 6 Greenl. 112; 27 Maine, 220.

If it be contended in behalf of the appellees, that the distribution is to be made, not according to the laws of Maine, but to those of New York, upon the ground that the domicile of the intestate was there, we answer:—

1st. That the fact was not so, and the proofs in the case, if admissible, do not establish it.

2d. That the appellees are estopped by their own acts of record from alleging the fact, even if it be so.

3d. That if the fact be established, the result will be that the whole proceedings must be quashed. Neither this Court nor the Probate Court had jurisdiction. No decree can be made in the case. There was no property in this State to be administered, and if there had been, the administration here should have been ancillary, and not principal.

4th. A more satisfactory answer than all, is, that by the laws of New York, the appellant is entitled to the whole, their laws in this respect agreeing with our own.

In support of the 1st answer, the case was presented in the Probate Court upon agreed facts, and the same were to be the basis of the decision in this Court.

In the appeal taken by the present appellees it is not assigned as one of the reasons, that the domicile was elsewhere than in Maine, or that other statutes were to govern.

It is too late now to receive proof.

As to the 2d, the appellees have uniformly asserted that the domicile of the intestate was in Wiscasset, in the county of Lincoln, and this is of record.

He is so called in the letters of administration, and so styled in the *notice of appointment* duly published, February, 1844.

Also, in a petition to the Judge of Probate, May 5, 1851, the appellees style themselves, "heirs at law of Geo. Hughes late of Wiscasset in said county" of Lincoln, and in the appeal by them in this case, the same description occurs. These papers are in the case.

They are estopped by the record, to which they are parties. The objection comes too late. It should have been made when administration was granted, of which due notice was published.

As to the 3d — It is clear in the case supposed, no jurisdiction vested in our Court. *Sigourney* v. *Sibley*, 21 Pick. 101.

4th. The laws of New York give the whole to the widow.

If so, this removes the only ground upon which the appellees hope to stand.

The estate in question is *personal*, and goes to the administratrix for *distribution*, according to the statute of distribution.

If it were *real* it would *descend* according to the law of *descents*, and these statutes in New York do not transmit to the same persons, as is the case in Maine.

By the statute of descent there, the mother of an illegitimate inherits. Not so, by the statute of distribution.

The *real* may go to the natural mother; the personal cannot.

CUTTING, J. — George Hughes died in 1832, intestate, leaving no property, except a claim for injuries and damages by him sustained, against the government of Mexico, which his widow, the appellant, in 1851, recovered as administratrix on his estate. The intestate left no children, and was himself illegitimate; but left a mother, since deceased, leaving collateral heirs, who claim either directly or by representation a moiety of the property, while the widow claims the whole.

By the common law, the intestate, being *filius nullius*, could have no ancestral or collateral heirs, and leaving no

children or lineal descendants, his estate at his decease would have escheated to the State.

But the Legislature have in some particulars changed that law, and by the law thus changed or mitigated, we must be governed in our determination as to the respective rights of these parties, which are to be decided as provided by statute "regulating the descent of intestate's estates," in force at the time of the husband's decease.

Section 19 of chapter 38, of the laws of 1821, provides, after the payment of debts, funeral expenses, &c., that "if there be no kindred to the said intestate, then she (the widow) shall be entitled to the whole of said residue." And we are satisfied that the term kindred, as used in this statute, means lawful kindred, and that the mother could claim no such relationship. *Cooley* v. *Dewey*, 4 Pick. 93.

But it is contended that the statute of 1821 was altered by that of 1838, c. 105, § 2, and incorporated into the R. S., c. 93, § 4, which is, that if any illegitimate child shall die intestate, without lawful issue, his estate shall descend to his mother; or, in case of her decease, to her heirs at law, and that the statute is retrospective and vests the whole estate in the appellees. Upon this point it is sufficient to remark, that the words of the statute are clearly prospective, indicating no expressed intention of a retrospective operation. *Hastings* v. *Lane*, 15 Maine, 134.

Neither do we perceive any force in the position, that because the claim was collected subsequent to the alteration of the law, although it accrued before, that the latter statute is to govern. With more propriety, it might be argued, if in this case the widow's memorial could speak, that the sum recovered before the Commissioners on Mexican Claims was allowed to her *personally* as a small compensation for her bereavement.

But a more important question arises as to the original jurisdiction of the Judge of Probate, which depends, under c. 105, § 3, upon the fact, whether or not, the intestate at the time of his decease was "an inhabitant of, or resident

in," the county of Lincoln, and if not, whether the proceedings before the Judge do not now preclude the appellees as the appellants from presenting that question.

Section 22 of the same statute provides, that "the jurisdiction assumed in any case by a Judge of Probate, except in cases of fraud, so far as it depends on the place of residence of any person, &c., shall not be contested in any suit or proceedings whatever, except on appeal from the Probate Court in the original case, or when the want of jurisdiction appears on the same record."

No fraud has been proved and the Probate record, made up from original documents, filed by both parties, describes the intestate, invariably, as "late of Wiscasset in the county of Lincoln."

Is that question now properly before us on the appeal? It seems not to have been made at the final or any preliminary hearing before the Judge of Probate, but the contention then was as to the distribution of the estate under the existing laws of this State, and particularly that of 1852, c. 260, referred to in the probate decree. But the appellants are not prohibited from showing such want of jurisdiction, provided it comes legitimately within any one of the reasons of their appeal filed in the probate office, to which by law they are strictly confined.

The first reason assigned; to wit, "Because the items of credit in said administration account were unreasonable, improper, unjust and illegal, and ought not to have been allowed," clearly admits the jurisdiction of the Probate Court. The other five reasons are in substance, that the decree is against law; against the law regulating the descent of the estate of deceased illegitimate persons; that the widow is entitled to no part of the estate and the appellants are entitled to the whole; but if to any, only to one half and the appellants to the residue; and consequently in not so determining the decree is erroneous.

Now to what laws regulating distribution did the appellants refer? To the laws of this, or of a foreign State, as now

contended for by their counsel? If to the latter, it is even then difficult to perceive any intentional impeachment of jurisdiction, but rather a submission to that tribunal, of which complaint is now made, that its decision was erroneous, because instead of being governed by the statute of 1852, then in force, and by virtue thereof distributing to the appellants one half, it gave them only one fourth part of the estate. But the Act of 1852, an Act, it would seem, of special legislation and very beneficial to the appellants, had it been constitutional, was repealed by the Act of 1853, c. 37, and the great trouble now seems to be, that the change in the law after the appeal, did not change the construction to be given to the reasons previously assigned for the appeal.

If it were intended to raise the question of jurisdiction, it must be admitted that the appellants were endowed with a degree of prescience truly remarkable, and a want of language to communicate such fact equally so, for the domicile of the intestate at the time of his decease was not questioned in the Probate Court, and the evidence of that fact was procured long after the appeal, but not long after the repeal of the Act of 1852. If the appellants had designed to have put in issue a question of jurisdiction, they could very easily have assigned it specifically, as one of their reasons, as in *Harvard College* v. *Gore*, (5 Pick. 370,) which would have left nothing for inference or controversy.

We are not satisfied that either of the reasons assigned puts in issue the jurisdiction, and consequently the testimony offered, other than the agreed statement before the Probate Judge, must be excluded, and the rights of the parties determined according to the laws of this State applicable thereto, and to which we have already referred.

The decree of the Judge of Probate is reversed and a decree must be entered, that Mary Hughes do retain in her hands the whole balance of said estate, and that she recover costs since the appeal.

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

JORDAN *versus* SCHOOL DISTRICT NO. 3, IN LISBON & WEBSTER.

School district meetings must be *notified*, in accordance with the provision of § 5, art. 2, c. 193, of the laws of 1850, or in accordance with the vote of the district, at a legal meeting, under § 7, of the same article, to make their proceedings binding upon the corporation.

Whether, after a school district, at a legal meeting, authorizes future meetings to be called under a notice differing from that required by § 5; a legal meeting might not be called in accordance with § 5, *quere*.

A school district, at a legal meeting, may ratify and confirm proceedings of previous meetings which were not strictly legal.

A committee, chosen at an illegal meeting, cannot, by their acts in superintending the building of a school-house, make the district liable to pay for its erection.

Where there is no legal contract on the part of a school district to build a school-house, nor any acceptance of the house, the building of such an house within the limits of the district, imposes no legal obligation upon its members to pay for it.

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

ASSUMPSIT to recover the price agreed for building a school-house.

It appeared by the record of a meeting held by the district on April 19, 1851, that one article was "to see in what manner notice of future meetings shall be given," under which they voted, that "the clerk call future meetings upon receiving a request of the agent or of any three legal voters of said district."

The plaintiff introduced the following from the district records: —

"Notice.

"To the legal voters of school district No. 3, in the towns of Lisbon and Webster, — Greeting.

"Pursuant to a written application to me made by the agent of said district No. 3, you are hereby notified and warned to meet at the school-house in said district on the 25th day of October, instant, at 3 o'clock in the afternoon, then and there to act on the following articles, viz: —

"1. To choose a moderator to preside at said meeting.

"2. To see if the district will agree upon a place to set the school-house.

"3. To see if the district will agree to build a school-house.

"4. To see if the district will agree to raise money to build a school-house.

"5. To see how much money the district will raise to build a school-house.

"6. To see what method the district will take to build a school-house.

"7. To act on any other business that may come before said meeting. "Samuel Cushman, Agent.

"Dated at Webster this 15th day of October, 1851.

"A true copy, attest, David Larrabee, Clerk."

"I hereby certify, that I have posted up a copy of the within notice at two public places within said district, to wit, one at the school-house within said district, and one at the corner of the Cathance road, being a public place within said district, on the 16th day of October, it being seven days before the day appointed for the said meeting.

"David Larrabee, Clerk.

"Webster, Oct. 16, 1851."

The records of that meeting show the choice of a moderator who was duly sworn, and

"2. Voted to pay David Larrabee $12,00, for land to set a school-house at the corner of the Cathance road.

"3. To build a school-house.

"4. To raise money to build a school-house.

"5. To adjourn this article.

"6. To dismiss this article.

"7. To choose a committee; chose Saml. Cushman, Chas. Hinkley and Levi G. Hanson for building committee; clerk to notify the committee.

"8. Voted to adjourn this meeting until next Saturday."

At the adjourned meeting, it appeared, that the 2d, 6th and 7th votes were reconsidered, and a committee was chosen to locate.

"Voted that Saml. Cushman, Kingsbery Dunnell and Levi G. Hanson be that committee, and that the same be superintending building committee, and to bring in their doings at the next meeting, and it was adjourned."

At such adjourned meeting, the committee's plan was accepted; the building of the school-house set up to the lowest bidder; the time when it should be finished appointed; its location fixed, and the plaintiff was the lowest bidder.

The plaintiff also read the doings of a school meeting of April 26, 1852, to show a recognition by the district of their contract with the plaintiff, and of the fact that he was building a school-house at that time for the district. He also offered the various other records in the same book, to show that the mode of calling the meeting of Oct. 25, 1851, was the common one, and also to show that the district had been organized for many years.

(Neither this book of records, nor any copy of it was furnished with the case,) but was made a part of it.

The plaintiff offered to prove by parol, *that all the voters* in the district were present at the several meetings, in which action in relation to the school-house was taken by the district and *acted* and assented to the doings of the meetings; *that* he was present at the meeting when the school-house was bid off and actually bid it off and made a contract therefor with the whole district there assembled; *that* he built a school-house for the district, (of the description given in the plan of the committee spoken of in the record,) under the direction and supervision of Saml. Cushman, Kingsbery Dunnell and Levi G. Hanson, all voters in the district, and *acted* in the capacity of building committee, and that the house was finished by the time fixed in the record; *that* he built it upon the land of the district, and that the fact was well known to the officers and members of the district and not objected to by them; *that* it was built on the spot designated and dictated by the persons acting as building committee; *that* several voters of the district had stated and admitted, that he had contracted with the

district to build a school-house for $169, and that he *had* built such a one as was agreed upon for the district; also by the clerk, Larrabee; *that* he called and gave notice of the meeting of Oct. 25, 1851, by posting up in two public places in the district, the notice, herein before recited, and that it embraced all from the word "notice" to "clerk;" *that* he posted it as his own call of the meeting, and not that of the agent, that the call as posted was not signed by the agent, but inserted by the clerk to indicate that the *request* was by the agent.

All this testimony was rejected by the presiding Judge.

The Court thereupon considering that there was no legal testimony offered, to make out a case, ordered a nonsuit.

To all which rulings and order, the plaintiff excepted.

Gould, with whom was *Tallman*, for plaintiff.

1. The plaintiff built a school-house, under the direction of three members of the district; the work was carried on under the daily observation of the voters of the same district, and in accordance with their plan, and finished within the time stipulated. He was not a member of the district and had no control whatever over the manner of keeping their records, but had a right to presume they would be properly kept. The defendants, to escape from their contract, set up their own wrong, that the meeting where proceedings were had, under which the plaintiff acted, was illegal. There should be some insurmountable legal objections, before a party under such circumstances should escape from his liability.

2. The meeting of April 19, 1851, seems to be unobjectionable. They then agreed upon the mode of calling their future meetings. R. S., c. 193, art. 2, § 7. A fair construction of § 7, is to authorize the district to prescribe the *mode* of calling meetings; including the designation of the *person* who should post up the notices. *Moore* v. *Newfield*, 1 Greenl. 44, shows analogous action under a similar statute.

3. Objection is made to the legality of the meeting of October 25, 1851. It is not contended, that the proceedings

under the call were insufficient to authorize the plaintiff to recover, if the meeting was legally organized. The fair import and construction of the record calling that meeting shows that the whole document was not the agent's but the clerk's. He copied a part of the agent's application and adopted it as his own call, signing it himself. It may have been a little irregular, but it was *substantially* a warrant. This also appears to be his from the return, which is made evidence by law. If there was any informality about it, it was still a substantial compliance with his duty. It was *intelligible* to the district; it answered all the purposes of a warrant. *Soper* v. *School District in Livermore*, 28 Maine, 193.

4. While it may be true that the records are the only legal evidence of *what was done* at the district meeting, it was competent to show by parol in what *condition* the call of the meeting was *posted up*. When the notice was posted it either purported to be from the *agent* or *clerk*. If any *ambiguity* appears in the record in this respect, can there be any impropriety in explaining it by parol? *Williams* v. *School District in Lunenburgh*, 21 Pick. 75.

5. If all the voters in the district were present and unanimously agreed to waive any informality in the notice and to proceed to business, it was competent for them to do so. Angel & Ames on Corp. 391 and 394, and authorities there cited. The statute does not *imperatively* require a notice. It only provides a mode in which a meeting may be called; but if the meeting is assembled in fact, why may they not bind themselves, especially to a stranger, without resorting to the mode provided by statute? *Saxton* v. *Nimms & al.* 14 Mass. 315. In *Moore* v. *Newfield* the voters were not all present. *Ford* v. *Clough*, 8 Greenl. 334.

6. Under the count upon a *quantum meruit*, the plaintiff ought to recover, for he offered to show his labor under the direction of a building committee, *de facto*. If they were such committee, the irregularity of the notice for the meet-

ing at which they were chosen, is not open in this case. If the case cited from 21 Pick. 85, is good law, the plaintiff may recover, though he fail to prove his contract. If the *call* was irregular, the record is *not wholly void.* The acts of an officer *de facto* of a corporation, though irregularly chosen, are binding and valid, at least as between the corporation and *third* persons. Angel & Ames on Corp. (2d edition,) pp. 81, 82, 224 to 227, and authorities there cited.

Gilbert, for defendants.

RICE, J. — The powers of school districts, or corporations, are limited and defined by legislative enactments. These corporations can act only in such manner and upon such subjects as the law prescribes. Any acts, therefore, of the inhabitants residing within the territorial limits of a school district, upon matters not confided by the law to the jurisdiction of such corporations, or any proceedings in a manner not authorized by law, would be ineffectual to bind the district in its corporate capacity.

Sect. 5, art. 2, c. 193, statute of 1850, provides, that school district meetings, on the written application of three or more of the legal voters of such districts, respectively, stating the reasons and objects of the proposed meetings, may be called by the selectmen of the town containing such district, or by the school district agent or agents, if any have been appointed.

Sect. 7, of the same chapter and article, provides, that every school district, at any legal meeting thereof, may determine the manner in which notices of its future meetings shall be given.

The defendants at a meeting held on the 19th of April, 1851, voted to authorize the clerk to call future meetings, upon request of the agent, or any three legal voters of the district.

It is suggested that the fact that the district did thus determine the manner in which future meetings should be called, does not deprive the agent or the selectmen of the

right to act under the provisions of the fifth section. It may well be doubted whether the action of the district under the seventh section does wholly supersede all authority under the fifth. But whether this be so or not, does not affect this case, because the meeting under which the plaintiff claims, was not notified according to the provisions of either section, and is therefore alike invalid in either case. Nor is it material whether there were a larger or smaller number of the inhabitants present. The meeting must have been legally notified before it was in a condition to act. *Moore* v. *Newfield*, 4 Maine, 44.

The plaintiff read the doings of a school meeting of April 26, 1852, to show a recognition by the district of the contract with the plaintiff, and of the fact that the plaintiff was building a school-house for the district. It was competent for the district by its subsequent acts, to ratify and approve of former proceedings which were not strictly legal. *Fisher & al.* v. *Inhab. of School District No.* 17, *in Attleboro'*, 4 Cush. 494. But inasmuch as neither the record which was read, nor a copy thereof, has been put into the hands of the Court, we are unable to determine whether any thing was subsequently done, at a legal meeting of the district, having a tendency to approve or ratify the contract as claimed by the plaintiff.

School districts are required by law to keep a record of their proceedings by a sworn clerk. Such proceedings can therefore be proved only by the record, or a copy thereof, properly authenticated. The parol proof offered was consequently properly rejected.

The plaintiff does not show that any persons were authorized by the district, at a legal meeting, to act as a committee to superintend the building of a school-house for the district. The fact that the plaintiff did build a school-house within the limits of the district, with the knowledge of the inhabitants, under the direction and supervision of men, who, without authority, assumed to act as a committee for the district, would not bind the inhabitants in their corpor-

ate capacity, unless they have in that capacity ratified such action.

There being in this case no evidence of any legal contract on the part of the district, or any party authorized by it, and no evidence that the district have by any acts accepted the house built by the plaintiff, the nonsuit was properly ordered. *Exceptions overruled.*

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

BUCKNAM *versus* THOMPSON.

By R. S., c. 146, § 28, it is provided "if after any cause of action shall have accrued, and 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."

A residence without the State, within the meaning of this section, has reference *only* to an *established* residence or *home*.

If a debtor, at the time a cause of action accrues against him, has a *home* in this State, it remains such, though he is absent for particular purposes, while he retains the intention to return.

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

ASSUMPSIT on two promissory notes. The general issue and statute of limitations were pleaded.

The defendant was a sub-contractor on railroads, and after giving the notes went to Massachusetts and continued to reside there several months with his wife, and from thence he removed into the State of Vermont, and with his wife resided there many months. He lived at board while out of the State, and when his contracts were performed, he returned to this State.

Before he left this State, he had a room in the house of his wife's father furnished, where he kept house, and his wife continued to occupy that room and furniture a part of the time while her husband was in other States, and when absent that room was retained.

The jury were instructed, that the phrase in the statute

"and reside without the State" had reference to an established residence or home without the State; that the terms established residence and home, were used to communicate the same idea. What constituted a home was explained to the jury.

The verdict was for defendant and plaintiff excepted.

Ingalls, in support of the exceptions.

1. The only question under the statute, § 28 of c. 146, is one of *absence* and residence beyond the State. *White* v. *Bailey*, 3 Mass. 273; *Dwight* v. *Clark*, 7 Mass. 515.

2. If the debtor is absent from the State, has no residence here where a summons could be left, and resides out of the State, it is not material when, or in what manner, it comes within the meaning of the statute.

3. The term established means "set" "fixed firmly," &c. The jury could not have found such a residence, and still the defendant might have such a residence as the statute contemplates.

Gould, contra.

TENNEY, J. — The jury were instructed, that the phrase "and reside without the State" had reference to an established residence or home without the State; that the terms established residence and home were used to communicate the same idea.

In order to suspend the operation of the statute of limitations, after the cause of action has accrued, and the statute has begun to run, the person, who sets it up in defence, must not only be absent from, but reside without the State. c. 146, § 28. This language is similar to that used in c. 32, § 1, under the 6th head, providing that any person of the age of twenty-one years who shall hereafter "reside in any town" within this State for the term of five years together, &c., shall thereby gain a settlement in such town.

The term "reside in any town" has received the judicial construction of this Court and others, which fully sustains the instructions given to the jury. *Green* v. *Windham*, 13 Maine, 225; *Wayne* v. *Green*, 21 Maine, 357.

It was obviously the intention of the Legislature to give to the creditor six full years and no more in which to bring his action for the recovery of a debt on simple contract, unless the evidence of debt be a witnessed note. And so long as the debtor has such a residence in the State as to make him subject to the jurisdiction of its Courts, the statute would continue to run.

If he had such a residence when the cause of action first accrued as constituted a home, it would remain such, notwithstanding his absences for special purposes and for periods which were definite as to time or purpose so long as there should remain the intention to return.

Judgment on the verdict.

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

ACHORN *versus* MATTHEWS.

A justice's writ, though not signed personally by the magistrate, but by one duly authorized, is sufficient.

A refusal to quash *such a writ* on motion, is the exercise of a discretion to which exceptions do not lie.

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

The action was originally commenced before a justice of the peace, and brought up by appeal.

The record stated, "a motion was made by defendant's counsel before me to quash the writ, because it was not signed in my own handwriting, but the motion was overruled because I had authorized the signature."

The defendant then pleaded the general issue, and there was judgment for plaintiff.

A similar motion was made before the presiding Judge, for the above reasons apparent of record. This motion was overruled, and the defendant defaulted by consent, subject to the opinion of the Court, and who were authorized to dispose of the action according to the legal rights of the parties.

Ingalls, for defendant.

Seiders, with *Hubbard*, for plaintiff.

TENNEY, J. — The only question presented in this case, is whether the Judge erred in refusing to quash the writ, on account of the name of the justice of the peace not having been affixed thereto, in his own handwriting, but having been done by his authority.

The Court may *ex officio* quash a writ, which upon its face is bad. *Cooke* v. *Gibbs*, 3 Mass. 193. But he may in the exercise of his discretion refuse to do so, upon motion like that presented in this case, and exceptions do not lie. *Richardson* v. *Bachelder*, 19 Maine, 82.

Report dismissed.

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

MOODY *versus* WHITNEY *& als.*

In an action of trover for the conversion of timber, where the defendants' possession has been uninterrupted, the measure of damages is its value when first separated from the freehold.

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

TROVER, to recover the value of certain mill-logs, alleged to have been taken by defendants from plaintiff's land.

The evidence tended to show, that the defendants cut trees on the plaintiff's land, and divided them into mill-logs, and caused the logs to be hauled two or three miles and laid upon another piece of plaintiff's land, near his mill, whence they rolled them into the stream and converted them to their own use; and that the value of the logs was greater than where they were cut, by the expense of hauling or something like it.

The counsel for plaintiff contended that the measure of damages should be the value of the logs at the place near the mill, where defendants took them.

On this point the instruction was, that if plaintiff was entitled to recover, the measure of damages must be the value of the logs when they first became personal property after the trees were first cut down.

The jury under that and other instructions found a verdict for plaintiff, and assessed damages at $17,66.

To this instruction the plaintiff excepted.

Ingalls, with whom was *Ruggles*, in support of the exceptions.

When trees are taken and sawed into timber, the owner may reclaim them in their new and improved state. The increased value belongs to the rightful owner of the property. This rule is not departed from in trover, unless the thing converted has been annexed to and made a part of some other thing of which it becomes the principal. Sedgwick on Damages, p. 507.

Where logs cut on plaintiff's land were drawn to defendant's mill and converted into boards, it was held the owner was entitled to recover the value of the boards. *Brown* v. *Sax*, 7 Cowen, 95.

In this case, the logs were hauled to plaintiff's, not to defendant's mill, as in the case cited. He does not claim the value of the boards as he might have done. There had been a previous *trespass*. But the *conversion* alleged was a distinct and subsequent act in taking the logs from plaintiff's possession at or near his mill.

But it would have been competent for the jury to adopt the measure of damages contended for by us, if the conversion had been at the time and place of the felling of the trees. *Greening* v. *Wilkinson*, 1 C. & P. 625; 2 Greenl. Ev. § 276; *Greenfield Bank* v. *Leavitt*, 17 Pick. 3; *Baker* v. *Wheeler*, 8 Wend. 505; *Bucknam* v. *Nash*, 12 Maine, 474.

Where there has been no increase of value, or other reason calling for the application of a different rule, the measure of damages is always the value at the time of conversion *with interest*.

In the case of *Cushing* v. *Longfellow*, 26 Maine, 306, the Court admit that a different rule as to damages prevails in *trover* from what was laid down in that case.

Lowell & Foster, contra, cited *Cushing* v. *Longfellow,* 26 Maine, 306.

TENNEY, J. — The question presented in this case is, whether the plaintiff, if entitled to recover in the action, can have in damages the value of the timber at the place where it was deposited, which was two or three miles nearer the destined market, than the spot where the trees were cut; or, is he limited in damages to their value, where they were first severed from the freehold?

In England, it has been held, that the jury are not restricted to find as damages the mere value of the property, at the time of the conversion, but they may find as damages, the value at a subsequent time in their discretion. *Greening* v. *Wilkinson,* 1 Car. & P. 621. And the doctrine in the case of *West* v. *Wentworth,* 3 Cow. 82, is somewhat similar. But in Massachusetts, the Court say, "We adhere to the value at the time, as a rule, which works well; and its certainty is quite an equivalent for its occasional want of perfect exactness." *Greenfield Bank* v. *Leavitt,* 17 Pick. 1. And it is believed, that the rule in *Greening* v. *Wilkinson,* has never been practically adopted in this State.

When the property has undergone some change after it was first taken, by additional labor being bestowed upon it, or by other materials being connected with it, the original owner has been allowed to take it, unless the identity of the thing be destroyed, or by annexing it to, and making it a part of some other thing, which is the principal; or by changing its nature from personal property to real estate. Cloth made into a garment, leather into shoes, trees squared into timber, and iron converted into bars, may be reclaimed by the original owner in their improved condition. Viner's Abr. Property (E) pl. 5; *Betts* v. *Lee,* 5 Johns. 348; *Curtis* v. *Groat,* 6 Johns. 168.

It has been held in some cases, that in an action of trover for property alleged to have been converted, the value of the property in its new and improved state, is the measure of damages, thereby allowing the original owner to receive, not only the value of the property when first converted, but all that has been added to it, provided its identity remains.

Brown v. *Sax*, 7 Cowen, 95, was trover for logs cut on the plaintiff's land, and afterwards drawn to the mill of the defendant, who converted the boards; the damages were held to be the value of the boards. In *Baker* v. *Wheeler*, 8 Wend. 505, it appeared that saw-logs, proved to have been the plaintiff's, when cut by the servant of the defendants and hauled to Fort Edward, and sawed into boards and plank by them, in trover for the *logs*, the measure of damages, was held to be the value of the sawed stuff and interest thereon. If, in these cases, there was no evidence of a distinct conversion, after the logs had been converted into boards and plank, the rule for the damages seems not only to be a departure from the principle, that the damages shall be the value of the article at the time of the conversion, and interest thereon, but at variance with adjudged cases.

In the case of *Morgan* v. *Powell*, 3 Adol. & Ellis, N. S. 282, which was *trespass* for taking coal from the plaintiff's mine, the damages were adjudged to be the value of the coal, immediately after it was severed. The Court relied upon and adopted the rule in *Martin* v. *Porter*, 5 M. & W. 351, which was, that the plaintiff was entitled to the value of the coal as a chattel, "at the time the defendant began to take it away;" that is, (as there stated,) as soon as it existed as a chattel; which value would be the sale price, at the pit's mouth, after deducting the expense of carrying the coals, from the place in the mine where they were got, to the pit's mouth. And in *Wood* v. *Morewood*, before PARK, B., he told the jury that they might give damages, under the count in *trover*, the value of the coals, at the time they became chattels, on the principles laid down in *Martin* v. *Porter*. It is understood by the report of the case, that the

one last named was *trespass* for coals after they were severed, but the principle was held to apply to the action of *trover* for the same reason. And it is difficult to perceive why a more rigid rule should be applied to a defendant in an action of trover, than to one of trespass.

If, however, the original owner chooses to possess himself of the same property, with its accretions after the conversion, and it is again converted, there is no good reason, why the taker, whether he is the one who originally took it, or a stranger, should not be holden to pay the value which it had when last converted. And a demand by the owner and a refusal by the taker, after it had passed into an improved condition, might be regarded as evidence of a conversion, after the first taking, which might admit of the same rule of damages. *Cushing* v. *Longfellow*, 26 Maine, 306.

A strong analogy exists between an article wrongfully converted, and afterwards changed into an improved state, without losing its identity, and goods fraudulently mingled with other goods; in which case, if the mixture is undistinguishable and a new ingredient is formed, not capable of a just appreciation and division, according to the original rights of each, then the party who occasions the wrongful mixture must bear the whole loss. But if the party who would be entitled to the whole of the mixture, makes no attempt to obtain the whole, but resorts to his action of trover, the damages would be, not the value of all that which he might rightfully take, but only of that which was first wrongfully converted by the act of mingling.

In the case before us, the evidence tended to show, that the defendants caused the timber standing on the plaintiff's land to be cut down and cut into mill-logs, and hauled two or three miles, and deposited on other land of the plaintiff. Farnsworth, one of the defendants, states in his letter to the plaintiff, that he became interested in the timber as a purchaser of the other two defendants, in the winter and spring of 1848, that Whitney and Kimball cut and hauled the logs, and that he was on the land before the timber was cut, and

several times while they were cutting, and the timber was afterwards landed near Sabattis river, on the plaintiff's land, and subsequently the defendants rolled it into the river and converted it to their own use. A part of the lumber purchased by Farnsworth was surveyed in the woods, and a part on the plaintiff's land before it was turned into the stream. The jury must have found, that all the defendants were engaged in cutting the timber from the stumps, and hauling therefrom, and the statements in the letter are not inconsistent with such finding.

It does not appear, that any possession was taken by the plaintiff of the timber, after it was landed near his mill, although it was still upon his land; neither does it appear that he made any demand therefor at that place; and there is no evidence of a conversion by the defendants after they began to take away the timber from the place where it originally stood, it being constructively in their possession during the whole time. *Exceptions overruled.*

Judgment on the verdict.

APPLETON and CUTTING, J. J., concurred.

LINCOLN ACADEMY *versus* NEWHALL *& al.*

A partial payment of a witnessed note, by a co-promisor, *before* the enactment of R. S., was an acknowledgment, that the balance was due, from which a promise might be implied of *all* the signers to pay it; and an action is maintainable upon the *note* until the lapse of twenty years *after* such partial payment.

ON FACTS AGREED.

ASSUMPSIT on a promissory note of defendants, dated Nov. 24, 1828, payable in one year from its date, with interest, for $154. On the back of the note were six indorsements in as many years, the *last* one being Dec. 5, 1838. The several payments were made as indorsed by Amos Newhall, one of the defendants.

The note was witnessed.

This action was commenced on Jan. 7, 1852. The defendants pleaded the general issue and by their brief statements alleged, *actio non accrevit* within twenty years next before action brought, nor within six years next after the last supposed new promise in 1838.

Upon these facts and pleadings the Court were to render judgment by default or nonsuit as the law required.

Ruggles & Gould, for defendants.

The plaintiffs claim, that the payment of part of the note revived the demand for the next twenty years. The case of *Estes* v. *Blake*, 30 Maine, 164, was evidently but little considered, and the Court was but little aided by counsel in the citation of authorities. There may have been some facts not mentioned in the report which had an influence on the hasty determination of it.

A leading principle to be kept in view is found in 2 Greenl. Ev. § 440, and cases are there cited in support of it.

The freshness and accuracy of the evidence is to be kept constantly in view in determining the question.

Six years is the general limitation for *casual* evidence. When the note is expected to remain for a longer period, the parties agree upon a witness, and twenty years is the longest period in which it is thought safe to rely on such attestation. Other acts, such as payment of a part, will avail the creditor for six years whether the note is witnessed or not, for such new promise has no connection with, or relation to such attestation. There is no reason why such a new promise should have a greater effect in an attested note than on one not attested.

In *Warren Academy* v. *Starrett*, 15 Maine, 443, the new promise was in writing and *attested*, and from the whole history of that case, it seems to be a strong precedent for the doctrine we contend for in this case.

Although in form the action is brought on the note, yet embracing the necessary pleadings, it is substantially an action on the new contract. The note is but the considera-

tion for the new promise. Hence the usage of declaring on the note, leaving the new promise to be set forth in the replication. *Little* v. *Blunt*, 9 Pick. 494; *Exeter Bank* v. *Sullivan*, 6 N. H; *Sittam* v. *Foster*, 1 Barn. & Cres. 250; *Farmer* v. *Smart*, 6 Barn. & Cres. 606; *Jones* v. *Moore*, 5 Binney, 577; *Bell* v. *Morrison*, 1 Pet. 371; 3 Bing. 332; *Presbrey* v. *Williams*, 15 Mass. 194.

The recovery is always in accordance with the terms of the new contract. If there is a condition it must be fulfilled. Story on Con. § 706; *Phillips* v. *Phillips*, 3 Hare, 299.

Where the point in controversy is the limitation bar by lapse of time, the new promise is the cause of action.

If this be so, it follows necessarily, that the statute of limitations applies to the new promise or contract as to any other. If it be not attested, it is barred in six years; if attested it may run twenty, as in the action agaist Starrett, before cited.

If the recovery is had upon the new promise and not the old, it follows, that the new promise is subject to the six years limitation. But if the recovery is had upon the original promise, (attested by a witness,) and not on the new, still that original promise is limited to twenty years, except so far as the new promise extends it, and without attestation it could extend it but six years from the time of such new promise, without involving all the uncertainties of *casual* evidence and frailty in the memory of witnesses, and in derogation of the rule as laid down in Greenleaf, before cited.

Hubbard, for plaintiffs, cited *Estes* v. *Blake*, 30 Maine, 164; 15 Maine, 443; *Patch* v. *King*, 29 Maine, 448; *Getchell* v. *Heald*, 7 Greenl. 26; *White* v. *Hale*, 3 Pick. 291; *Sigourney* v. *Drury*, 14 Pick. 387; Greenl. Ev., 2d vol. § 444; *Shepley* v. *Waterhouse*, 22 Maine, 497; *Pike* v. *Warren & al.*, 15 Maine, 390; *Dinsmore* v. *Dinsmore*, 21 Maine, 433; R. S., c. 146, § § 23, 27.

TENNEY, J. — The suit is upon a promissory note, admitted to have been given by the defendants to the plaintiffs, and attested by a subscribing witness, at the time it was executed. It became payable according to its tenor on November 24, 1829, and upon it are six indorsements of various sums at different times; the first being on May 8, 1830, and the last on December 5, 1838. The indorsements appear to have been for payments made by Amos Newhall; and it is agreed, that they were for actual payments, according to the indorsements.

The defence relied upon is under the statute of limitations. The last indorsement being before the Revised Statutes took effect, which provide in c. 146, § 27, that none of the provisions of that chapter respecting the acknowledgment of a debt, &c., shall apply to such acknowledgment, &c., made before that chapter shall take effect as a law, the provisions in § 21, that the acknowledgment or new promise of one joint contractor shall not make liable another, can have no effect upon this case.

By the law as it stood on December 5, 1838, an acknowledgment of one joint promisor, which would take a case out of the statute, as to him, would equally affect the other co-promisors. *Shepley* v. *Waterhouse*, 22 Maine, 497.

The question here presented is whether the acknowledgment of indebtedness by payments, all of which were within ten years after the note was payable, will take the case so far from the operation of the R. S., c. 146, § 11, that an action will not be barred within twenty years from the time of the last acknowledgment.

The case of *Warren Academy* v. *Starrett*, is relied upon by both parties; but it seems to have little to do with the question at issue. The original note in that case, purported to be witnessed, and to have had upon it indorsements of payments. The signature of the note was denied to be that of the defendant; but the written renewal of the note being witnessed and proved, the Court ruled, that the renewal might be regarded as an independent note; and being

witnessed, was within the exception of the statute. It was of no consequence, whether the original note was witnessed or not, after the proof of the new witnessed note for the sum due on the original. This case is similar to the case of *Commonwealth Insurance Company* v. *Whitney*, 1 Met. 21, where the memorandum upon the note was decided to be a note of itself. But the case of *Gray* v. *Bowden*, 23 Pick. 282, was more like the one at bar. There it was held that the memorandum upon the note in suit, was not a note in writing promising to pay money, nor a promissory note. Here the promise is implied by the payments made and indorsed, and not constituting a new note.

The last acknowledgment, that the balance was unpaid, as shown by the indorsement, was about nine years after the maturity of the note, and about thirteen years before the commencement of this action.

The note would not have been barred by the statute of limitations, if there had been no acknowledgment of its being unpaid, until the lapse of the full term of twenty years from the time when it became payable. And the payments could not abridge the time, within which the action would not be barred. These payments, if restricted in their effect, as the defendants contend, would be substantially a new promise, which would be barred long before the statute would be a defence to a suit on the original note, and would be entirely ineffectual upon the question involved. The case therefore is somewhat different in this respect from one, where the new promise, express or implied by payments, was made after, or at the time the statute attached. And it follows, upon the principle contended for in defence, that in order to prevail against the statute at any time after the expiration of six years from the time of the last acknowledgment, and before that of twenty years, from the maturity of the note, the action must necessarily be founded upon the original promise.

Payments made upon a note not witnessed, and before the statute of limitations would prevent a recovery thereon,

are regarded an acknowledgment that the balance is due. It is a valid agreement on the part of the maker, that the note for that balance is to be treated, as if the sum due became payable at that time, and that an action therefor could be maintained, if commenced within six years. Whatever was the effect of the note, when it first reached maturity, it is thereby agreed shall be its effect at the time of the acknowledgment. A different principle is not to be applied to a note attested by a subscribing witness. The admission, that it is outstanding, is an acknowledgment, that it is outstanding as it is, and not as it would be without the attestation. In both cases the promise implied is, that the balance shall be paid upon such a note as that to which the promise attaches, and the law determines what length of time the holder may have in which to enforce payment, according to the character of the note, the existence of which is recognized by the acknowledgment.

The argument of the defendants' counsel is exceedingly ingenious, and sets forth in a strong light the evils to be apprehended from allowing written contracts actually barred by the statute or about becoming so, to be renewed by evidence so frail as the recollection of witnesses. The Legislature, which revised the statutes of the State in 1840, was impressed by a similar opinion, and made provisions accordingly, to take effect thereafter. That department of the government legislated for the future, as they had the power to; but another department of the same government cannot legislate for the past.

The case of *Estes* v. *Blake,* 30 Maine, 164, was not made without full consideration; and no authority has been cited by counsel or found by the Court which conflicts with the doctrine therein expressed. *Howe* v. *Saunders,* not yet reported. *Defendants defaulted.*

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

CUTTING, J. *dissented* and expressed his views as follows:

Statute c. 146, § 11, provides, that, "all personal actions on any contract, not limited by any of the foregoing sections, or any other law of the State, *shall be brought*, within twenty years after the accruing of the cause of action."

The cause of action on the note in suit, accrued on Nov. 24, 1829, and was "not limited by" section 7, providing for witnessed promissory notes. Consequently, if this suit is brought on the *original* promise, as is contended for in the opinion, it was barred by force of the statute at the expiration of twenty years from that time; otherwise, if brought on a new promise, such promise not being witnessed, would be barred after six years, and in neither event can the plaintiffs recover.

Section 27 does not restrain the operation of these two sections above cited; that section is "respecting the acknowledgment of a debt, or a new promise to pay it," and must refer to verbal acknowledgments or promises, and not to a promise implied by an indorsement, which is provided for by section 23, limiting only the four preceding sections, thus leaving sections 7 and 11 in full operation.

JACKSON, *Complainant, versus* JONES.

In a bastardy process, upon objection to the competency of the complainant as a witness, that she had not remained *constant* in her accusation, and proof offered to sustain it, the question is one of fact to be determined by the presiding Judge, and no *exceptions* lie to his determination.

If such *determination* is erroneous the *only* relief for the respondent is by a motion for a new trial upon the evidence reported.

The case of *Murphy* v. *Glidden*, 34 Maine, 196, doubted.

COMPLAINT under R. S., c. 131, SHEPLEY, C. J., presiding.

After the preliminary evidence was introduced, the complainant was offered as a witness to prove the accusation against the respondent. She was objected to on the ground, that she had not remained constant in such accusation.

Testimony was heard in support of, and opposed to the objection, which is recited in the report, except the cross-examination of one witness, in relation to which the report says, "on cross-examination, not here recited, statements were made by the witness suited to impair the confidence of a tribunal in the credibility of all his statements." The report concludes — "Upon this testimony the complainant was admitted as a witness, and a verdict of guilty was rendered."

If exceptions will lie to such ruling, and that ruling was erroneous, the verdict is to be set aside and a new trial granted.

Lowell, for respondent, cited *Murphy* v. *Glidden*, 34 Maine, 196; *Allen* v. *Westport*, 15 Pick. 35; *Johnson* v. *Johnson*, 3 Metc. 63; *Jones* v. *Huggeford*, 3 Metc. 515; *M'Managill* v. *Ross*, 20 Pick. 99; *Bradford* v. *Paul*, 18 Maine, 30.

Ruggles & Gould, for complainant, cited R. S., c. 97, § 18; *Fletcher* v. *Clark*, 29 Maine, 485; *Bradford* v. *Paul*, 18 Maine, 30; *Page* v. *Smith*, 25 Maine, 256.

CUTTING, J. — By R. S., c. 131, § 8, the complainant is made a competent witness, provided it shall first be made to appear to the Judge, that she had previously made her accusation to, and been examined on oath by the magistrate, respecting the person accused, and the time and place, as correctly as could be described, when and where the child was begotten, and such other circumstances as might be deemed useful to the discovery of the truth; and being put upon the discovery of the truth, respecting the same accusation at the time of her travail, shall have thereupon accused the same man with being the father of the child, of which she was about to be delivered, and had continued constant in such accusation. Evidence appears to have been introduced sufficient to enable the complainant to go upon the stand as a witness, when objection was made to her competency, because, as it was contended, she had not remained constant in such accusation, and testimony tending to show

that fact was introduced by the defendant. This issue then became a question of fact to be heard and determined by the presiding Judge; and being found in favor of the complainant, she was permitted to testify; to which *finding* the defendant has filed his exceptions; and the principal question is, whether they were properly taken.

The statute of 1852, c. 216, § 8, gives this Court, sitting as a court of law, no jurisdiction, except in certain specified cases, among which are "all questions of law arising on reports of evidence, exceptions, agreed statement of facts, cases in equity, and in all cases, civil or criminal, where a question of law is raised." The question before the Judge, being one purely of fact and not of law, his decision is final and conclusive, and exceptions do not lie. If otherwise, it is difficult to perceive how we could come to a different conclusion, since it appears that all the testimony upon that point has not been reported.

But perhaps it may be urged, that the Judge made no decision upon the question of fact, and to that point may be cited *Murphy* v. *Glidden*, 34 Maine, 196. Whatever may be the force of that authority, in that particular case, as to the ruling of the District Judge, under the then existing law, upon the evidence as there reported, we think in this case the question of fact was distinctly raised and decided. An issue had been made as to the complainant's admissibility, and evidence, *pro* and *contra*, had been introduced, and it is found, that "upon this testimony the complainant was admitted as a witness." Besides, it is inferable that the exceptions are not taken to the mode and manner or particular form of the decision, but because it was against the evidence or the weight of evidence, in which event the defendant could avail himself of the error only under § 8, before cited, on motion for a new trial, "upon evidence reported by the presiding Justice."

Exceptions overruled, and
Judgment on the verdict.

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

LINSCOTT *versus* TRASK.

Upon the issue whether the money claimed in the suit belonged to plaintiff or her *late husband*, after evidence introduced by defendant showing that plaintiff had no money or other property at the time of her husband's death, or for *some year or two previous*, it is competent to rebut that evidence, by proving the declarations of her husband *within that period* to the contrary, and what he said as to the management of her property.

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

ASSUMPSIT to recover $100, which plaintiff gave to defendant to keep for her on the day of her husband's funeral. He told her he would return it in a few days. It was mostly in gold. He subsequently refused to repay it.

The defendant was executor of the estate of plaintiff's husband and claimed the money as part of the estate.

A verdict was returned for defendant, and plaintiff excepted.

Although the exceptions embraced the general instructions given to the jury, it is unnecessary to state them, as the cause was decided upon one of the rulings in the progress of the trial, and that will readily be understood from the testimony recited in the opinion.

Ruggles & Gould, in support of the exceptions.

Ingalls, with whom was *Lowell, contra.*

CUTTING, J. — The counsel for the plaintiff in their argument have presented several questions, which do not arise in the exceptions, and since the whole evidence is not reported, we have no means of determining as to the correctness or otherwise of the general instructions of which complaint is now made.

The only question properly presented is, as to the rejection of the evidence offered. The plaintiff claims to recover of the defendant the sum of one hundred dollars delivered to him under a promise to restore the same to her on demand. The defence set up is, that the sum so received

was the property of the plaintiff's husband, which after his decease lawfully came into the defendant's hands as his executor.

Upon this issue the defendant had "introduced evidence tending to show that the plaintiff had no money or other property of her own at the time of her husband's death, *or for some year or two previous.*" To rebut this evidence "the plaintiff's counsel asked a witness whether he had heard said John Linscott, (the deceased,) *within a year or two previous to his death,* speak of his wife, the plaintiff, having money or other property of her own, and if so, what he said of the management of it, if any thing, by himself, or other disposition of it."

By thus placing the testimony received and that offered, in juxtaposition, it is difficult to perceive any legal grounds for its rejection. But it is contended by the defendant's counsel, that the evidence introduced by him might have been excluded, had the same been seasonably objected to, which not being done, they were not precluded from objecting to the rebutting testimony. If their premise be correct, their conclusion perhaps may be properly inferred. But we think the proposition cannot be sustained, the testimony introduced and admitted was not exceptionable, for in order to show the state of the plaintiff's funds at the time of her husband's death, evidence of her being possessed of property a year or two previously, was proper for the consideration of the jury, as tending in some degree to show that she might have been so possessed, when she delivered the money to the defendant. If the evidence excluded was properly admissible on other grounds than the one assigned by the Judge for its exclusion, the exceptions must be sustained. But was the reason assigned a correct one? "The Judge ruled the inquiry inadmissible as not being an inquiry respecting the hundred dollars claimed in the suit." This reason assumes, that the husband's gold must have borne upon it some earmark to distinguish it from that of the wife. The evidence is, that the plaintiff, "at the time of

her marriage, was possessed of property in notes; that for years afterwards she had notes, one or more being taken by her for balance of former note or notes; that said John collected some of them for her, as being her property, two or three years before his decease; that he had some gold in May, 1849; that he had a considerable amount in gold a few years before." Because the husband had gold, it by no means follows from the evidence, that the wife had not gold also, or that the gold delivered to the defendant was that of the husband, and not her own; and the evidence offered and excluded might have tended to show, that the whole or a portion of the gold might have accrued from the proceeds of the notes collected by the husband.

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

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

COLE *versus* SPROWL.

Of the taxation of costs in actions appealed from the late District Court.

THIS was an action "of the case" commenced in June, 1848, and entered in the District Court for the Middle District, at the June term of that year. The writ set forth the plaintiff's title to certain real estate, and the act complained of, was the moving and placing a building in the road or way adjacent to plaintiff's store, and thus obstructing him in passing into and around his store, closing up access to the doors on one side and obstructing his lights, &c.

A trial was had in the late District Court, and from their judgment the plaintiff appealed.

Another trial was had in the Supreme Judicial Court at the September term, 1851, and a verdict was returned for plaintiff of $45.

Exceptions were taken to the rulings in that trial, and

the cause continued, when they were overruled at the May term, 1853, and judgment entered upon the verdict.

In the Act relating to the late District Court, R. S., c. 97, § 15, it was provided, that when any appeal shall be made in any action, except actions of trespass on land, replevin, actions against towns, writs of entry or of dower, by any plaintiff, and he shall not recover more than two hundred dollars, debt or damage, he shall not recover any costs after such appeal, but the defendant shall recover his costs on such appeal.

On April 30, 1852, this section, together with all relating to the late District Court, was repealed, and all matters within its jurisdiction transferred to the Supreme Judicial Court.

Both parties claimed costs after the appeal, and the matter was submitted to the full Court.

Lowell, Thacher & Foster, for defendant.

1. This action is not included in the exception in R. S., c. 97, § 15.

2. The verdict rendered at September term, 1851, established the rights of the parties as to costs. It was less than $200, and the defendant's right to costs then attached. The judgment is upon that verdict.

3. The only power the Supreme Court had, after the repeal of c. 97, to proceed at all in the hearing and disposition of appealed cases, was by virtue of c. 96, § 16, which in effect incorporates § 15, of c. 97, into it.

4. If it be said that after the repeal of c. 97, the Supreme Court had no appellate jurisdiction, the answer is, that if the actions already appealed could be heard after the repeal, they could only be heard according to the provisions of § 16, c. 96, which was a rëenactment of § 15, c. 97.

Ruggles & Gould, for plaintiff.

By the Court, SHEPLEY, C. J., TENNEY, RICE and APPLETON, J. J. — The plaintiff is entitled to recover costs of both Courts.

STANWOOD *versus* WOODWARD.

An inn-holder has a lien for the entertainment of his guest, upon his property committed to his charge.

But before *such lien* can be established, he must prove that he is an inn-holder according to the provisions of R. S., c. 36.

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

REPLEVIN for the tools of a book-binder and a lot of materials used in that trade.

No copy of the pleadings was furnished, but they seem to have been the general issue and a brief statement of a *lien claim* upon the property as *inn-holder*, for the board of the defendant.

The defendant kept the Commercial House at Rockland. The plaintiff went there on May 15, 1852, and stayed until June 11th, following. The property replevied was put into a back room, and remained there till Nov. 30, of the same year. A tender was made to defendant for the sum charged for *storage*, but he refused to give up the property until the board of plaintiff was paid. That has not been done.

The Court were authorized to enter a judgment according to the rights of the parties.

Sargent and *H. C. Lowell*, for defendant.

Meserve, for plaintiff.

SHEPLEY, C. J. — The plaintiff appears to have been the owner of the property replevied. The defendant denies his right to have possession of it, asserting a lien upon it as an inn-keeper for board of the plaintiff at the Commercial House, in Rockland.

No person can be an inn-holder without being licensed according to the provisions of the statute. c. 36, § 17; *Lord* v. *Jones*, 24 Maine, 439.

The defendant cannot establish a lien which will enable him to retain the property of the plaintiff, without proof of his character as an inn-holder. There being no such proof a default must be entered. *Defendant defaulted.*

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

COUNTY OF SAGADAHOC.

REED *versus* NEVINS *& al.*

The obligee in a bond, after he has assigned the same, can maintain no action upon it, without the consent or request of the party in interest.

After an assignment has been made of such bond, it cannot be revoked by the assignor without the consent of the assignee.

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

DEBT on a poor debtor's bond, dated Nov. 12, 1849.

At the District Court in Feb. 1848, the plaintiff recovered judgment against the defendant, Nevins, for $4068,44, and costs. On the execution issued on this judgment the bond in suit was given.

On the back of the bond, in consideration of $4000, was an assignment bearing date of Nov. 1, 1850, under the hand and seal of the plaintiff, transferring all his interest therein, and in the judgment, to one Timothy Batchelder.

Across said assignment was the following:— "I hereby revoke this assignment never having received any consideration for it, and it never having been delivered to Timothy Batchelder. "Sam'l D. Reed."

There was evidence, that the plaintiff made a disclosure on a poor debtor's bond in January, 1849, and in relation to this judgment against Nevins, said that not near the amount of it was due, and that he offered to assign it to the creditor, but it was refused because he stated there was not much due on it, and because the debtors were not responsible.

Evidence was also produced, that Reed, the plaintiff, made another disclosure, as a poor debtor, on Dec. 5, 1850, and he then stated that the execution and judgment against Nevins had been assigned to Timothy Batchelder the last month; that nothing had been paid to him on the judgment;

that $150 of it had been paid to H. Tallman; that he had forgotten what was the consideration of the assignment; that Batchelder had a note against him, but did not know what he owed him; that he probably owed him on account; that there was no agreement with Batchelder to account to him for any thing he received more than sufficient to pay what he owed him.

The cause was taken from the jury and submitted to the full Court, with authority for them to enter such judgment as the rights of the parties might require.

Randall & Booker, with whom was *Tallman*, for defendants.

Merrill, for plaintiff.

SHEPLEY, C. J. — A party plaintiff, who has no interest in the subject matter, upon which a suit is founded, cannot maintain that suit, unless it be prosecuted at the request or by the consent of the person beneficially interested. *Bradford* v. *Bucknam*, 3 Fairf. 15; *Brag* v. *Greenleaf*, 14 Maine, 395; *Ballard* v. *Greenbush*, 24 Maine, 336; *Foster* v. *Dow*, 29 Maine, 442.

A judgment was recovered by the plaintiff against Nevins, who appears to have been arrested by virtue of an execution issued on that judgment, and to have executed the bond, upon which this action has been commenced, with the other defendant as his surety, to obtain his discharge from that arrest. The bond bears date on November 12, 1849. The plaintiff, on November 1, 1850, made upon the back of that bond an absolute assignment under his hand and seal of all his right, title and interest in it, and in the judgment, and to all money due by virtue of it to Timothy Batchelder. Its execution must have been proved or admitted before it could have been received as evidence and made a part of the case. The plaintiff, for the purpose of proving that he had no title to or interest in that judgment, declared on oath that "the execution and judgment above named had been assigned to Timothy Batchelder," and "that there was

no agreement with Batchelder to account to him for any thing he received more than sufficient to pay what he owed him." To deny that the assignment was made perfect by delivery or acceptance by Batchelder, would amount to an accusation that the plaintiff was guilty of swearing falsely. The plaintiff could not revoke or annul that assignment, by writing a revocation across it, without the consent of his assignee. Such consent is not only not proved; it is negatived by the language used to revoke the assignment. The plaintiff by that language alleges, that the assignment was not delivered, contrary to what must have been proved or admitted; and that he had received no consideration for it, contrary to his written admission contained in the assignment, that he had. There is now no proof offered, that the assignment was not delivered, or that a valuable consideration was not paid. This suit cannot be maintained without proof that it is prosecuted at the request, or by the consent of the assignee. There is no such proof. Any presumption of the kind is negatived by the attempted revocation. If the plaintiff could maintain this suit, recover a judgment and collect it, he could effectually deprive his assignee of all benefit to be derived from the assignment, and thus accomplish his attempted purpose to revoke it. *Plaintiff nonsuit.*

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

HUNT *versus* RICH.

An individual, without *lawful* authority from the town obligated to keep it in repair, cannot reconstruct one of its highways, and make it safe and convenient in parts of it not previously actually *used* by travelers. For such acts he is liable in trespass to the owner of the land.

A title by *deed* is not necessary to sustain such an action. *Possession* is sufficient against a wrongdoer.

Where a parcel of land is bounded upon a *highway*, the grant extends to the *centre* of the way, if the grantor's title allow it.

The mere fact that the existence of a *road* is proved to the jury, will not authorize them to infer that it was of such *width* as to make it safe and convenient to be passed over with teams and carriages.

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

TRESPASS *quare clausum.*

The pleadings were the general issue and brief statement of authority from the town to make safe and convenient a public highway, which they were bound to repair; and that the acts, &c., were done by defendant in performance of his duty as a committee appointed for that purpose.

The plaintiff claimed title by possession and also by deed. The boundaries in the deed are recited in the opinion.

It was said by the witness who made the deed, that there was a road passing near plaintiff's lot, and a good deal said about where it was; and he run out the plaintiff's land and began one rod west of the stone wall on the eastern side of the road, and then run back ten rods, and the back line was parallel with the street.

Some of the evidence tended to show the cutting, &c. on the east and some on the north of said line.

Defendant justified under a vote of the town of West Bath and read extracts from the records.

The defendant requested these instructions.

1. That the deed should be construed to limit the extent of plaintiff's possession.

3. In this case the plaintiff does not own the fee to the centre of the road.

Both were refused.

4. That if defendant was acting under the authority of the town in repairing the road, he is justified in making it safe and convenient.

This was given with this qualification, "not unless that authority was lawfully conferred."

5. That if the cutting, &c. by the defendant, was east of a line drawn from a point one rod west of the eastern wall at Hunt's south line, to the south-east corner of Luther Storer's wall, as stated by witness, then the plaintiff cannot recover. (Refused.)

6. That if satisfied of the existence of a road, the jury

are authorized to infer the width to be such as to make the road safe and convenient for passing with teams and carriages. (Refused unless connected with other testimony.)

The Judge did instruct the jury, that the plaintiff's land, by the boundaries named in his deed, must be considered as bounded on the highway, whether the way was of greater or less width; that the record of the call, warning and proceedings of the town, purporting to give authority to open the way, were illegal and conferred no authority.

A verdict was returned for plaintiff, and defendant excepted.

Gilbert and *Tallman*, in support of the exceptions, among other points, contended, that although the meeting at which defendant received authority to make the road was illegal, yet the town being bound to have the highways safe and convenient, each individual could rightly perform that duty. The right to pass over it necessarily included the right to make it safe and convenient.

Porter and *Smith*, *contra*.

TENNEY, J. — This action is trespass for a breach of the plaintiff's close in West Bath, with aggravation in having torn down and destroyed his fence, his fruit and other trees, and dug up the bank and carried away the soil and earth. The defendant pleaded that he was not guilty; and in a brief statement justified the acts complained of, as having been done under the authority of the town in making and repairing the highway, alleged to be over the land on which the acts were committed, and in removing obstructions therefrom. The plaintiff relied on parol evidence, and upon a deed from one Winter *& ux.* for proof of his possession of the premises described in the writ. The verdict, under instructions from the Court, was for the plaintiff; and whether those instructions and the refusal to give others, as requested, were erroneous, are the questions of law now before us.

The jury were instructed, that the plaintiff's land by the boundaries named in the deed, must be considered as bound-

ed on the highway, whether the way was of greater or less width; and that the record of the call, warning and proceedings of the town, purporting to give authority to open the way, were illegal and conferred no authority.

The description in the deed is as follows: — "on the western side of the road, and nearly opposite the northern end of the dam at Winnegance, and six feet southerly from directly opposite on a continuous line, from the south-west corner of a lot of land we sold to T. W. Waldron, then north fifty degrees west ten rods, thence northerly parallel with the street, carrying the width of ten rods to land of Luther Storer, thence easterly to the street, leaving on the street three rods of land adjoining the land of Luther Storer."

It is manifest from the description in the deed that it was the design of the parties thereto, to bound the grantee on the street, and not upon a line arbitrarily assumed as the true boundary, without reference to the street; it was regarded as matter of uncertainty at what particular place the line of the street was; and to fix, so far as was practicable, the location of the land, a line was run for that of the west line of the street, and the south and north lines were fixed as being ten rods from each other, and the west line as ten rods distant from the street wherever that should be. The eastern boundary was intended to be upon the highway, and not to deviate therefrom, if its width should prove to be greater or less than was then supposed.

The other instructions given, and the fourth instruction requested and refused, appertain to the same question, and may be considered in connection.

It was not controverted in argument that the proceedings of the town disclosed by the record, touching the authority conferred upon the defendant, were irregular and wanting conformity to the requirements of the statute. It was however insisted, that as the town was bound to keep all their ways in repair, and an inhabitant of the town was therefore exposed to loss in case of any neglect therein, he may have

been informally appointed an agent for the purpose of making the road, and repairing the same, and may do all which is necessary to prevent the town from incurring any liability.

Every person is entitled to a passage over a highway. In order to make that passage safe and convenient no one can deny his right to remove a stone, and to repair any temporary defect in the road for such a purpose; and greater repairs in the part ordinarily traveled, if not injurious to the owner of the land, might not give him a cause of action. But it does not follow that such private individual could in his own discretion reconstruct the highway, take down the fences which are within its limits, cut down trees and take away the earth on parts which travelers have not before used for passing and repassing. The statute has entrusted this duty to an officer to be legally chosen at a meeting of the town, properly called and held, and to be under oath in the discharge of this duty. To his judgment and discretion is committed an important trust. He is to see that a proper road is to be made for the public, and that the rights of individual proprietors of the land are not unnecessarily invaded. R. S., c. 25, § § 62, 71, 72. In *Ruggles* v. *Lesure*, 24 Pick. 187, MORTON, J., says:—"Individuals have no right to lay out, widen or straighten public streets or highways. Private interests would clash with public convenience."

If such power cannot be exercised by a private individual, according to his own opinion of what is fit and proper, no number of citizens can confer upon him greater power unless in the mode prescribed by law.

The action of trespass is founded upon a supposed injury to the plaintiff's possession, and can be maintained without proof of title. It follows that title to a part does not prevent a recovery for the injury to the land not covered by the deed, but which the plaintiff has in possession, against a person making out no justification.

When lands are bounded on a highway, they extend to the centre of the highway, if the grantor has title so far. *Bangor House* v. *Brown*, 33 Maine, 309. Before the third in-

struction requested could have been properly given, it must have been shown by evidence that the principle was here inapplicable. Nothing of the kind is found in the case.

The instruction requested, that the existence of a road would authorize the inference that it was of such width as to be safe and convenient, was properly refused. If the truth of the proposition involved in the request was established, in many cases it would subject proprietors of lands adjoining highways to great losses without compensation; and might carry a right of way, founded in prescription, to an extent beyond the limits proved by long and continued use. *Exceptions overruled.*

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

STATE OF MAINE *versus* LIGHTBODY.

Grand jurors required to attend upon a court are obtained by means of a *venire issued in due form.*

Such *venire* is a judicial writ, and to be in *due form*, must bear the *seal* of the court from which it issues.

Persons selected as grand jurors, under a venire *without* the seal, have no authority to act in that capacity, although empannelled and sworn in court without objection.

And all indictments found by *such jury* may be quashed on motion.

ON FACTS AGREED.

INDICTMENT. APPLETON, J., presiding.

Upon the arraignment of the prisoner and before pleading to the indictment, his counsel moved that it be quashed, because there was no seal of the Court affixed to the *venires* by which the grand jury were summoned.

It was agreed that the validity of the indictment *thus found* should be submitted to the full court, and if valid, the cause to proceed to trial; otherwise that it should be quashed.

J. S. Sewall, in support of the motion.

Evans, Attorney General, *contra.*

TENNEY, J. — A writ, according to the definition of the common law of England, is in general the king's precept in writing under seal issuing out of some court, to the sheriff or other person, and commanding something to be done touching a suit or action or giving a commission to have it done. Terms de ley 1, Inst. 73. The definition, when applied to the precept of the State, is the same.

Venire facias is a writ judicial, awarded to the sheriff to cause a jury in the neighborhood to appear, when a cause is brought to issue to try the same. Old Nat. Br. 157.

By the Revised Statutes of this State, c. 135, § 10, it is required that the clerk of the courts shall issue *venires in due form*, directed to the constables of as many towns, &c., and for as many jurors, &c.; always collecting the grand and traverse jurors, &c., as uniformly from all parts of the county as the situation of towns, &c., will permit. By c. 172, § § 1 & 2, it is made the duty of the clerk of the courts to make out from the returns of the venires for grand jurors an alphabetical list of such jurors, and being empannelled, they are to be sworn.

From these provisions of the statute it is manifest, that the grand jurors are drawn and summoned, and that they attend the court by the authority of *writs of venire facias*, that these are signed by the clerk, and in the form which has been in practice under the common law. From the facts, that they are *writs*, and that an essential part of a writ is the seal of the Court, they do not conform to the statute requirement without seals, and are therefore wanting "in due form."

The bill of indictment against the defendant was found by those, who were empannelled and sworn, as grand jurors are required to be sworn, but who were not drawn and summoned by writs of *venire facias;* and the authority under which they were in attendance was no greater than the authority in any other form or a verbal commission.

We infer, however, from the case, that they were organiz-

ed and proceeded to their business, in the mode ordinarily practised by grand juries.

In *Patterson's case*, 6 Mass. 486, the juror whose name did not appear in the constable's return, was put upon the panel, he swearing that he was summoned.

A quaker acted as a member of a grand jury, and a person indicted pleaded in abatement to the indictment, that he did not take the oath required. The Court say, "Indictments not found by twelve good and lawful men at least, are void and erroneous at common law; and the circumstance, that it was found by twelve men is stated in the caption of every indictment according to the English forms and practice. But this formality has not been preserved with us; and the omission is not to be objected to indictments found according to our practice; viz., *the jurors for the Commonwealth upon their oath present, &c.* An irregularity in this respect, if it should happen, might become a subject of inquiry upon a suggestion to the Court; for under their superintendence the grand jury is constituted, and must be understood to have the legal number of qualified men. This being the construction to be given to the record, after an indictment has been received and filed by the Court, no averment to the contrary can be admitted as a formal plea. Objections to the personal qualifications of the jurors and the legality of the returns are to be made before the indictment is found, and may be received from any person who is under a presentment for any crime whatsoever; or from any person present who may make the suggestion as *amicus curiæ*." *Commonwealth* v. *Smith*, 9 Mass. 107.

In the first case referred to, the evidence that the juror was drawn and summoned was supposed to be insufficient. And in the other the objection was for an alleged want of qualification in the juror by not taking the grand juror's oath. And the remarks of the Court might seem to favor the proposition, that objections to grand jurors would not avail, after the filing of the indictment. But the ground of objection did not lie so deep in that case as in the present.

There it was not that the juror was wanting in qualification to be a member of the pannel, nor that he was not legally drawn and notified to be at the Court, but that he had not taken the prescribed oath. And when the Court say that objections to the legality of the returns, are to be made before the indictment is found, it is understood to have reference to the *persons* returned as jurors, and not to the *precepts* which directed them to be summoned.

It has been held, in the matter of *State* v. *Symonds*, 36 Maine, 128, that an indictment, found by the grand jury, a part of whom were summoned under the authority of *venires* issued by direction of the Court at a term subsequent to that when the grand jury was first empannelled, in order to make up the necessary number, could not be sustained, and on motion, judgment was arrested after conviction.

In the case before the Court, the constable and the officers of the town, in causing the grand jurors to be drawn and notified, acted without authority, and the men who were thus called upon were clothed with no powers as grand jurors, though they passed through the process of being empannelled and sworn. And being in attendance upon Court, without authority, nothing done subsequently would confer upon them the right to act. And the omission of the defendant to suggest to the Court their incompetency till after the indictment was found and filed, could not give to it any validity.

Certain men sitting as a grand jury, without authority, cannot be made a legal body by consent of a person accused by them; *a fortiori*, they cannot become so by any omission to make objections, on the part of those against whom bills may be found. *Indictment quashed.*

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

COOMBS *versus* INHABITANTS OF TOPSHAM.

When a verdict will be set aside as against evidence.

The law as laid down in *Moor* v. *Abbott*, 32 Maine, 46, reaffirmed.

CASE, to recover damages for injuries alleged to have been received by means of a defect in a public highway. The cause was tried before APPLETON, J.

After a verdict for the plaintiff the evidence was reported on a motion for a new trial. It was agreed that if the verdict was against evidence, or if the instructions given were erroneous, or if those rejected were material and were erroneously refused, the verdict should be set aside and a new trial granted; otherwise judgment to be rendered on the verdict.

Bronson and *Russell*, for defendants.

Tallman and *Orr*, for plaintiff.

TENNEY, J. — This action is to recover damages alleged to have been sustained by the plaintiff upon Green street, in the town of Topsham, by reason of a defect therein, which street, it is also alleged, the defendants were bound to keep in repair.

In the attempt to have the verdict set aside, the defendants do not apparently rely upon errors in the instructions to the jury, or in withholding instructions which were requested. But they insist, that the verdict was palpably against the entire evidence of the case, and that there was no testimony on which the verdict against them can rest.

Some attempt was made by the plaintiff to show the existence of a highway, over the ground, on which the obstruction, that occasioned the injury was placed, by a location, exhibited by the town records, made in 1799; and also by a constant user for a period sufficiently long to render the town liable.

Without specifying the defects in the record, which are obvious, the endeavor of the plaintiff to show the place of the location of that highway, so as to embrace within it,

the alleged obstruction, appears from the evidence to have failed. So far as he succeeded in causing a protraction of that road upon the earth, it would leave the place of the accident a considerable distance westerly of the westerly line of the same.

Under their motion to set aside the verdict the defendants contend, — 1st. That the evidence introduced by the plaintiff, to show the road by an user, upon which the alleged defect existed, tends to establish no such fact, as will make them liable; and 2d. That the accident happened by a defect in the carriage of the plaintiff rendering it unsafe, so that if it did take place in the road which they were bound to keep in repair, or by the joint defect in the carriage and the road, they are not responsible therefor.

A survey of the road, and the grounds near, was made under an order of Court, and a plan of the same was introduced at the trial. Witnesses for both parties testified, that they saw the plaintiff when he was thrown from the sleigh, and when the injury alleged in his writ was received by him. Upon the plan introduced, a spot upon the earth is indicated, on which the object that the sleigh struck, lay at the time. No question is made, that this spot is correctly represented. Other objects are shown by the plan, and no doubt is raised that their position is in all respects correct. These are the Purrinton, the Thompson and the Coombs houses, the stone post near the Purrinton house, the pile of lumber, easterly of that post, and the pump near the Thompson House.

B. C. Bailey, the surveyor, who made the survey and plan, testified, that he has known the road called Green street thirty odd years, that he has never known any travel in the place, where the accident happened, and has known no change in the place of travel.

Walter R. Littlefield stated, that he saw the plaintiff's sleigh hit the log which lay a few feet from the stone post; the log lay nearer the road, than the stone post stood; and has known no material change in the travel of the road.

Isaac Lincoln testified, that he had been acquainted in Topsham 50 years, and for a long time with the road running by the Purrinton house; and resided on that street 50 years ago; the travel of the road came within four feet of the Purrinton house, and he thought was the same as many years before.

The witness last named makes the travel of the road so near the Purrinton house, (and Littlefield having stated that the log which the sleigh struck was nearer the traveled part of the road, than the stone post,) that the log according to this testimony could not have been far to the west of the west line of the travel of the road. But it is proper to notice, that the spot shown by Littlefield to Bailey as the place of the disaster, is by the plan, not so near the traveled way as is the stone post.

The before named witnesses were all introduced by the plaintiff, and no one testified that the log, with which the sleigh came in contact, was within what was ever the traveled part of the street.

The testimony introduced by the defendants is strong and full, that the log was still further westerly from the travel of the road.

Henry A. Haines testified, that at the time the injury was received by the plaintiff, he rode with him in Green street; that the horse jumped on to a pile of logs to the right, and threw the plaintiff out, &c. Before that, the horse had been frightened opposite Dr. McKeen's, a distance of forty rods or more, as appears by the plan, and run down to the Purrinton house, and that the hold-back iron broke, when they were opposite McKeen's and let the sleigh against the horse and frightened him; and when he first jumped, he sprang as though something had hit his heels. This testimony of the plaintiff's witness is confirmed by that of George Rogers, who stated, that the plaintiff called on him, as one of the selectmen of the town of Topsham, to settle the damage on account of the accident, and said, that opposite Dr. McKeen's, the hold-back iron broke, and

let the sleigh against the horse's heels and frightened him; and that he could not tell whether he turned him in, in front of the Purrinton house, for the purpose of stopping him, or whether he went in of his own accord.

Cyrus Purrinton, for the defendants, testified that he had a conversation with the plaintiff, who told him that the accident happened by his horse being frightened, and running away with him; that as he came down the street, he came very near running into the pump, and that after he passed the pump, he reined the horse in, in front of the Purrinton house, by the corner, to bring him up, and was there thrown out.

From this evidence, which is not apparently controlled by any other in the case, it is quite obvious, that the horse became unmanageable by the breaking of the hold-fast iron, near the house of Dr. McKeen, and the pressure of the carriage upon him, which caused him to be frightened. This contributed at least to the injury, as the evidence would seem clearly to indicate; and for it the defendants were not responsible, if it did not occur by any defect in the road, of which there is no evidence.

By the authority of adjudged cases, if the accident was only partially the result of a defect in the carriage, making it unsafe, though not previously known to the plaintiff, the defendants are not liable. *Moor* v. *Abbott*, 32 Maine, 46.

On the whole, it is so manifest, that upon both grounds relied upon in the argument, in support of the motion, that the jury acted under a misapprehension of the evidence, of the instructions in law of the Court, from undue sympathy for the plaintiff, or were under some other improper influence, that it is thought proper that the cause should be sent to another jury. *Motion sustained, verdict set aside, and new trial granted.*

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

DRUMMOND *& al. versus* WINSLOW.

An authority in the master of a vessel to receive a partial payment in advance for the freight, may be inferred from subsequent payments made to him on that account, with the approbation of the owner.

And money thus found in the hands of the owner, belonging of right to the charterer, may be recovered in an action for money had and received.

ON FACTS AGREED.

ASSUMPSIT to recover fifty-five dollars.

The plaintiffs chartered the defendant's brig Emily, of which one Elisha Small was master, to perform a voyage from Portland to Port Conway, in Virginia, and from thence to Bath with a load of timber, at a sum specified per thousand.

The voyage was performed.

While the brig lay at Port Conway, Small obtained from the agent of the plaintiffs $55, and receipted for the same on the bill of lading. That sum has been repaid by the plaintiffs.

After the brig arrived at Bath, a settlement of the freight was made between the parties and payment received. On the bill rendered were two items of credit of cash paid to Capt. Small, to the amount of $200, but the sum sued for was not embraced in the settlement.

It was stipulated, that the Court might draw such inferences as a jury might, and if from these facts, the defendant is liable to pay said sum, a default is to be entered; otherwise a nonsuit to be entered.

Tallman, for defendant.

The owners are not chargeable with money loaned or advanced to the master, unless there is shown a necessity for which the money was advanced. Kent's Com. 4th Ed. p. 163; Abbott on Ship. p. 135 to 140 and note; *Keith* v. *Murdock*, 2 Wash. C. C. 297; *Pope* v. *Nickerson*, 3 Story, 465; *Mervin* v. *Shaler*, 16 Conn. 489.

Randall & Booker, for plaintiffs.

The case finds, that the sum claimed is actually due to the

plaintiffs and some good reason should be shown, or it should be paid. None such appears. The sum claimed was paid by the plaintiffs' merchant, at the South, to Winslow's master there, in part for freight.

It is enough for the case that a mistake of fact, from some cause existed, by which the plaintiffs paid fifty-five dollars more than was due; and the money so paid is recoverable back in this action. *Norton* v. *Marden*, 15 Maine, 45.

CUTTING, J. — The bill of lading was executed by the master, on August 6, 1851, who on the same day indorsed thereon the sum of fifty-five dollars, as received of the plaintiffs' agent "on account of the within" (bill,) which sum on settlement, for some cause, was overlooked by the plaintiffs. And the defendant now contends, that the master was not authorized to receive it for him.

Without examining the law, as to how far a master is authorized to charge the owner of a vessel for supplies or funds procured during the voyage, concerning which the authorities cited by the defendant's counsel are principally applicable, we think the evidence discloses sufficient authority in the master to charge the defendant. It appears, that "after the arrival of the brig at Bath, the account of freight was settled between the parties," which was on August 30th, (1851); that in that account there settled, under dates of the 18th and 28th of the same month, are two items of credit, "By cash to Capt. Small," both amounting to the sum of $200; thus the defendant recognized the acts of the master in receiving payments in advance for the freight; and if he was authorized so to do twelve days before the final settlement, we think it may be reasonably inferred, that such authority extended to a period twelve days prior to the first item in the credit, which would carry it back to the date of the indorsement. And according to the agreement of the parties the defendant is to be defaulted.

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

BROWN *versus* CLIFFORD.

Where a judgment debtor has an exclusive ownership of a parcel of land, a levy by his creditor upon an *undivided* portion of it, is invalid and void.

But when the debtor owns an *undivided* portion of a farm, a levy by his creditor upon a less proportionate part than he owns, will be effectual to divest his title to the part levied on.

The validity of a levy, as between the debtor and creditor, is not impaired, by the omission to have the incumbrance of a mortgage, known to be existing, deducted from the appraised value of the land.

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

ENTRY to recover an undivided share of a farm described in the writ. *Nul disseizin* was pleaded.

The demandant claimed under a levy made July 24, 1851, upon nine forty-fourths of five-eighths of the farm, supposed to belong to the tenant.

The levy was introduced, and evidence that at the time it was made, the tenant was asked as to his title and replied, that there were eight shares, that he had purchased four and owned one, making five-eighths.

In defence was read a mortgage deed of general warranty from the tenant to one Cutting, dated June 20, 1848, acknowledged and recorded, purporting to convey the entire farm; and the note described in the condition was also produced and read.

It was also in evidence, that the farm was reputed to be the property of the first wife of tenant's father, by whom he had nine children, one of them dying after his mother and before his father, without issue.

There was evidence tending to show, that demandant knew of the existence of the mortgage, but that he said it was only a sham. No allowance was made for it in the levy.

The jury were instructed, if satisfied from the evidence, that the tenant at the time of the levy was the owner of the whole farm, the levy having been made upon an undivided portion of it, would not be legal, and their verdict should

be for the tenant; that if satisfied the tenant was at that time the owner of an undivided portion greater than the portion on which the levy was made, it would be legal and the demandant would be entitled to their verdict, although he knew the mortgage to Cutting was in existence at the time the levy was made.

A verdict was returned for demandant and the tenant excepted.

Gilbert, for tenant.

Porter, with whom was *Smith*, for demandant.

1. The correctness of the first part of the instruction is not contested.

2. In support of the second proposition we cite c. 94 § 10, R. S. The whole matter, as to the interest of the tenant, was a proper subject of inquiry by the jury, and they have settled it.

3. In regard to the mortgage, no objection lies to the instruction. If the creditor deems a mortgage honest and fair, he will of course, have its value deducted when making a levy, but he is not precluded from electing to take the risk. 8 Shepl. 160.

TENNEY, J. — The jury were instructed, that if the tenant was the owner of the entire farm, at the time of the levy, the levy upon an undivided portion was illegal and invalid. This instruction was in accordance with the provision of R. S., c. 94, § § 3 and 4.

The jury were further instructed, that if the tenant owned an undivided portion, greater than that on which the levy was made, it would be legal, and the demandant would be entitled to their verdict. By § 11, of the chapter of the statute referred to, when the debtor is the owner of such an interest as the instruction supposes, the whole or a part of his interest, as may be required to satisfy the execution may be taken, and thereafter held in common with the cotenants.

The whole of the debtor's interest in the premises shall

pass by the levy, unless it be larger than the estate mentioned in the appraiser's description. R. S., c. 94, § 10. The levy can pass no greater estate than it describes; and if it be less than that to which the debtor has title, it is restricted to the description. And it being in nowise injurious to the debtor, that an estate less than he owned should be taken by the levy, it will be effectual. There may be questions, as to the extent of the debtor's interest, and the creditor may not wish to involve himself in disputes and litigation, and therefore limit his extent, that it may be free from doubt in this respect.

Another question involved in the instructions, is whether the omission to deduct the mortgage debt, from the estimated value of the premises, it being known to the creditor, will render the levy invalid. R. S., c. 94, § 31. The provision refers to a levy upon the right of redeeming from a mortgage, and not to a case where the creditor is willing to treat the land as that of the debtor, unaffected by the mortgage. He may choose to do this on the ground, that the mortgage is fraudulent and invalid as against creditors. And it has been held, that if the creditor choose to take the interest of his debtor, subject to the mortgage, without allowing any thing for the debt, he may do so. *Cummings* v. *Wyman*, 10 Mass. 464; *White* v. *Bond*, 16 Mass. 400; *Litchfield* v. *Cudworth*, 15 Pick. 23.

The appraisers did not estimate the value of the right of redeeming the portion of land owned by the debtor, but the whole is appraised subject to the incumbrance, and without any deduction therefor, and the levy is valid between the debtor and creditor notwithstanding the mortgage given by the former. *Judgment on the verdict.*

RICE and CUTTING, J. J., concurred.

SMALL *versus* CLIFFORD.

Possession merely of the common property by one of the tenants, is not evidence of an *ouster* of his co-tenants.

But a notorious claim by one tenant of *exclusive* right in connection with *exclusive* possession of the common property, is an actual ouster of the other tenants.

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

ENTRY to recover possession of three-twentieths of five-eighths of a farm.

This action is against the same tenant as in *Brown* v. *Clifford, ante*, p. 210, and the title of demandant is by a levy upon an *undivided* portion of the same farm. Similar testimony was before the Court and jury, and the same instructions given. An additional question arose out of the pleadings.

The tenant pleaded the general issue, and by a brief statement alleged that he was tenant in common with demandant at the time of suing out the writ, and before and since, and that he did not disseize the demandant or in any way deforce or hold him out or obstruct his lawful entry therein.

It appeared that the tenant was in possession of the farm and had taken the crops and sold timber, and that he was asked in the road to give up possession of plaintiff's part levied on. He said he had made a deed to Capt. Cutting; that it was out of his hands, and the creditors might get their pay as they could.

The tenant requested the Judge to instruct the jury that there was not sufficient evidence to prove a disseizin.

That words uttered off the premises, unaccompanied by any acts preventing the entry of demandant, cannot constitute a disseizin.

These requests were refused, and the jury were instructed, that to entitle the demandant to maintain the action, if satisfied that the parties were tenants in common, they must

be satisfied that the tenant resisted or refused to permit the demandant to occupy his share or denied his title to it.

Verdict for demandant. The tenant excepted.

Gilbert, for tenant.

Porter, with whom was *Smith,* for demandant, cited *Hall* v. *Dewey,* 10 Verm. 593; 5 U. S. Dig. p. 753, § 48; 6 U. S. Dig. p. 182, § 20; 1 Shepl. 337.

The refusal to instruct as requested was right. A denial of demandant's title and a refusal to permit him to enter and occupy may as well be made off as on the premises.

TENNEY, J. — In addition to the points involved in the case of *Brown* v. *Clifford, ante,* p. 210, the question was raised under the pleadings whether the tenant had ousted the demandant of the undivided portion of the farm set off to him. Evidence was introduced tending to prove, that the tenant claimed title to the whole of the farm, while in possession thereof, at the time when he was not in person upon the land. The Court was requested to instruct the jury, that words uttered off the premises, and unaccompanied by any acts preventing the entry of the demandant, could not constitute a disseizin.

No question was made that the tenant was in possession of the farm. From this fact alone an ouster is not to be presumed; but it may be proved by a notorious claim of exclusive right accompanying exclusive possession. If a tenant in common enter into the actual and exclusive possession of lands, taking the rents and profits to his own use, and openly asserting his own exclusive property in the lands, denying the title of any other person, it is an adverse possession by him, and an ouster of the other tenants. Stearns on Real Actions, 41.

Judgment on the verdict.

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

PATTEN *versus* KELLEY *& als.*

Chapter 148, § 29, R. S., requires poor debtors disclosing accounts and contracts for money, &c., to have the same appraised; and if the creditor shall not then take such property, the debtor shall deposit with the justices an assignment in writing to the creditor of all the property thus appraised and set off.

In *such assignment* no conditions can be inserted which are not required by the statute. If the debtor qualifies the assignment, by requiring indemnity against all cost before the creditor shall institute suits on demands thus assigned, the justices have no authority to make out and deliver to the debtor a certificate that they have administered to him the oath prescribed in § 28 of that chapter; and such certificate is invalid.

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

DEBT on a poor debtor's relief bond.

The defence was, that he took the oath within the six months allowed to him in the bond. A certificate of the statute oath required, by two justices of the peace and quorum, was produced by the defendant.

The debtor disclosed demands against sundry persons, which were appraised by the justices.

The debtor made an assignment of these demands to the plaintiff for the consideration of eighty-five dollars, (the amount of the appraisal,) concluding thus, "with authority to said Patten to collect and receive the same, as I myself could, and for his own use, he however first indemnifying against all cost, should he institute suits therefor."

The case was submitted to the full Court to render such judgment as the rights of the parties should require.

Gilbert, for plaintiff.

Randall & Booker, and *Tallman*, for defendants.

APPLETON, J. — By R. S., c. 148, § § 29, 30, provision is made for the appraisal and assignment which the debtor may disclose as belonging to him. By § 30, "if the creditor be absent, or shall not then conclude to accept the same as aforesaid, the debtor shall deposit with the justices an assignment in writing to the creditor of *all* the property thus

appraised and set off; and the justices shall make a record of such proceedings, and cause the property so disclosed to be safely kept and secured, for the term of thirty days, thereafterwards to be delivered to the creditor, with the assignment aforesaid, *on his demanding* the same within that time."

The exception here taken is, that the assignment tendered imposes on the creditor conditions not authorized by the statute. The debtor sells, transfers and assigns to the plaintiff certain claims, subject however, to the following condition: — "he however *first indemnifying* against all cost, should he institute suits therefor." The statute imposes no conditions to be performed by the creditor before the bond is to be available. No mode is provided to fix the terms of indemnity, or the penal sum for which it is to be given, or to determine upon the sufficiency of the sureties which may be offered. The bond is to be delivered to the creditor on his "demanding the same" within thirty days. This requires that more shall be done than merely demanding the property assigned. It imposes a condition precedent, to be performed before the assignment is to become effective. If the plaintiff had demanded in this case the property within the time limited by statute, he would not have been entitled to it according to the terms of the assignment left with the trustees. If an assignment may be trammeled with conditions, such as the debtor may deem expedient, it may become practically unavailable to the creditor. As the property disclosed was not "duly secured" to the use of the creditor, in accordance with the provisions of the statute, the justices were not authorized to make out and deliver the certificate provided in § 31. *Call* v. *Barker*, 27 Maine, 97. *Defendants defaulted.*

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

DONNELL *& als. versus* GATCHELL.

The limitation bar is not suspended for six months from attaching to a cause of action, where the writ was abated, by reason of being brought in the wrong county.

FACTS AGREED.

ASSUMPSIT. The writ was dated March 30, 1853, and brought upon a note dated Nov. 14, 1846. The general issue was pleaded, and a brief statement filed, that the defendant relied upon the limitation bar.

The plaintiffs brought a suit on the same note on Nov. 12, 1852, returnable at the January term, in Lincoln county, in 1853, wherein James Smith of Brunswick, in the county of Cumberland was summoned as trustee.

That writ was abated on motion of defendant, because no trustee, residing in the county where it was pending, was summoned.

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

Barrows, for defendant.

1. The action is barred by the R. S., c. 146, § 1, clause 4.

2. The former writ not having been abated for want of form, or by the death of either party, the case is not within the exception specified in R. S., c. 146, § 12.

Jurisdiction is one thing, form another. To prevent the statute from attaching, the action should have been commenced in a court by law having jurisdiction of the parties and the subject matter. R. S., c. 115, § 9, provides that no writ or process shall abate for want of form only, but there could be no such provision as to objections to the jurisdiction.

The Court will not add to the exceptions created by the statute. *Packard* v. *Swallow*, 29 Maine, 459; Angell on Limitations, 533.

Sewall and *Ingalls*, for plaintiffs.

1. It was the manifest intention of the Legislature, that a party should not be precluded from trying his action upon the merits, by any mistake of the officer in serving it, or of

the attorney in making it. The exception in R. S., c. 146, § 12, applies to all writs which are "abated" for whatever cause. The words, "for any matter of form," apply to the words, "or the action otherwise avoided or defeated," and not to the word "abated."

2. But if this is not the true reading, then we say the cause of the abatement of the first suit was matter of form. By R. S., c. 115, § 9, provision is made that no writ shall be abated "for want of form only." The two sections are to be construed together, and so construed as to give meaning to both. Matters of form, in c. 146, cannot mean the same thing as in c. 115. The provision in c. 146 is a senseless and unmeaning one if the term "form" is used in both sections in the same sense. A provision is made for a case, which on such a construction could never happen. The fair construction, therefore, is, that the term "form," as used in c. 146, is a much more comprehensive term than as used in c. 115, and embraces a class of cases not embraced in the latter chapter.

3. The former writ in this case was by law abateable. *Greenwood* v. *Fales*, 6 Greenl. 405. And for no cause affecting its merits, but for matter of form. If so, the present suit was commenced within the six months allowed by the exception in the statute, and the limitation Act cannot apply.

SHEPLEY, C. J. — The question presented is, whether this suit is within the exceptions to the operation of the statute of limitations, c. 146, § 12, permitting suits, commenced within six months after an abatement or defect of a former suit for the same cause of action, to be maintained.

It is alleged in argument, that it was the intention to permit a new suit to be maintained, whenever the first suit had been abated for any cause, or defeated for matter of form.

Writs may be abated on trial of issues of fact, and for causes which would prevent the maintenance of any suit for the same cause of action, between the same parties on the

same facts. It does not appear to have been the intention to suspend for six months the operation of the statute of limitations in such cases, to allow another action to be commenced. The statute only allows another action to be commenced within that time, when a writ has been abated or an action defeated "for any matter of form or by the death of either party."

The writ in the former action was not abated for any matter of form, but because it appeared upon inspection to have been commenced and made returnable in the county of Lincoln, when it should have been in the county of Cumberland.

This action not having been commenced within six years after the cause of action accrued, is barred by the statute of limitations. *Plaintiff nonsuit.*

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

KIMBALL *versus* CITY OF BATH.

Towns, in making necessary repairs upon their streets and side-walks, may interrupt the public travel and obstruct them, without incurring any liability therefor.

But ways undergoing repair, should not be left in the night time, without precautionary means to give travelers warning of their danger.

For accidents, occurring in the night-time on ways thus situated, where no suitable precautionary measures are taken to warn travelers or citizens of the danger, towns are equally liable as when they occur from want of repair.

Of the causes for setting aside a verdict for excessive damages.

ON MOTION to set aside the verdict as against the evidence and weight of evidence, and also against the law. Another reason assigned was, that the damages were excessive.

The plaintiff, an inhabitant of Bath, received an injury, thought to be permanent, while returning to his boarding-house on a dark night, by falling from the side-walk. One of the streets of Bath was in need of repair, and the street

commissioner had necessarily taken up one length of a plank side-walk, which left from 12 to 18 inches break in the level of the side-walk. At this place the injury was received. The jury returned a verdict for plaintiff, assessing the damages a little over $1400.

Randall & Booker, for defendants.

1. The road was under repairs. If an accident happen by reason of an obstacle necessarily placed in the way, damages cannot be recovered. *Johnson* v. *Whitefield*, 18 Maine, 286. It cannot be necessary to cite authorities to prove the right of towns to obstruct a road for the purpose of repairs. It will not be contended, that the law requires towns to make repairs, and then punishes them for taking the means necessary to do so.

2. But it is said the town should have given notice of the obstruction. We agree to this proposition, provided the obstruction be a dangerous one, but not otherwise. A bar there would not have been justifiable. A heavy foot travel passed there during the time of repair with perfect safety and a bar there would have blocked up the entire travel of the street. But it may be said lights should have been exhibited; then lights should have been suspended over the whole city. Few of the side-walks there, but are quite as much exposed to accidents as this. The whole annual expenditure of highway money could not put even the side-walks in such repair as this principle requires. The rule, that the kind of travel, and the ability of the town to make fine roads, that exist in large cities, cannot be applied to us and our plank side-walks.

3. But the plaintiff was a citizen and boarded in the immediate vicinity of this place, and knew the condition of the road and side-walk, and is required to use ordinary care. *Moore* v. *Abbott*, 32 Maine, 46; *Farrar* v. *Greene*, 32 Maine, 574.

4. The damages are excessive. This is not like a slander case, or like some other cases of tort, where exemplary damages may be required. It is only the actual damages,

and the evidence furnishes the elements by which they may be computed. There is nothing proved, or attempted to be proved, but an injury to the tendon of the heel. His business was not interrupted, for he proves himself to have been about it the next day after the accident. The evidence shows he was lame before this, and when he received this injury he consulted no surgeon nor employed one, but only an *herb* doctor. The plaintiff appears to have been guilty of gross negligence.

Gilbert & Tallman, for plaintiff.

RICE, J. — This is a motion to set aside the verdict on the ground that it was rendered against the evidence and the weight of the evidence in the case, and because the damages were excessive; and also on the ground that the jury was improperly selected and filled up. The objection to the manner of selecting and filling up of the jury we do not, however, understand is relied upon.

As to the weight of the evidence, we do not think the jury erred in the conclusion that the way was defective, at the time and place of the injury. But it is contended that inasmuch as the street was then undergoing repairs, the defendants are not liable.

Towns are not only authorized, but required by law to repair their public ways, including streets and side-walks, so that they may be safe and convenient for those who may have occasion to pass and repass upon them. To do so effectually, it may be necessary to break up and remodel both the bed of the streets and the side-walks, and at such times the public are necessarily subjected to some degree of inconvenience and insecurity. For such necessary interruption of travel and inconvenience to the public, towns are not liable. But while, for the purpose of repairs, they may thus break up and temporarily obstruct the passage over their public ways and side-walks, they are not authorized to leave their streets or side-walks, while undergoing repairs, in such a condition as unnecessarily to expose those who

may pass upon them to inconvenience or danger. At such times, ways should not be left during the night without some temporary railing, or other means of protection, or some beacon to warn passengers against such uncommon danger. By neglecting to adopt such reasonable precautionary measures for the safety of citizens and travelers, towns are equally culpable, and as liable as they are when their ways are permitted to become unsafe from want of repairs. Any other rule would enable negligent or vicious town officers to set pit-falls for the unwary, with impunity.

We think the evidence shows very clearly, that the city authorities did not adopt suitable precautionary measures to protect, during the night time, passengers upon the street where this accident occurred, while repairs were being made.

The damages assessed by the jury may have been greater than the Court would have awarded upon the evidence. But the parties are entitled to the judgment of the jury and not of the Court upon that question, and Courts will not set verdicts aside on the ground that damages are either excessive or inadequate, unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law; mere difference of judgment is not sufficient. There is nothing in this case to induce the belief that the jury were prejudiced or unduly biased, or that they made any mistake of fact or law. If they have erred in judgment, the error is not so palpable as to authorize the belief that they were controlled by any improper influences.

Motion overruled. — Judgment on the verdict.

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

RAWSON & *als. versus* CLARK.

A devise of real estate to T. L. with the proviso, that if he is not then living or should not live to claim and receive the same, then to go to J. S. L., vests the title in T. L. if he is living at the death of the testator.

The legality of the proceedings in the assignment of dower, cannot be contested by one having no interest to be affected thereby.

If the judgment debtor is owner in common of one undivided *half* of an estate in reversion, a levy by his creditor upon one undivided *third* is valid.

It is no objection to the validity of a levy, that neither the appraisers in their certificate, nor the officer in his return state the amount of the debt and fees and charges of the execution levied. This may be made certain on inspection.

Unless more land is taken than enough to satisfy the debt and costs, *as taxed*, the levy cannot be avoided.

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

WRIT OF ENTRY. *Nul disseizin* only was pleaded.

The demandant claimed title to the land described in his writ, by virtue of a levy of an execution in favor of demandants against Truxton Lowell.

Whether Truxton had any estate to be levied on depended upon the construction of the will of John Lowell, who devised his real estate to his sons Truxton and John C. to be equally divided between them; provided however, that if Truxton was not then living, or should not live to claim and receive his half, then the whole was devised to John C.

Evidence was produced that Truxton had been in Bath one or more times since the decease of his father.

Dower in the estate of John Lowell was assigned by commissioners appointed by the Judge of Probate to his widow before the levy.

The reversionary right of Truxton in the widow's dower, was a part of the land levied on.

The tenant was in adverse possession of the demanded premises. Objections were made to the legality of the assignment of dower, and to the want of validity in the levy. There were no other objections to the demandant's right to recover.

If the Court should be of opinion, that the demandant had established a *prima facie* right to recover, the default of the tenant, which had been entered by consent, was to stand; otherwise to be taken off and the case sent down for trial.

Porter & Smith, for tenant.

1. The premises demanded were not the property of the judgment debtor at the time of the levy. He never *claimed* and *received* his half under the will of his father.

2. The levy is void, because 1st, in the appraisement of the reversionary interest, it was appraised as the debtor's *one-third part,* when by the will, if he took any thing, it was *one-half;* and 2d, in the assignment of dower, no notice was given to Truxton or the appointment of an agent; and 3d, the oath taken by the commissioners was not the one required by the statute, the words "and without favor and affection," being omitted.

3. It no where appears in the appraisers' certificate, or the return of the officer, what the amount of the debt and cost and fees and charges were. Neither does he state that the sum of $1259,47, which the property was appraised at, was in full satisfaction of, and to the amount of said execution and fees and charges, but he adds in conclusion, "I therefore return this execution fully satisfied and all fees and charges." This might be, had he called the amount of the execution ten dollars more than it really was.

Gilbert, for demandant.

APPLETON, J. — The plaintiff claims title to the demanded premises by virtue of a levy on the same as the property of Truxton Lowell. The right of Lowell to the estate levied upon, depends upon the construction of a clause in the will of his father, John Lowell, in which, after bequeathing all his real estate to his sons, John C. and Truxton, to be equally divided between them, he adds the further proviso in relation to Truxton, "provided further, that if my son Truxton *is not now living or shall not live* to claim

and receive his half as aforesaid, then I give and devise the whole of my said estate to my son John C., on condition of his maintaining my wife as aforesaid."

When the will was made, it was uncertain in the mind of the testator, whether his son Truxton was then living or not, or if then living, whether he would be alive at the time of his death. It is against that contingency he intends to guard. It is on that account that this provision is inserted. The bequest to Truxton is in the most general terms. The subsequent proviso looks not to any specific act of claiming or receiving, but to his living. If living, the title would vest in him by operation of law. No act of his was necessary to perfect his title; nor was any act contemplated by the testator as necessary to be done. All the will requires is that he should be alive at the death of the testator, and that such was the case is not questioned.

The Judge of Probate, by R. S., c. 95, § 3, may assign dower to the widow "when her right of dower is not disputed by the heirs or devisees." The tenant is neither heir nor devisee, nor does it appear that the right of the widow was disputed by the heirs or devisees. Neither does it appear that the tenant has any interest in the estate, which will be interfered with by the assignment as made. The return of the Commissioners shows that all interested in the estate were legally notified, though the mode and manner of giving such notice is not specifically set forth. It appears however, that one of the owners of the reversion acknowledged notice, and formally assented in writing to the assignment of the Commissioners. From the decree of the Judge of Probate there has been no appeal. But it is not necessary to determine whether the dower be well assigned or not, as the tenant is not shown to have any estate authorizing him to control its legal assignment.

An objection is taken to the levy because it was made upon one-third of the reversion only, when the judgment debtor in fact owned one-half thereof. No reason is perceived why a creditor may not levy according to the exigency

of his demand. To say that a levy should not be made on less than the fraction of the debtor, where the estate is in common, would be practically to defeat the right of all whose demands are less in value than the interest of the debtor. The debtor may convey by deed any assignable portion of his estate in common. The creditor may in like manner levy on any part of that interest that may be needed to satisfy his demand. The case is within the express language and the obvious intention of R. S., c. 94, § 11.

By the return of the officer, it appears that both of the judgment debtors were resident without the county, and having no attorney within the same. No notice therefore was required to be given. R. S., c. 94, § 11. In such case the duty devolves on the officer to choose two appraisers, which it appears he has done. Where the officer in his return of an extent, stated that he chose two of the appraisers, the debtor not being within the State, nor within his knowledge, the return was held sufficient. *Cooper* v. *Bisbee*, 4 N. H., 329.

An objection is taken that it does not appear what was the amount of the debt, and the costs and charges. That is certain which may be made certain. The amount of the execution and the interest accruing thereon, can be ascertained from the data before the Court. The remaining charges are those of the officer. To avoid a levy, it must appear that more than enough land to satisfy the debt and costs was taken. *Thayer* v. *Mayo*, 34 Maine, 141. It has been held that a levy was not void, because the officer taxed a gross sum for his expenses. *Tibbetts* v. *Merrill*, 3 Fairf. 122. A levy is not void because the officer taxed and caused to be satisfied in the extent, fees not authorized by law. *Sturdevant* v. *Frothingham*, 1 Fairf. 100. It does not appear that there was any error in the amount taken as and for the debt, or in the fees taxed for the expenses of the levy. In *Moody* v. *Harvey*, 2 N. H., 495, the appraisers certified that "they set off the land in full satisfaction of the execution, with officer's fees and incidental charges," but

it in no other way appeared at what sum the land was appraised, and it was held that nothing passed by the extent. But in that case the decision was placed on the ground that the land should be appraised at a fixed and definite sum. That has been done in the present case. Besides, the officer in his return states, substantially, all the facts required by R. S., c. 94, § 24, and it is not for the Court to extend the requirements of the statute beyond the expressed will of the Legislature. *Defendant defaulted.*

SHEPLEY, C. J., concurred in the result only. — TENNEY, RICE and CUTTING, J. J., concurred.

ROGERS *versus* KENNEBEC & PORTLAND RAILROAD CO.

No exceptions can be taken to the omission of the Judge to instruct the jury upon a question raised in the argument of counsel, unless he is requested, or it is material for their consideration and decision.

A motion to set aside a verdict, as against evidence, must be sustained with a report of the *whole* evidence submitted to the jury.

Without such certified report, the Court have no authority to consider the motion.

ON EXCEPTIONS and motion for a new trial, from *Nisi Prius*, TENNEY, J., presiding.

CASE.

The action was before the Court on a former occasion, 35 Maine, 319, and the nature of it may there be found.

The counsel for the plaintiff contended in his *argument*, that this was not a navigable stream within the meaning of R. S., c. 126, § 1, and that if so, plaintiff by force of that statute had a right to erect and maintain his dam to raise water for working his mill. But the Judge omitted to give any instructions in relation to the right of mill owners, under that provision of the statute, no request being made therefor.

For such omission the plaintiff excepted.

A verdict was returned for plaintiff for $106,66.

The defendants filed a motion to set it aside as against the evidence, the weight of evidence and the instructions of the Court.

The plaintiff having claimed a prescriptive right to flow the lands above defendants' embankment, the jury were directed to find whether he had such right, and also if they should find a verdict for the plaintiff, to ascertain and be able to say what amount, if any they found, for an unreasonable detention of plaintiff's logs.

The jury answered, that they found the plaintiff had no prescriptive right to flow where he claimed, and that they found $6,66, as the damages for the detention of the logs; and upon being inquired of, for what the residue of the verdict was rendered, answered, "for the stopping of the fresh water of the stream."

With the evidence reported was the following. — "The plaintiff introduced testimony tending to show the extent of the injury he had sustained in consequence of the diminution of the head of water, caused by the obstruction to the flow of the tides above the embankment, and also the damages he had sustained by the detention of the logs above the embankment, in consequence of the improper construction of the culvert; but it is not deemed necessary to report that testimony upon the motion filed in this case, as the defendants raise no question upon this part of the case under the special finding of the jury."

The certificate of the presiding Judge was as follows: —

"The foregoing is a correct report of the evidence, so far as it had any bearing upon the question whether the damage found by the jury, aside from that found to have been caused by the unreasonable detention of the logs of plaintiff, was excessive."

Evans, for defendants, argued, that that part of the verdict, "for stopping the fresh water of the stream," could not be sustained by any evidence in the case.

Gilbert, for plaintiff, contended, that defendants did not

present their case in conformity to the requirements of the law.

Evans, in reply. — Every word of the testimony, having any bearing on the question presented, is fully reported. It is so stated in the certificate of the Judge.

The question now is, was there any evidence to authorize the jury to give any damages whatever for obstructing the running of the water in the fresh water stream? This was a ground of action hardly set forth in the writ, scarcely thought of at the trial, and on which no testimony was introduced.

The ground of complaint in behalf of plaintiff was the exclusion of the tide waters.

The plaintiff's mills as testified by Sewall, are "altogether dependent on the tides for water power." "At low tide it was entirely bare (in the creek,) there," where the embankment was built.

Upon this ground the plaintiff failed. He had no right to retain the tides for the use of his mills.

Upon what evidence then was the verdict rendered?

The counsel argues, that it does not appear what was the character of the stream, its width, depth, configuration of the bottom and other things, showing its capacity, &c., which he deems material elements.

If all this does not appear, it is because there was no testimony upon the subject. If the plaintiff claimed damages, and was entitled to damages from any diminution of his water power, by reason of obstructions in the stream, the burden was upon him to show it, and the extent of it. It was his duty to show that the stream was capable of affording power, and that he had in fact, not in theory, been deprived of its beneficial use by the acts of the defendants.

But no such proof was adduced, and now that the jury have rendered a verdict without a particle of evidence, the counsel complains that the case does not show such proof.

The report shows, that there was no such evidence, nothing whatever to justify the finding.

The testimony which was offered, tending to show the extent of the injury received in consequence of shutting out the tide, had no connection with, and no bearing whatever upon the circumstances and condition of the fresh water stream.

And as to the "nature of the bottom" of the pond above the embankment, its porousness, evaporation, &c., &c., there was no evidence in the case, and hence none could be reported.

SHEPLEY, C. J. — The case is presented by a bill of exceptions on behalf of the plaintiff; and on behalf of the defendants by a motion to have the verdict for the plaintiff set aside as against evidence.

The exceptions are taken to an omission to instruct the jury respecting the right of the plaintiff to erect and maintain his dam, there having been no request for such instructions. It does not appear from the case, as presented, that such a question became material for consideration and decision by the jury. The exceptions must therefore be overruled.

The argument for the defendants upon the motion is not limited to the question whether the damages, other than those assessed for detention of logs, were excessive. It insists, that the jury had no legal right to find any such damages.

While the argument for the plaintiff insists that the case on the motion has not been properly presented; that all the material evidence has not been reported bearing upon that question.

The report does not purport to present all the evidence before the jury. The certificate of the presiding Justice, stating that it is a correct report of the evidence, so far as it had any bearing upon the question, whether the damages, other than those found for the detention of logs, were excessive.

On the motion, the case can only be entertained by virtue

of the provisions of the Act of 1852, c. 246, § 8. The class of cases to be thus presented, comprehends "all motions for new trial upon evidence as reported by the presiding Justice."

Was it the intention to authorize the presiding Justice to report such portion of the evidence as he might consider to be the whole relating to a particular point, or as material to a decision of it; or was it the intention to have the whole evidence submitted to the jury reported?

What one Justice or one counsel might consider to be the whole or the material evidence bearing upon the point another might not.

The Court of law must regard the report as correctly made. This might subject the rights of a party to the control of the presiding Justice without affording him any relief for errors in the selection of what would present the whole or be material for a decision of the question.

If this be the true construction, it will introduce a practice entirely new and liable to occasion, as in this case, contests, whether all or all material evidence upon the point has been reported. The intention is believed to have been, not to introduce a change so important and objectionable, but to continue a former practice of allowing a party thinking himself aggrieved by a verdict, to present in an authenticated form all the evidence, on which that verdict was found, for consideration by the Court.

This being regarded as the correct construction, the case is not so presented by the report as to enable the Court to act upon it. The motion not being properly sustained must be overruled.

Exceptions and motion overruled.

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

INHAB'TS OF RICHMOND *versus* INHAB'TS OF THOMASTON.

Upon a question of his settlement, the declarations of a pauper while in the act of removing, or while doing an act with reference to removing from one town to another, are admissible in evidence to show his intention as to changing his residence.

But his declarations, while about his ordinary business, as to his future intentions or expectations, cannot be received.

Facts within the *personal knowledge* of a deponent, tending to show an intention of the pauper to change his residence, may be given in evidence; but when from the whole answer *it is manifest that the facts stated, were merely communicated by the pauper to the deponent, they must be excluded.*

A physician who has contracted with a town to furnish the necessary medical services for their poor, at a stipulated price, with such additional sum as they should recover for his services rendered to paupers chargeable to other towns; in a suit by the town to recover for such services and other supplies, *he* is a competent witness, *after* his portion embraced in the suit has been paid by the town,

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

ASSUMPSIT.

The action was for supplies furnished for the support of Joseph D. Lombard, wife and child, whose settlement was alleged to be Thomaston.

The principal question was the place of their settlement.

It appeared he was first seen in Thomaston in April, 1844, and hired out there for a few months. In the spring of 1845, he was coasting, afterwards was a common mariner in vessels sailing out of Thomaston, and the testimony tended to show, that he lived there more than five years together.

In May, 1846, the pauper was married in Thomaston, and the testimony of the widow, (the said Joseph D. being dead,) tended to show that four days after, he went to sea, and after remaining a short time she went to Lincolnville on a visit, and was in Camden at her sister's a part of the summer He returned from sea in the summer of 1846, sick, and went where his wife was at Camden on a visit. When he returned from sea in the summer of 1847, he found her there on a visit and stayed there a number of weeks.

It appeared that Lombard, after remaining in Camden six weeks in the summer of 1847, did, for the first time, go to keeping house with his wife in Thomaston, not having before kept house at any place. He continued to live there until March, 1850.

The defendants called one Joel R. Thompson, who testified that he sailed in the schooner Heard with Lombard in January, 1847, to New Orleans; that on his way out he said he should not live any longer in Thomaston; he spoke of it several times on their way out, but did not say he should reside at New Orleans; that he said nothing about moving when he returned home; that he did say he expected his wife was at Camden, and when he returned he was going to some other town. He stated on the way out at what place he was going to reside after his return from New Orleans; that it was other than Thomaston; but the witness was not allowed to state where he said he was going to reside, it being objected to.

The defendant introduced the deposition of Chas. Wormwell, a portion of which related to a conversation he had with Lombard at the time he was putting his dunnage on board the Heard in Jan. 1847, as to his intention of going to Camden to live, and a subsequent conversation of a similar import while Lombard was on board the Heard in the harbor and about going to sea. This part of the deposition was excluded. The part excluded was in these words, "he informed me that he expected to have a vessel which he was to command in Camden, when he returned in the spring of 1847. He said he had some relations of his wife in Camden, who were going to assist him to a vessel. That he made arrangements for his wife to go to Camden as soon as she was done work at Mr. Levenseller's, (where she was when we left,) where he intended to meet her when he got home."

The plaintiffs called Dr. Libby, who testified as to his attendance on the pauper. On cross-examination it appeared, that in the year 1852, he had contracted with the

plaintiffs to doctor their poor for a specific sum, with the right as an additional sum, of what the town should collect for paupers having their settlement in other towns. A portion of the expenses incurred for Lombard, was embraced in the year 1852, for medical services. The Court, upon objection being made, held him to be an interested witness.

The witness then left the stand, but was afterwards recalled, and in answer to defendants' questions, stated that the overseers of Richmond had paid him the amount of the bill arising within the year, and although then objected to as interested, by defendants, he was admitted and testified to the services before spoken of.

The jury returned a verdict for plaintiffs. The defendants excepted to the rulings.

Gould, in support of the exceptions.

Ingalls & Abbott, contra.

RICE, J. — One material question in issue between the parties was, whether the paupers removed from Thomaston to Camden in the winter or spring of 1847. To prove such removal, the defendants proposed to introduce certain declarations of Lombard, made at the time he was about departing from Thomaston, on a voyage to sea, in the fall of 1846.

Declarations are often admitted in evidence, for the purpose of explaining the nature of a transaction which is then the subject of inquiry. Where it is necessary to inquire into a particular act, or the intention with which a person performs an act, proof of what the person said at the time of doing it, is admissible in evidence for the purpose of showing its true character. 1 Phil. Ev. 231.

The declarations of a trader, at the time of his departure from his house, or the realm, or of his absenting himself, are properly admissible in evidence as showing his intention, when the question is whether he has committed an act of bankruptcy. 2 Phil. Ev. 329.

For the purpose of proving an assignment to have been made with the design of defrauding creditors, the declarations of the party, at the time of his signing and executing the instrument, are admissible in evidence as a part of the transaction, against the plaintiff claiming under him. 2 Phil. Ev. 385.

The principal points of attention are, whether the circumstances and declarations offered in proof, were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character. 1 Greenl. Ev. § 108.

Declarations, to become part of the *res gesta*, must have been made at the time of the act done, which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction. Per HOSMER, C. J., in *Enos* v. *Patten*, 3 Conn. 250. And the act performed, which may be thus explained, must be connected with, and constitute a part of the subject matter to be determined.

Thus, in the case of *Thorndike* v. *Boston*, 1 Met. 242, the question to be determined was, where was the plaintiff's place of residence. Upon that point his declarations made about the time of his departure from Boston, and while he was making preparations to go to Edinburg, as to his intentions, were held admissible.

So too, in the case of *Gorham* v. *Canton*, 5 Maine, 266, the declarations of the pauper, when setting out on a journey from one town to the other, were held admissible, to show the intention of the pauper.

The paupers, in the case at bar, were married, but in indigent circumstances, having no habitation of their own. The husband was a common mariner; the wife a servant, living out in families, as a domestic. In the fall of 1846, the husband shipped as a seaman, on a voyage to New Orleans. His wife was then at service in a family in Thomaston. About the time of his departure on this voyage, he

made declarations as to his future hopes and intentions, as to business and residence. Those declarations were in part admitted, and excluded in part, at the trial. Exceptions are taken that all were not admitted.

The fact sought to be proved was, that the paupers moved from Thomaston to Camden. The primary question, then is, was the pauper *moving*, or doing any act with reference to *moving* from Thomaston, at the time he made the declarations testified to by the witness Wormwell? Most clearly not. He was then in the pursuit of his ordinary business, just starting on a voyage to sea, on which he was to be employed for several months. He was not then in the act of changing his residence; was not on his way to Camden, nor to any other place in search of a residence or home. He was doing no act in connection with a change of residence. His whole conversation had reference to his future expectations and intentions, after he should have completed the voyage upon which he was then entering.

Such being the situation of the pauper at the time of making the declarations testified to, if the Judge erred, it was in admitting any part of the conversation.

It is objected that certain facts stated by the witness Wormwell, were excluded improperly. We think it is apparent that the statements by the witness, that Lombard had "made arrangements for his wife to go to Camden," &c., were a mere narrative of what Lombard had communicated to him, and not facts within the personal knowledge of the witness, and were therefore properly excluded.

The payment of the bill of Doct. Libbey, by the town, extinguished any legal interest which he had in the event of the suit, and he was, after such payment, properly admitted.

Exceptions overruled.

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

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

EASTERN DISTRICT,

1854.

COUNTY OF WALDO.

PITMAN *versus* POOR *& al.*

No permanent interest in real estate can be acquired by a parol agreement.

Thus, a parol license that the plaintiff or his grantor may build a dam on the land of another, to raise a reservoir of water for the use of his mill, will confer no right upon the plaintiff to *maintain* such dam after it is built, or *control* the water raised by means of it.

Nor can the owner of *such reservoir dam* use the water raised thereby for a mill *subsequently* erected, to the *detriment* of the *earlier* mill, for the reason that it was the *oldest* dam.

In regard to the *owner of the soil*, it may be considered as erected when he *first* appropriated it to his own use.

The owner of the first mill is entitled to the beneficial use of the water, as though no reservoir dam existed.

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

CASE, for diverting the water from plaintiff's mill, so that he lost the beneficial use of the same.

In 1826, one Hall Clements owned a mill-site on which he built a saw-mill. The year prior he obtained verbal per-

mission of the owners of the land above to build a reservoir dam, to accommodate the mill he was intending to erect. That dam was built, and the water thereof was under the control of Clements and plaintiff till 1844. About that time, the original mill having been burnt, another was erected on the same site. The plaintiff succeeded by deed to all the rights of Clements.

In 1844, defendants purchased of the owner, the land flowed by the reservoir dam and the soil on which it stood, and in his deed no reservation whatever was made. They also erected a mill between plaintiff's and the reservoir dam, and claimed to control the water in that dam, and did control it, until the commencement of this suit, and at times detained the water from plaintiff's mill.

The presiding Judge instructed the jury, that if Hall Clements obtained a license by parol from the owners of the soil to erect the reservoir dam, and thereby flow their land, and if in consequence of such license he erected said reservoir dam and built mills on the site where the plaintiff's present mill now stands, relying on such reservoir to supply the same, and the present plaintiff has his rights to the same, that neither the owner of the soil nor the grantee of such owner can divest him of his rights thus acquired to the reserved water.

The jury found, that if the plaintiff was entitled to the control of the reservoir dam, his damages were one hundred and twenty dollars; that if he had no such rights, but the title to the reservoir dam was in the defendants, and they had the right to control the same, that he had sustained no damage.

It was stipulated, that if the instructions were correct, judgment was to be entered on the verdict; but if erroneous, and the control of the reservoir dam is in the defendants, the verdict is to be set aside, and judgment rendered for defendants.

Dickerson, for defendants.

1. The license to Clements gave *him* no interest in the

land, and was revocable at the pleasure of defendants' grantor.

2. The conveyance of the soil to defendants was a revocation of the license, and vested in them the control of the water and of the reservoir dam, at least so long as plaintiff should suffer it to remain there. Defendants had no knowledge of the license and could not be bound by it.

3. Clements could not assign his interest to plaintiff.

4. If these acts of defendants' grantor were not a revocation, the actual possession taken by defendants and held for many years, is a revocation.

5. No consideration is pretended to have been paid for the parol license; showing that it was a mere naked authority.

6. The plaintiff's claim cannot be sustained without a virtual repeal of the statute of frauds.

That a license might be created by parol, the counsel cited, 3 Kent's Com. 452; *Ruggles* v. *Lassell*, 24 Pick. 187; *Emerson* v. *Fish & al.* 6 Maine, 200; *Pease* v. *Gibson*, 6 Maine, 81.

They are distinguished from easements. An easement cannot be revoked like a license. Coke on Lit. 9, § a; *Tentinam* v. *Smith*, 4 East, 109. See *Mansfield* v. *Whitney*, 15 Wend. 380; *Thompson* v. *Gregory*, 4 Johns. 81; *Cook* v. *Stevens*, 11 Mass. 533; *Fitch* v. *Seymour*, 9 Met. 467.

Abbot, for plaintiff.

TENNEY, J. — Hall Clements, by a verbal permission of the owner of the land on which it stands, erected the reservoir dam, and in a year or two after, built upon the privilege now occupied by the plaintiff, a mill, which stood for several years, and was burnt. He afterwards rebuilt the mill on the same site, about eighteen years after the erection of the former mill. He conveyed his interest in the reservoir dam, which passed through several mesne conveyances to the plaintiff, who controlled the water in the same

till eight or nine years ago, the time when the mill was rebuilt, and when the defendants having acquired the title to the soil on which the reservoir dam stands, and to the land flowed, built a mill on their own privilege, above the mill of the plaintiff and below the reservoir dam; since which time, the defendants have controlled the water upon the land flowed and in the reservoir dam, and at times have detained it from the plaintiff's mill. This action is for this diversion of the water from the plaintiff's mill, for the use of that of the defendants', so that the plaintiff, as he alleges, has thereby lost the beneficial use of the same.

The jury were instructed, that if the reservoir dam was erected under a parol license from the owner of the soil, and thereby to flow his land, and the person having the permission, built mills on the site where the plaintiff's mills now stand, relying on this dam for a supply of water, and the plaintiff has the rights of the one who built the dam, that neither the owner of the soil, nor his grantees, can divest him of the right thus acquired to the reserved water.

It is said, in 3 Kent's Com. 452, "that the modern cases distinguish between an easement and a license. A claim for an easement must be founded upon grant, or by deed, or writing; or upon prescription, which pre-supposes one, for it is a permanent interest in another's land, with a right at all times to enter and enjoy it; but a license is an authority to do a particular act, or a series of acts, upon another's land, without possessing an estate therein. It is founded in personal confidence and is not assignable."

In *Cook* v. *Stearns*, 11 Mass. 536, the Court say, "a license is technically an authority given to do some act, or a series of acts on land of another without possessing any estate in the land. Such as a license to hunt in another's land, or to cut down a certain number of trees." "But licenses, which in their nature amount to the granting of an estate for ever so short a time, are not good without deed." If the defendant have a license from the former owners of the plaintiff's close to make the bank, dam and

canal in their land, this extended only to the act done, so as to save him from their action of trespass, for that particular act, but it did not carry with it an authority at any future time, to enter upon the land; and transferring the land to another, or even leasing it, without any reservation, would of itself be a countermand of the license.

The same doctrine is held by this Court, in *Emerson* v. *Fisk & al.*, 6 Greenl. 200 and 205, both as to the legal definition of a license to do acts upon real estate, and its revocation by an attempted transfer.

The Court, in *Mumford* v. *Whitney*, 15 Wend. 380, review many of the cases upon this subject, in which the doctrine of some is in conflict with that of others, and it is said by SAVAGE, C. J., who delivered the opinion of the Court, "I shall not undertake to reconcile these various cases. It is evident the subject has been understood very differently by different Judges. But in this all agree, that according to the statute of frauds, any permanent interest in the land itself, cannot be transferred, except by writing. Much of the discrepancy may have arisen from the different ideas attached to the word *license*. If we understand it as Chancellor KENT defines it, it seems to me, there can be no difficulty." "If A agree with B that B may build a dam upon the land of A, * * * * if it is to be permanent, or any thing more than a temporary erection, such an agreement is not technically a license. The object of A is to grant, and of B to acquire an interest, which shall be permanent; a right not to occupy for a short time, but as long as there shall be employment for the water power to be created. Can such an interest, such a right, be thus created?" The answer to this question is given in the language of Mr. Sugden, when speaking of the case of *Wood* v. *Lake*, Sug. 4, cited in 1 Phil. Ev. 354; "It appears to be in the very teeth of the statute, which extends generally to all leases, estates and interests."

When these principles are applied to the case at bar, the plaintiff has acquired no such rights as he claims. It

is manifest that the interest, which was intended by Hall Clements to be obtained by the reservoir dam, was a permanent interest and right, which could not legally pass to him without an agreement in writing; and his attempt to assign this supposed interest and right was perfectly nugatory.

The plaintiff was not entitled to control the reservoir dam, according to the facts which the jury must have regarded as established under the instructions which they received. In addition, however, to the verdict for the plaintiff, the jury found, that if the plaintiff had no such right as was the basis of the verdict for him, but the title was in the defendants, and they had a right to control the reservoir dam, no damage was sustained.

By the agreement shown in the report, to entitle the defendants to a general verdict, the instructions to the jury must be decided to be erroneous, and it must be decided that the defendants have the legal right to control the reservoir dam. By this control, we understand the power to use it to raise a reservoir of water, without any regard to injury, which the plaintiff may sustain, by its detention, in the operations of his mill.

It does not follow from want of right in the plaintiff to *control* the reservoir dam, that he may not maintain an action against the defendants, for diverting the water from his mill, to his loss, for the purpose of detaining and using it for theirs. The title to the soil on which the reservoir dam stands, and to the land flowed by it, may not of itself be a sufficient defence to such a claim.

It is true, according to the facts in testimony, the reservoir dam was built before the erection of any mill or other dam, but by the permission of the owner of the land, where it was placed, and for the use of the mill designed to be erected, and which was built soon after, in pursuance of the design, upon the plaintiff's privilege. This dam, by being first in order of time, may not now, under R. S., c. 126, § 2, protect the defendants' mill from an injury, which may be

occasioned by the dam that was built originally, or may have been built since, on the plaintiff's site, for the direct use of his mill. But on the other hand, this site, and the mill thereon, may be considered, when all the evidence shall be presented, as having the right of the statute protection, if the site was first occupied by a mill lawfully erected upon it, and used, and the right to maintain the mill was not lost or defeated by abandonment, or otherwise.

The reservoir dam does not appear to have been erected for the purpose of detaining water for the use of any mill, excepting such as should be built on the plaintiff's privilege. It was always used exclusively in connection with the mill there standing, till the erection of the mill on the defendants' privilege long afterwards. As a dam to be used for the benefit of their mill, its origin may be considered no earlier than its first appropriation to its present purpose, and it may be treated in the same manner as it would be, if it had been then erected.

The plaintiff is entitled to the same free use of the water, which he would have, if there was no reservoir dam, and no more.

The instructions not being strictly correct, the verdict for the plaintiff must be set aside. But as the entire right of controlling the dam, does not appear from the facts reported, to be in the defendants, they are not entitled to a general verdict, and the case must be sent to another jury.

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

WENTWORTH *& al. versus* POOR *& al.*

The owner of a mill erected *subsequently* to one lawfully existing upon the same stream, is liable in damages, if, by his mode of using the water, the first mill is rendered less beneficial and profitable than it was before.

And this liability is not lessened although the damages arise from the use of *improved machinery* by the owner of the second mill.

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

CASE, for obstructing the water, and thereby injuring the plaintiffs' mill between March, 1845, and Feb. 1849.

The plaintiffs were owners of a dam and saw-mill, and the mill-site had been in use since 1826.

A reservoir dam on the same stream above was made by plaintiffs' grantor under a parol license from the owner of the soil in 1825, for the accommodation of the mills below, and for the one which was about being built on plaintiffs' site, and was actually erected the next year.

Prior to March, 1845, the plaintiffs, by permission and agreement with the individual who erected the reservoir dam, controlled and enjoyed the benefit of the water raised thereby for the use of their mill, in such quantities, and at such times as they saw fit.

In 1844, a saw-mill was erected upon a mill-site about two rods above plaintiffs' mill, which was purchased, in March, 1845, by defendants, and they bought also the soil connected with the "reservoir dam" above, of the owner, without any reservation of the dam or water raised by it.

After such purchase, the defendants claimed and exercised control over the "reservoir dam," and used the water raised thereby for their mill, but permitted the water, after being used at their mill, to flow in its natural channel to the plaintiffs' mill.

The evidence tended to show, that owing to the improved machinery, it required less water to operate defendants' wheel than plaintiffs', and that by reason of such use the plaintiffs were unable to work their mill to the same advantage and profit they did before defendants' mill was built and put in operation.

The defendants contended that they had a legal right to use the water in the manner they did, and were not responsible to plaintiffs for any diminution of profits of their mill which might result from that mode, the water being permitted after thus used to flow in its natural channel.

The Court instructed the jury, that if by reason of the improved machinery in the defendants' mill, less water was required to carry it than was required to carry the machinery in plaintiffs' mill, and thereby plaintiff's mill was rendered less beneficial and profitable than it was before said mill and machinery of defendants' were put in operation, they were entitled to a verdict to the extent of the injury so sustained.

A verdict was returned for plaintiffs, and exceptions were filed to the instructions:

Dickerson, for defendants.

1. The reservoir dam was built under a license merely, and was revocable at the pleasure of the owner of the soil.

2. The conveyance of the soil to defendants was a revocation of the license, and vested in them the control of the water. Angell on Watercourses, 316; *Farrar* v. *Stackpole,* 6 Maine, 154; Dane's Ab. c. 76, art. 8, § 39.

3. Having the right to control the reservoir dam, the defendants had the right to control the reserved water, (8 Met. 466; 15 Johns. 213,) provided they let out the usual flow of the stream. This appears to have been done.

4. No complaint can be made, that we had improved machinery, unless we used less than the natural flow of the stream.

5. The reservoir dam has a *priority* over the plaintiffs' mill, it was erected before it, and the defendants have succeeded to all the rights of the original owner.

Abbott, for plaintiffs.

TENNEY, J. — The plaintiffs were the owners of a saw-mill, dam, and mill-site, from March 10th, 1845, to Feb. 17th, 1849. Upon this site a saw-mill had been erected, and continued from 1826 to the time of the commencement of this action. In 1844 a saw-mill was erected upon a mill-site on the same stream and about two rods above the plaintiffs' mill; and this saw-mill and mill-site were purchased by the

defendants, and they continued to occupy it till this suit was commenced.

Under the evidence adduced, and the instructions given, the jury must have found that by reason of the improved machinery in the defendants' mill, less water was required to carry it than was necessary to carry the machinery in the plaintiffs' mill; and in consequence thereof the latter was rendered less beneficial and profitable than it was before the defendants' mill and machinery were put in operation.

The plaintiffs, by becoming the owners of the mill, dam, and site occupied by them, succeeded to the rights of those from and through whom their title was derived, and can recover for damages done to them during their ownership by the defendants, in the same manner as could have been done by those who first erected and owned the same, had they continued to hold and to occupy it.

The Revised Statutes, in c. 126, § 2, provides that no dam shall be erected to the injury of any mill lawfully existing above or below it on the same stream; nor to the injury of any mill-site on which a mill or mill-dam shall have been lawfully erected and used, unless the right to maintain a mill on such last mentioned site shall have been lost or defeated by abandonment or otherwise.

The plaintiffs, by the case, are not brought within the exception in this provision, and the instructions were in accordance with the statute. *Baird* v. *Wells*, 22 Pick. 312.

Exceptions overruled.

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

KNOWLTON, *Adm'r, in Equity, versus* REED *& als.*

Of the elements of a partnership.

Of the distinction between part owners and partners.

Of a tenancy in common.

Under the equity jurisdiction of the Supreme Judicial Court may be brought all cases of partnership.

To confer jurisdiction under this head, the *parties* to the bill must bear the relation of *partners* to each other, and the property claimed must be the effects of a *partnership*. Being part owners, or tenants in common, and property thus held will not avail.

BILL IN EQUITY. This bill was brought by plaintiff as administrator of Ephraim B. Stevens against W. Reed, jr., E. G. Reed, Henry Hedge, Henry M. Springer, Amaziah Trask, William T. Libby and Benj. H. Reed, to account for the plaintiff's share of the effects of an alleged partnership.

The case was heard upon a general demurrer and answers by those who had been notified, and upon facts agreed.

The parties to this bill, on Nov. 26, 1849, entered into an agreement, under their hands and seals, with W. & D. Moor, jr., to lease of them the steam boiler, engines, and the steam machinery that was then in the steamboat Oregon, the frame of a new boat with the necessary lumber, spikes, &c., to build a new hull with, by their shipping the same and paying the freight to San Francisco; and there the parties to this bill were to construct a new boat from said materials, and to have the use of it by paying said lessors one-fourth of the gross earnings for one year after she was ready for business; and if sold at the end of one year the lessees were to have one-half of what she sold for, and said Moors the other half, and the same proportion if sold afterwards, and if not sold, to run longer on similar terms, it all the owners agreed to it.

On Dec. 4, 1849, the parties to this bill made and signed the following agreement: —

"1st. We the undersigned agree to form ourselves into a company to go to *California*.

"2d. Each one agrees to furnish himself with one years' provisions, to the amount of at least seventy-five dollars. He also agrees to pay the freight out there on the same. Each one also agrees to pay his passage there, also to furnish his own clothes, bedding, &c., also each one to furnish equally his part of tools suitable for building a steamboat called the *Gold Hunter*, on some part of the Sacramento river.

"3d. Each one also agrees to stop by said boat one year at least from the time she is ready to operate. We also agree she shall be employed in digging in the bed of the river *Sacramento*, or any of its

branches as we may think proper, or to run her as a freight and passenger boat on the river, or in any other business as we may think most advantageous for all concerned.

"4th. We also agree this company shall compose the crew of said boat and that each one shall do the part allotted to him to the best of his knowledge and judgment, for the benefit of all concerned.

"5th. We also agree, that this boat shall have two officers, viz. Captain and Mate, (to be voted in by the company,) who shall retain the command of said boat for one year from the time she is ready to commence running; the Captain to keep the books and all the accounts for the said term of one year, and if required by any of the company, to exhibit his books once every three months during the above term; each one of the company to be allowed equal rights and equal privileges.

"6th. We also agree if any one of said company is sick to do all in our power to restore him, and make him comfortable, and if a physician is necessary to obtain one if possible, the company paying all expenses equally, and in all cases of sickness or lameness, the one so unfortunate shall receive the same share or pay as he had while well, so long as he may continue sick, and if he should die, his nearest relatives shall receive one half his pay or share, so long as the company continue together, from the time of his death.

"7th. We also agree that said steamboat shall receive one quarter part of her earnings, the other three-quarters to be equally divided among the company, after paying all expenses for running the boat, and all other expenses to or upon said boat during the time aforesaid, according to our contract with William & Daniel Moor.

"8th. We also agree that if any one deserts the company before the expiration of one year from the time aforesaid, he shall forfeit his part of the provisions and wages in the hands of the company at that time, &c.

"9th. We also agree that if we think the Captain's services worth more to the company than any one else, we will consider him something out of our shares, whatever we may think proper, and if we do not earn any thing, or make any thing, he will not receive any more than the others."

The members of the company, with the exception of Springer, proceeded to San Francisco, and after their arrival, labored and turned in their earnings to purchase materials for the new boat, the intestate contributing more than the others; and the purposes for which the company was formed, were carried out until the death of the intestate, in November, 1850. After his death, the boat was finished and run according to the contract until it was sold.

The plaintiff claimed right to a discovery of the accounts

of receipts and expenditures, and a decree for his intestate's share of the earnings and sale of the boat.

W. G. Crosby, for respondents, contended that the case as presented, did not come within the jurisdiction of the Court. It was not a case of *partnership*, and cited *Dwinel* v. *Stone*, 30 Maine, 384.

Knowlton, pro se. A partnership is a contract to share the profits and loss. Story on Contracts, § 198. Here was a community of interest in the capital stock and in the net profits. Story on Contracts, § 203. No one of the company owned any thing separate by himself. So far as any thing appears, each one of the company had the right "to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership for its purposes, in the same manner and with the same powers, as all the parties could when acting together." By the very principles laid down in the case cited for respondents, this was a partnership.

TENNEY, J. — Relief is sought of the Court, as a Court of equity, in this case, as one of partnership, under the jurisdiction conferred by R. S., c. 96, § 10. It thus becomes important to ascertain, whether the plaintiff's intestate and the defendants held the relation of partners to each other in the contracts between them, and the transactions referred to in the bill, answers, proofs and agreement; and whether the property that is claimed in this suit was such as can be treated as the effects of a partnership.

"The true nature, character and extent of the rights and interests of partners, in the partnership capital stock, funds and effects are to be ascertained by the doctrines of law applicable to that relation, and not by mere analogies furnished by joint tenancy, or by tenancy in common." Partners are joint owners and possessors of all the capital stock, funds and effects, belonging to the partnership, as well those acquired during the partnership, as those which belonged to it, at the time of its first formation and establishment. So

that whether its stock, funds or effects be the product of their labors or manufactures, or be received or acquired by sale, bargain or otherwise, in the course of their trade or business, there is an entire community of right therein between them; each has a concurrent title in the whole, or, as Bracton says, *Tenet totum in communi, et nihil separatim per se.*" Story on Part. § 91.

"Every partnership is founded in a community of interest, but every community of interest does not constitute a partnership." Story on Part. § 3. "There is no survivorship in cases of partnership." Story on Part. § 90. "There is no doubt, that by the principles of the common law, the death of any one partner will operate as a dissolution of the partnership, however numerous the association may be, not only as to the deceased partner, but as between all the survivors. Story on Part. § 317. "Although as to future dealings, the partnership is terminated, by the death of one partner, yet for some purposes, it may be said to subsist, and the rights, duties and authorities of the survivors remain, so far as is necessary, to enable them to wind up and settle the affairs of the partnership. They have therefore, a right to receive the debts, due to the partnership; and on the other hand to apply the partnership assets and effects in discharge of the debts, and other obligations due from it." Story on Part. § 344.

"The act of each partner in transactions relating to the partnership, is considered the act of all, and binds all. He can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive; draw and indorse, and accept bills and notes." 3 Kent's Com. § 43, p. 17, 1st ed. "With respect to the power of each partner over the partnership property, it is settled, that each one, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm. He can sell the effects or compound or discharge the partnership debts."

"A like power in each partner exists in respect to purchases on joint account, and it is no matter with what fraudulent views the goods were purchased, or to what purposes they were applied by the purchasing partner, if the seller be clear of the imputation or collusion. 3 Kent's Com. p. 20.

"A partner may pledge, as well as sell the partnership effects, in a case free from collusion, if done in the usual mode of dealing, and it has relation to the trade, in which the partners are engaged, and when the pawnee has no knowledge that the property was partnership property. 3 Kent's Com. p. 22.

"Partners differ from mere part owners of goods and chattels in several respects. The latter are either joint owners or tenants in common, having a distinct, or at least an independent, although an undivided interest in the property, and neither can transfer or dispose of the whole property, or act for the others in relation thereto; but merely for his own share, and to the extent of his own several right and interest." Story on Part. § 89.

"In tenancy in common each party has a separate and distinct, although an undivided interest, and possesses (as it is technically expressed,) the whole of an undivided moiety of the property and not an undivided moiety of the whole property." Story on Part. § 90.

"If a part owner sells, he can sell only his undivided right. The interest of part owners is so far distinct, that one of them cannot dispose of the share of the others, and this may be considered as a settled principle." 3 Kent's Com. § 45, pp. 116 & 117, 1st ed.; Story on Part. § 90.

"There is no survivorship between tenants in common, but the share of the deceased tenant in common goes to his personal or real representative." Story on Part. § 89.

In the case of *Livingston* v. *Lynch*, 4 Johns. Ch. R., 573, the Chancellor says, "one partner may pledge the credit of the others to any amount, and each partner commits his entire rights to the discretion of each of his co-partners." But with tenants in common, "each has a distinct, though un-

divided interest, in the establishment, and an entire dominion over his own share or proportion of the property; but without any right or power to bind the interest or regulate the enjoyment of the property of the other members;" and in the same case it is said, "so, the provision, that the shares of each of those members should, on his death, descend to his heirs, was founded entirely upon the contemplation of a tenancy in common." *Dwinel* v. *Stone*, 30 Maine, 384.

In the case under consideration, on Nov. 26, 1849, W. & D. Moor, jr., made a lease to William Reed, jr., and others, embracing the plaintiff's intestate and the defendants, of a steam boiler, steam engine and other materials with which to prepare a steam boat in California, on the conditions and terms therein expressed. Among other things therein stipulated, the said Reed and others were to have the use of the steam boat, by paying to the said W. & D. Moor, jr., one fourth part of the gross amount, that said boat and crew should earn for one year after the same should be ready for business; and the said Reed and others were to have one half part of the amount, for which said boat should sell, after one year's operation, if the boat should be then sold; if not sold then, it was to be one half part at the time of the sale. On the 4th day of December next following, William Reed, jr., and others, the lessees of W. & D. Moor, jr., mutually contracted in writing with each other, that they would form themselves into a company to go to California; each to furnish himself with provisions, and pay the freight thereof, to pay his own passage, to furnish his clothes and bedding, and his part of the tools, for building the steam boat; to stop by said boat one year, at least, from the time that she should be ready to run, and compose the crew of the same, in the business in which it was therein stipulated she should be employed, and to do the part allotted to him, for the benefit of all concerned, according to his best skill and judgment. It was provided that a captain and mate of the boat should be chosen by the votes of the company, to have command for one year from the time of the readiness of the boat to run;

the captain to keep the books and all accounts for the term of one year, and exhibit the same as often as once in three months, at the request of any one of the company. Each member was to be allowed equal privileges with the others. In case of sickness or bodily inability of any member to perform the ordinary duties, it was agreed, that he should have all proper care and attention at the expense of the company, equally to be divided with its members, and should be entitled to the same share during such sickness or disability, as he had a right to receive, when well; and in case of his death, his nearest relatives were to receive one half of his pay or share, so long as the company should continue together after his death. The steamboat was to receive one quarter part of her earnings, and the other three quarters were to be equally divided among the company, after paying all expenses for running the boat, and all other expenses to or upon the same during the time agreed upon, according to their contract with W. & D. Moor, jr.

The contract of W. & D. Moor, jr. with William Reed, jr. and others their lessees, was several days previous to that of the latter among themselves. The rights obtained by the lessees under that contract were those which they held as tenants in common, and not otherwise. In the subsequent agreement, there is no provision in terms that those rights had undergone or should undergo any alteration. Nothing of the kind is implied. It is equally silent in reference to the power of the individual members of the company, to make contracts in behalf of the whole, incur liabilities, manage the whole business, or dispose of the property on their account; no provision is made for a name of the company. The parties to the contract of Dec. 4, 1849, provided for a continuance of their common enterprise, under the same agreement, which was the basis of their association, if any members thereof should die before its completion. It was manifestly the intention, that in such an event, there was to be no survivorship between the members, but that the share of such person should go to his heirs, under the stip-

ulation that his nearest relatives should receive one half of his share or pay, so long as the company should continue together from the time of his death; exhibiting the design that the company should continue to exist by virtue of the contract, with the same number of shares after the death of some of the members, as before; but that the share which had belonged to a member who should die, should not be treated as being so valuable afterwards, as when the owner was actively engaged as one of the company in the promotion of its objects. This provision touching the shares of deceased members, while the purpose of the company should be in progress, "was declaring the true character and interest of tenants in common."

The bill is framed, so that if relief can be granted according to the prayer thereof, it must be under the equity jurisdiction of the Court, over the case, as one of partnership. It is not such, and therefore cannot be maintained. Whether the merits of the case can be considered, by this Court in the exercise of the equity power conferred upon it, under a bill properly framed, it is not now important to intimate.

Where Courts of equity have unlimited jurisdiction, as in England, the ordinary remedy for part owners of a *ship* to obtain an adjustment of the ship's accounts among themselves, is a suit in a Court of equity. Abbott on Shipping, part 1, c. 3, § 6, p. 145, 5th Am. ed. In this State, it has been held, that while between the joint owners of a vessel, no settlement has been made of her disbursements and earnings, and no balances have been ascertained and agreed upon, one part owner cannot sustain against another an action for his proportion of the net avails. *Maguire* v. *Pingree*, 30 Maine, 50; 12 Pick. 378, and that the ordinary remedy for the adjustment of the accounts between themselves is in a Court of equity. Story on Part. § 449; Story on Eq. Juris. § 442 to 450. It does not follow, that if such a remedy is open to the part owners of a ship, that it could apply to such a case as that presented in the present

instance, under the limited equity powers of this Court. Neither is it to be assumed, that the plaintiff may not have at law an adequate remedy. Part owners of a ship may maintain an action against other part owners of account and for the destruction thereof; "and by parity of reasoning probably for a sale of the entirety of the ship without their consent." Story on Part. § 449; *Wilson* v. *Reed*, 3 Johns. 175. The tenant in common of a chattel may maintain trover against his co-tenant for the sale of the entire chattel without authority. But no opinion is intended to be intimated touching the appropriate remedy for the plaintiff in this case, if his intestate or the estate has been deprived of legal or equitable rights by any or all of the defendants in the present suit. *Bill dismissed with costs.*

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

MUDGETT, *in Error, versus* EMERY.

The costs in actions are wholly regulated by statute law.

And to entitle one to recover costs, he is required to be the prevailing party.

In a real action, where, by a brief statement, a portion of the demanded premises is disclaimed, and *such part* is accepted by the demandant in satisfaction of his claim, a judgment in his favor for costs is erroneous.

WRIT OF ERROR to reverse a judgment of the Supreme Judicial Court. The facts in relation to that judgment are recited in the opinion of the Court.

Hubbard, for defendant in error.

Mudgett, pro se.

HOWARD, J. — The defendant in error was demandant in a writ of entry. The respondent pleaded the general issue, and by brief statement disclaimed a portion of the premises demanded. Upon a trial in the Court below, the respondent prevailed, and the demandant appealed. After this the appellee died, and his administrator, the plaintiff in error,

was summoned in, and assumed the defence, and the heirs were notified of the pendency of the suit, by order of Court. R. S., c. 145, § § 9, 19. The disclaimer was amended by leave of Court, after the administrator appeared; and "was accepted by the appellant," as expressed upon the record, and he subsequently had judgment for costs only. Stat. of 1846, c. 221.

We do not perceive upon what ground the demandant was legally entitled to costs. He did not recover any portion of the demanded premises; and he was not the prevailing party upon the issues tendered, or upon default. He appears to have "accepted" the disclaimer, in satisfaction of his demand, and there the controversy seems to have terminated; with the exception, perhaps, of the matter of costs. These are regulated wholly by statute, none being allowed by the common law, *eo nomine*. The disposition of the case, though somewhat novel, may have been in accordance with the intentions of the parties, so far as the merits were concerned; but the demandant's claim for costs, under such circumstances, cannot be supported upon any provisions of the statutes of this State.

There was error, therefore, in entering up judgment for the demandant for costs; and that judgment is reversed.

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

HOLBROOK *& als., in Equity, versus* THOMAS.

One of the modes, by which a mortgagee may foreclose his mortgage, is by giving public notice in a newspaper in the county where the land lies, three weeks successively; and causing a copy of such printed notice, and name and date of the newspaper, in which it was last published, to be recorded in the registry of deeds, within thirty days after such last publication.

Under this mode of foreclosure, the mortgager has three years in which to redeem, from the time of such *last* publication.

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

BILL IN EQUITY to redeem land under mortgage.

The defendant, holding a mortgage of the land described in the bill, caused to be published in a public newspaper of the same county, the following: —

"Notice of forelosure. This is to give notice, that I, the subscriber, claim by virtue of a mortgage, dated July 29, 1848, a certain part of a house and land situate in said Frankfort village, more particularly described in said deed, recorded in Waldo Registry of Deeds, vol. 63, p. 294, the condition of said mortgage having been broken, by reason whereof the undersigned claims foreclosure of the same."

The first publication of that notice was on April 19, and the last on May 3, 1850. A copy of the last publication was seasonably recorded.

The plaintiffs, on Nov. 14, 1850, became the owners of the equity of redemption, and on April 27, 1853, notified the defendant, that they were such owners, and were desirous of redeeming the same; and requested the defendant to render a true account of the amount due on said mortgage, and of the rents and profits, and money expended in repairs and improvements, if any; and the defendant refused to render any account.

The facts in the case being found, it was agreed that the presiding Judge should report the same, and that the full Court should determine the following questions: —

1. Does the notice of foreclosure set out sufficient in substance to foreclose the mortgage according to the provisions of the statute?

2. Do the three years, required to foreclose the mortgage commence running from the date of the first or last publication of the notice of foreclosure?

If the Court should be of opinion that the notice was sufficient, and that the three years required to perfect the foreclosure, commence running from the *first* publication, judgment is to be for the defendant.

But if the notice was insufficient, or the three years began to run from the *last* publication, judgment is to be for

the plaintiffs, and that defendant account for rents and profits.

N. H. Hubbard, for plaintiffs.

C. H. Pierce, for defendant.

HATHAWAY, J. — A bill in equity to redeem land mortgaged. The second question presented by the case is, "do the three years required to foreclose the mortgage commence running from the date of the first or last publication of the notice of foreclosure?"

One of the modes of foreclosing a mortgage, as provided by stat. c. 125, § 5, is, that the mortgagee, or person holding under him, may give public notice in a newspaper, three weeks successively; and the sixth section of the same statute, provides that the mortgager, or person claiming under him, may redeem within three years next after the "publication mentioned in the preceding section."

The "publication mentioned," is one "three weeks successively," and could of course have no legal effect until the last publication was made, which is the only one entitled by the statute to be recorded, and from which commences the three years right of redemption.

There is no occasion to consider the other question presented, and, as agreed by the parties, "judgment is to be for the plaintiffs and that the defendant account for rents and profits."

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

TYLER *versus* HOLMES.

Where the *owner* of a vessel contracted in writing to sell and convey her to certain persons upon the payment of a sum stipulated, and thereupon ceased to exercise any control over her in the appointment of her master, or in directing her employment, and did not receive her earnings; *he* is not liable for money advanced on the request of the *master*, to pay for necessary repairs.

Tyler *v.* Holmes.

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

Assumpsit to recover eighty-five dollars advanced to pay for certain repairs made on the schooner "Nidus," at the request of the master.

The vessel received damage by coming in collision with another within five or six miles of Boston, and it was necessary to repair, and the money was advanced by plaintiff to pay the necessary bills.

The defendant appeared by the records in the Custom House to be the sole owner.

A contract between the defendant and Joseph P. Hardy and others, made in April, 1846, under seal, was introduced, wherein the former agreed to sell, and the latter to purchase the vessel for a certain sum; and after that contract the possession and control of the vessel passed into their hands, and the master sailed her on shares.

After the evidence was all out, the cause was withdrawn from the jury and submitted to the decision of the full Court, to enter a default or nonsuit as the law would authorize.

Hubbard, for defendant.

Dickerson, for plaintiff.

Shepley, C. J. — The defendant having received a bill of sale of the schooner Nidus from her owners, made a written contract on April 11, 1846, to convey her to Joseph P. Hardy, William Holmes, Horace F. Holmes and Benjamin Smith, upon payment of their notes to him for $1950.

The persons, who thus contracted to purchase her, and those claiming under them, appear to have had the exclusive possession and control of her from that time, appointing her masters, directing her employment, receiving her earnings, and conducting in all respects as her owners, until after the plaintiff, at the request of her master, advanced money to him to pay certain bills for repairs.

The case of *Cutler* v. *Thurlo*, 20 Maine, 213, is deci-

sive against the plaintiff's right to maintain a suit to recover of the defendant under such circumstances.

Plaintiff nonsuit.

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

ABBOTT *versus* GILCHRIST *& al.*

A contract to furnish an article to be manufactured or prepared in a prescribed manner, is not affected by the statute of frauds.

An *agreement* to procure and deliver at a time and place fixed, a vessel frame, to be hewn and prepared according to certain moulds, is binding, without being in writing.

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

ASSUMPSIT to recover half of the contract price of a vessel frame.

The evidence showed a parol contract to deliver the timber for a vessel frame, of which plaintiff was to furnish one half, to be hewn and prepared according to certain moulds.

The timber was delivered according to the contract.

The defence relied upon was the statute of frauds, and the defendant's counsel requested instructions to the jury in the words of that statute. The presiding Judge refused to give them.

A verdict was rendered for plaintiff, and the defendant excepted to such refusal.

Abbot, in support of the exceptions, cited 3 Met. 367; 20 Pick. 9 and 344.

Palmer, contra, cited 2 Strange, 506; 7 Term R. 14; *Garbutt* v. *Walson*, 5 B. & A. 209; *Tempest* v. *Fitzgerald*, 3 B. & A. 419; 9 B. & C. 443; 1 Rich. S. C. 199; 1 Met. 283; 21 Pick. 205; 19 Maine, 137.

SHEPLEY, C. J. — Whether the requested instructions should have been given, will be determined by ascertaining whether the contract between the parties was within the prohibitions contained in the statute of frauds, c. 136, § 4.

It appears to have been a contract to procure and deliver at a certain time and place, one half of a frame for a vessel, to be hewn and fashioned according to certain moulds.

The distinction between contracts for the sale of goods, and contracts to furnish articles to be manufactured or prepared in a prescribed manner, was stated in the case of *Hight* v. *Ripley*, 19 Maine, 137.

Contracts of the latter kind are not within the statute; and of this kind the contract between these parties appears to have been. *Exceptions overruled.*

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

STATE OF MAINE *versus* UPHAM.

If a person on trial for an alleged offence offer no evidence of his good character, no legal inference can arise, from such omission, that he is guilty of the offence charged, or that his character is bad.

Nor will such *omission* authorize an *argument* to the jury against his general good character.

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

INDICTMENT.

The defendant was indicted for having in his possession ten or more counterfeit bank bills at one time with the intent to pass them as true or false.

Evidence was introduced tending to prove the essential parts of the indictment.

The prisoner offered no evidence of his general good character. But his counsel argued to the jury, that from his position in society as postmaster, his character ought to avail him in aid of the common presumption of innocence.

The counsel for government argued, that the want of such

testimony authorized the jury to infer that his character was bad.

The Judge was requested by defendant to instruct the jury, that the failure to offer such proof furnished no legal inference of defendant's guilt; or that his character was not good.

This request was refused, but the Judge told the jury, that it was legitimate for the government's counsel to urge in argument the absence of such proof as furnishing a basis of inference against the general good character of the accused.

Defendant was convicted and his counsel excepted to the refusal and instruction.

Palmer, in support of the exception.

Evans, Att'y Gen., contra.

HATHAWAY, J. — In the case, *State* v. *McAllister*, 24 Maine, 139, the defendant offered no evidence of good character, and the attorney for the government was permitted to urge, in argument to the jury, that circumstance, as contributing to strengthen the case, on the part of the State; and the Court held that, that circumstance was proper for their consideration.

In the case at bar, it is stated, in the bill of exceptions, that "the counsel for the government argued to the jury, that the absence of proof from the accused of his general good character, authorized them to infer that his character was bad, and the defendant's counsel asked the Court to instruct the jury, that the failure to offer such proof by the defendant, furnished no legal inference of his guilt, or that his character was not good. The Court declined to give such instruction, but told the jury, "that it was legitimate for the government's counsel to urge in argument the absence of such proof, as furnishing a basis of inference against the general good character of the accused;" and one question presented for our consideration, in this case, is concerning the correctness of the rulings of the Judge who presided at

the trial, in refusing to instruct the jury as requested, and in the instruction given.

The law presumes every man innocent until there is proof of his guilt; and the legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled. In some cases, the presumption of innocence has been deemed sufficiently strong to overthrow the presumption of life. 1 Greenl. Ev. § § 34 and 35.

The prosecutor cannot be permitted to offer testimony concerning the prisoner's character, unless the prisoner enable him to do so, by introducing testimony in support of it. 2 Russell on Crimes, 704; 3 Greenl. Ev. § 25. Where, upon the trial of an indictment, no proof as to the general character of the person is given, the law presumes that it is of ordinary fairness. If he choose to give no evidence upon the subject, the jury is not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged. *Ackley* v. *The People*, 9 Barb. Sup. Ct. 609. The rulings of the presiding Judge, in this matter, cannot be sustained, either upon principle or authority. The defendant might well repose upon the legal presumption of his innocence, without apprehending that he incurred the danger of furnishing the basis for an argument against him, by neglecting or declining to introduce witnesses to prove his character good, when the law presumed it to be so.

It is unnecessary to consider the other questions presented in the case.

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

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

WHITCOMB *versus* SMART *& als.*

A loan made to some individual members of an Odd Fellows' Lodge, for which a note was given to their Secretary, by name, may be recovered by a suit upon the note in the name of the payee, when he is authorized to commence it by the members of the Lodge.

ON FACTS AGREED.

This suit is upon a promissory note signed by defendants and payable to plaintiff, "P. S. of Adelphian Lodge No. 42," for money borrowed of the Lodge.

The plaintiff and defendants were all members of an order called "Odd Fellows," and at the time the note was made the plaintiff was "permanent Secretary" of the Lodge, but had ceased to hold that office when the suit was commenced. The action was brought by the authority and direction of the association, and plaintiff had no interest in it except as a member.

If the action is maintainable a default is to be entered; otherwise plaintiff to become nonsuit.

Dickerson, for plaintiff, that the action was rightfully brought, cited *Buffum* v. *Chadwick,* 8 Mass. 108; *Clapp* v. *Day,* 2 Maine, 305; and that it was not necessary, that plaintiff should have an interest in the note to authorize an action in his name, but if brought by the owner by consent of the party of record it was sufficient, cited *Bragg* v. *Greenleaf,* 14 Maine, 395; *Bradford & al.* v. *Buckmore,* 12 Maine, 15.

Palmer, for defendants.

There is no pretence that the "Lodge" is a corporation. If they are a partnership, the plaintiff is a member with defendants and others, and in that view the action is not maintainable. Gow on Part. 132; 2 Fairf. 196.

As an association of persons, they are not in law capable of any associate or common interest in this suit, apart from the *record plaintiff and the defendants.*

Defendants are tenants in common with plaintiff in the property of the claim, and will be so in any judgment that

could be recovered. And if defendants should pay to plaintiff the amount, a suit for money had and received would lie in their behalf to recover back a portion of the money so paid. He would be their trustee for their share of the money.

The only remedy where members are indebted to an association of which they constitute a part, is in equity, by which the whole matter may be liquidated.

If defendants took possession of the note, the other associates would have no right of action for so doing. 9 Shepl. 347; 24 Maine, 222; 9 Cowen, 230.

Both the nominal and real plaintiffs and defendants are joint owners of the note, and there can be no legal parties to the suit. The cases cited on the other side do not touch the point raised here.

Dickerson replied, and cited *Harper* v. *Osgood*, 2 Hill, 217; *Potter* v. *Yale College*, 8 Conn. 52: *Fisher* v. *Ellis*, 3 Pick. 322; *Fairfield* v. *Adams*, 16 Pick. 381; *Commercial Bank* v. *French*, 21 Pick. 486; *Bailey* v. *Onondagua Co.* 6 Hill, 476.

APPLETON, J. — The defendants borrowed one hundred dollars of the funds of a voluntary association of Odd Fellows, of which they as well as the plaintiff were members, and gave therefor a memorandum of the following tenor: —

"Searsport, Oct. 14, 1847.

"$100. For value received, we promise to pay Ebenezer Whitcomb, P. S. of Adelphian Lodge No. 42, one hundred dollars in fifty-seven days from date, unless sooner called for.

"Albert Smart,
"Reuben S. Smart,
"James Field, jr."

The plaintiff has ceased to be Permanent Secretary, but the suit is brought in his name, with his consent, and by the authority of the association interested in the funds sought to be recovered.

The words "Permanent Secretary of Adelphian Lodge

No. 42," may be considered as merely descriptive of the person, and constitute no objection to the maintenance of the suit in the name of the present plaintiff. *Buffum* v. *Chadwick*, 8 Mass. 103; *Clapp* v. *Day*, 2 Greenl. 305.

It is not material, that the plaintiff has ceased to be Permanent Secretary. It is not necessary that a party should have an interest in the demand, if the suit is commenced in his name, with his consent, and by the authority of those interested. *Bradford* v. *Bucknam*, 3 Fairf. 15; *Bragg* v. *Greenleaf*, 14 Maine, 395. Where a bill of exchange was indorsed to S. S. F., Cashier, it was held that he might maintain an action upon the bill in his own name, notwithstanding he might be obliged to account for the proceeds to the bank of which he was cashier. *Fairfield* v. *Adams*, 16 Pick. 381.

It is insisted, as the plaintiff and defendants are both members of the association, that no suit can be maintained by one member against another to recover funds, in which, when paid, they will have a common interest, and that the only remedy for those interested, is by bill in equity. Such is undoubtedly the case where one of the parties on record is both co-plaintiff and co-defendant. The rule, however, does not apply to a case like the present.

It has been settled by a series of cases, that joint stock companies may, as between themselves, agree on a particular person or on several persons as the party in whose name or names actions may be brought. *Cross* v. *Jackson*, 5 Hill, 479. Though they may *inter sese* be partners, yet they may agree that some one as trustee may in his own name enforce any contract made with him for the common benefit. *Townsend* v. *Gowey*, 19 Wend. 427. "We think," remarks BEST, C. J., in *Radenhurst* v. *Bates*, 3 Bing. 57, "that the members of a firm cannot by agreement give an authority to any one of them to bring an action in his name against persons not members of the firm; but when several parties create by agreement penalties to be paid by one to the others, we see no objection to their empowering one to sue for the

others. Such an agreement is in effect an undertaking not to object on account of all, who ought otherwise to have been joined in the action, not being joined." So it was held in *Phelps* v. *Lyle*, 10 Ad. & Ell. 113, that "the company may authorize certain persons to act for them or to sue alone upon contracts expressly entered into with them." And this too, when the parties thus contracting were members of the company. The same principles are involved in the decision of *Clapp* v. *Day*, 2 Greenl. 305.

The contract in this case was made by the defendants with a member of the joint association, and for a valuable consideration. The association have approved the loan and sanctioned the contract as made with the plaintiff, and have authorized this suit to enforce its performance. All that remains for the defendants, is to perform the contract into which they have entered. When that shall have been done, ample remedies exist for the protection of their interest in the common fund. No defence whatever is made, and a default must be entered. *Defendant defaulted.*

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

MERRILL, *Executor, versus* SHAW *& al.*

A covenant by the vendee of certain bank shares, that he would indemnify and save harmless his vendor from any and all liabilities he may have incurred as *stockholder*, or from any loss or damage he may sustain from or on account of *that capacity*, is limited to such liabilities for damages as are recoverable *by law* of his vendor.

For costs incurred and for time employed by the vendor in defending a groundless suit, in consequence of having been such stockholder, no action can be maintained upon such *covenant*.

An individual stockholder has no authority to defend an action against the banking corporation, after the charter has been repealed and the effects have gone into the hands of receivers.

Where the plaintiff had sold to defendant certain *shares* in the Frankfort Bank, and took his covenant against loss or damage on account of having once owned them; and when the charter was repealed was appointed and acted

as one of the receivers of the bank, and in a suit against it after such appointment had *wrongfully* agreed to a judgment against the bank, upon which judgment his own property was taken in part satisfaction for having owned *such shares*; for all expenses by him incurred in obtaining a reversal of *such judgment*, and expenses and time in defending judicial proceedings growing out of such illegal judgment, he has no claim upon the covenants of his vendee.

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

Covenant Broken.

The plaintiff's testator on April 24, 1840, sold and transferred to B. Shaw, one of defendants, eight shares of the Frankfort Bank at fifty per cent. of their original cost; Shaw also bought the shares owned by two other persons at the same time, and the defendants signed an agreement under seal "to indemnify and hold harmless all of them, or either of them, from any and all liabilities they may have incurred in their capacity as stockholders aforesaid, or from any loss or damage they may sustain from or on account of said capacity, except the depreciation of the stock aforesaid."

This suit was commenced on Sept. 4, 1848, upon the above agreement, and was tried at the Dec. term, 1850, and after the evidence was introduced, was agreed to be continued for the plaintiff to procure the reversal of a judgment against him in the C. C. of U. S., for the first district, and that the costs and trouble therein might be considered as embraced in this suit, and claimed as though they had accrued and been paid when this action was commenced; and upon the whole legal evidence the Court were to enter a nonsuit or default, according to the legal rights of the parties. No questions were involved by the pleadings.

In March, 1841, the charter of said Frankfort Bank was repealed, and afterwards the plaintiff's testator and one S. M. Pond appointed receivers of said bank.

On June 3, 1841, the Suffolk Bank commenced a suit against the Frankfort Bank for the bills of the bank which had previously, Nov. 5, 1839, been presented for payment and refused, and on that writ attached the real estate of

several who were or had been stockholders, for security, and among them the estate of plaintiff's testator for having owned the shares sold to defendant. There was some evidence tending to show, that defendant Shaw, was notified to defend this suit, and some against it. At the Dec. term, 1841, said testator agreed with the Suffolk Bank, that they might take judgment in their action for a sum agreed.

The execution issued on that judgment was satisfied in part upon the said testator's real estate.

In Sept. 1844, the Suffolk Bank commenced an action of ejectment in the C. C. of U. S., against the testator for the land levied on, and obtained a judgment thereon in May, 1848, and under a writ of possession took the control of the land. The defendant Shaw, was notified to defend this last suit, but declined.

At the Dec. term, 1849, the judgment in the action against the Frankfort Bank was reversed, on a writ of error sued out by the testator, because the bank charter had been repealed and the bank had no existence, both when that suit was instituted and when judgment was rendered.

In 1851, the judgment against the testator in the C. C. of U. S., was reversed, and a judgment for restoration to the testator of the land taken and costs recovered, rendered.

The plaintiff claimed to recover for counsel fees by him paid in obtaining the reversal of the judgment in the action of the Suffolk Bank *v.* the Frankfort Bank, and for counsel fees paid in the defence of the suit against him in C. C. U. S., by said bank, and for fees paid by him in obtaining a reversal of the latter judgment; and also for his time and trouble in attending upon and defending those suits.

Several questions were discussed by the counsel in argument, which the grounds of the opinion render unnecessary to be noticed.

A. Merrill, for plaintiff.

1. The defendant Shaw, was notified to defend the suit

against Frankfort Bank, but such notice was unnecessary. Chitty on Con. 753.

2. The charter of the bank had been repealed before the suit was commenced. There was no party to be sued, or to appear and defend. Not even a stockholder whose property had been attached, could defend. The suit was not against plaintiff; he was therefore not bound to defend. 23 Maine, 315; 26 Maine, 335.

3. The plaintiff was a receiver of the Frankfort Bank; it was his duty to agree upon the amount due the Suffolk. He only agreed not to defend the suit, which he had no right by law to do. If he had a right to defend it as stockholder, an equal right devolved upon defendant.

4. The statute of 1836, c. 554, made the stockholders liable for bills not redeemed. The Suffolk Bank had presented such bills, and it was mainly to provide against this liability that the bond was taken.

5. This bond is an indemnity covering even all expenses which might be incurred in defending suits which might be brought against the testator, in his "capacity" to recover bills, even though such suit might fail, and especially if it fail by mistaking the form of action. The suit failed for that reason. 23 Pick. 112 and 334. The failure in that action was not because there was not a legal claim, but of a mistake in the form. The defendant cannot complain of paying a less sum than he would otherwise be liable for.

Hubbard, for defendants.

The testator was the receiver of the bank, and his loss, (if any,) has been occasioned solely by not defending the suit against the Frankfort Bank, as he ought to have done, instead of consenting to a judgment. For such negligence the defendants are not responsible. Sugden on Vendors, vol. 2, pp. 509, 510 and 511; Comyn's Dig. vol. 3, pp. 100, 112 and 268; Cruise's Dig. title 32, c. 26, § 51, and note; 24 Maine, 56; *Ellis* v. *Welch*, 6 Mass. 246; 4 Mass. 349.

If a covenantee be disturbed by a man *without title*, his remedy is against the disturber, and not on his covenants.

The covenant is restricted to losses occasioned by those having the legal title.

If a condition be that a lessee shall enjoy quietly, and he be disturbed by one without title, it is not a breach of the condition, though the words express he shall enjoy without disturbance from any person.

If the plaintiff yields to an adverse title, the burden is on him to show it was permanent. 4 Mass. 349.

The plaintiff claims for counsel fees for resisting a claim which had no legal existence. He voluntarily yielded to a defective title. He can have no claim.

Merrill replied.

TENNEY, J. — On April 24, 1840, the plaintiff's testator transferred to the defendant Shaw, eight shares in the capital stock of the Frankfort Bank, and two others transferred to him five shares each, in the same. In consideration of these transfers, Shaw paid the sum of fifty dollars for each share, and he and the other defendant by their obligation covenanted with the testator and others named, "to indemnify and save harmless all of them, or either of them, from any and all liabilities they may have incurred in their capacity as stockholders aforesaid, or from any loss or damage they may sustain from or on account of the said capacity, except the depreciation of the stock aforesaid."

On Nov. 5, 1839, the Suffolk Bank presented at the banking-house of the Frankfort Bank an amount of bills of the latter, and duly demanded payment thereof, which was refused. The charter of the Frankfort Bank was annulled by an Act of the Legislature, passed on March 29, 1841, and the plaintiff's testator and another were appointed receivers with the power to close up the affairs of the bank.

On June 3, 1841, the Suffolk Bank instituted its suit against the Frankfort Bank for the recovery of the amount of bills, which had been presented, and the property of the plaintiff, of the defendants and others was attached in that process. The plaintiff's testator, as one of the receivers,

employed counsel in defence of that suit, and while it was pending gave directions to his counsel to enter into an agreement in behalf of the Frankfort Bank with the Suffolk Bank, that the former should be defaulted, and the latter should take judgment for the amount of the bills before demanded, and interest thereon at the rate of six per cent. This agreement was made, and upon the default, judgment was rendered accordingly at the Dec. term, 1842, in the county of Waldo. Execution was seasonably issued upon that judgment, which was extended upon the real estate of the testator, in part satisfaction thereof. At the Circuit Court of the United States, holden at Portland in October, 1848, judgment for the possession of this real estate was obtained in a suit in favor of the Suffolk Bank against the testator.

The present action was instituted September 4, 1848, and was continued till December term, 1850, in the county of Waldo, when it came on for trial. At the December term, 1849, in that county, the judgment in favor of the Suffolk Bank *v.* the Frankfort Bank, was reversed on a writ of error brought by the testator in his own name, on the ground, that the corporation against which it was rendered, had ceased to exist before the judgment was entered, and also before the action was brought.

After the report of this case was made up, upon a review of the action of the Suffolk Bank against the testator, in the Circuit Court, the judgment obtained therein was reversed at a term of that Court holden in September, 1851, and judgment rendered for a restoration of the real estate levied upon of the testator, and for the costs recovered by the Suffolk Bank, and the marshal's fees on the writ of possession, which had been paid by him, and interest on the whole, together with his costs, all of which have been paid by the Suffolk Bank.

In the report of the present case, "it is agreed by the original parties thereto, that this action shall stand continued a sufficient time for the plaintiff to make an effort to

procure a reversal of the judgment against him, in the Circuit Court, and the costs, expenses and trouble incurred by him in procuring such a reversal or a release of such judgment, may be claimed by him in this action in the same manner as if they had occurred before the bringing of this action, and had been declared on in the same."

The indemnity provided by the obligation of April 24, 1840, was 1st, from the liability of the testator, which had become fixed; and 2d, from that to which the plaintiff's testator was exposed, and both on account of his having held the stock, which he transferred to Shaw. Was this indemnity limited to the injury, which might be the legitimate result of the actual and legal liability, whether incurred at the date of the obligation or afterwards, or did it extend so as to embrace the expenses and the value of his time, in resisting claims arising from a supposed liability, when none of those claims had any legal foundation?

Some legal rules exist touching the construction to be put upon covenants and bonds with conditions, where the real intention of the parties thereto, may not be perfectly obvious; some of which will be noticed. "If a condition be, that the lessee shall enjoy, this shall not be extended to tortious acts; and therefore, if he be disturbed without title, it is not a breach of the condition." "So in covenant." Comyn's Digest, Condition, (E.)

"If a condition be to save harmless from all things contained in an indenture, he is not bound to indemnify from a collateral thing." "Nor from actions, in which he has a lawful defence, without the obligor." "If a covenant be to save harmless against a seizure, made by A, it extends to it, whether the seizure be tortious or not, but if a general covenant to save harmless, it extends not to tortious acts. Ibid, Covenant to indemnify, (I.)

"A covenant of warranty cannot be broken, but by an eviction or ouster of some title paramount to the grantor's." *Twombly* v. *Hewley*, 4 Mass. 441. "And to entitle a plaintiff to recover on a covenant of warranty, he must show an

actual eviction or ouster, by a paramount title." *Bearce* v. *Jackson, Adm'r,* 4 Mass. 408; *Prescott* v. *Trueman,* 4 Mass. 627. "If one consents to an unlawful ouster, he cannot afterwards be entitled to a remedy for such an ouster. But an ouster may be lawful; and there is no necessity for him to involve himself in a lawsuit, to defend himself against a title, which he is satisfied must ultimately prevail. But he consents at his own peril. If the title to which he has yielded be not good, he must abide the loss." *Hamilton* v. *Cutts,* 4 Mass. 349.

It was competent for the parties to the contract to covenant for an indemnity against all the expenses which the testator might incur, in any measures taken by him, to avoid damages and costs, whether the claims should be legally valid or otherwise. This is often done, in the bonds which sheriffs take of their deputies. And if the parties to this contract designed to make it thus broad, their intention must prevail in the construction. But this intention is not manifest from the contract itself.

We are to presume, that they took into consideration the exposure, under the laws of the State then in force, of stockholders in banks to pay from their private property, a sum equal to the amount of their shares, such as they had acquired in the bank, the affairs of which had become so deranged, that the plaintiff and others were willing to relinquish their stock on the receipt of fifty per cent. of the sum actually paid in; when large amounts of bills had been presented and payment thereof refused; and other similar demands and refusals to an uncertain extent were to be apprehended, if not highly probable. Such was the exposure of the plaintiff's testator, as the holder of his shares, at the time of the contract, and before its execution. He was by that contract to be saved harmless from the liability, which had become fixed, and from loss and damage, which might arise thereafter from or on account of his having been the holder of the shares, which he then transferred. It could not have been understood, that the contract amounted

to an insurance against the loss and damage which might arise in fruitless attempts in groundless proceedings against him, when his former capacity of a stockholder made him in no wise answerable for such claims. And the language employed will not admit of such a construction; it favors it to no greater degree, than the terms employed in the cases cited, where it was held, that no liability to pay such expenses existed. The manifest intention of the parties to the contract was, to secure the testator against those legal liabilities, which he had incurred, or the loss and damage which he might sustain, growing legitimately out of his capacity as a stockholder.

At the time of the institution of the suit in favor of the Suffolk Bank, the liability of the plaintiff's testator in that suit had ceased, as effectually as it would have done, under a valid written discharge of the officers of the bank itself; and at that time no loss had occurred, which could be the basis for a suit against the defendants. No other suit has been commenced against him, excepting that in the Circuit Court, which was brought and prosecuted, in order to make the levy upon his real estate available.

The claims, which are presented in argument by the plaintiff, are the sums paid to counsel for services in defending the suit in the Circuit Court; in the writ of error to reverse the judgment rendered on default in this Court; and the counsel fees in this suit, together with such sum, as the Court may deem reasonable for the personal care and trouble of the testator, in the same suits.

The action of the Suffolk Bank having had no foundation from its commencement, could have been successfully defended. The defendant Shaw, could not have legally appeared in defence, though he may have had full notice of the pendency of the suit. The plaintiff's testator was a stockholder also, but he had of course no greater right to appear as such, *Whitman* v. *Cox*, 26 Maine, 335, and it necessarily follows, that Shaw could not defend as his vouchee. And it would be unjust to the testator to suppose, that as a receiv-

er, he would allow the defendants to take the defence of the suit, on account of the private contract between them and himself, as a former holder of the shares transferred to Shaw, regardless of the higher duty to the creditors, debtors and stockholders of the bank. The defence could have been made by the receivers alone, when their counsel by the authority of one, who instituted the present suit, agreed to a default and submitted to a judgment. A judgment so obtained and afterwards reversed, cannot now be treated as establishing the liability of the plaintiff's testator, when the judgment in the Circuit Court has also been reversed for want of a legal foundation, and the fruits of both have been restored. The expenses incurred in the processes adopted to cause the reversals of these judgments, as well as the defence of the suit in the Circuit Court in favor of the Suffolk Bank, not being on account of any liability of the testator, constitute no breach of the defendants' covenant. And the cause of action having failed on this account, the counsel fees in the same action cannot be obtained.

Whatever may have been the liability of the testator on account of the claim of the Suffolk Bank, if it had been presented to this Court on its chancery side, is not now before us, as no loss or damage can have accrued, on account of a liability, which has not been determined in such a suit, and which has not been yielded to without a suit. Neither can the plaintiff now substitute the loss, which his testator might have sustained in actions against him, and in which he might have been held liable, for the expense incurred in avoiding a judgment, in a suit, which was commenced and prosecuted, and ultimately failed.

Other questions were involved in the case, but their consideration has become unnecessary, for a final disposition of the action. *Plaintiff nonsuit.*

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

NICKERSON *versus* HARRIMAN.

By § 23, c. 154, R. S., every master of a vessel, who shall knowingly transport out of the State, any person under the age of twenty-one years, without the consent of his parent, master and guardian, shall be punished by a fine, and shall be liable to such parent, &c., for all damages sustained, *in an action on the case.*

No *vindictive* damages were intended to be given to the father by this enactment.

In *such action*, the measure of damages is compensation for the pecuniary injury or loss resulting from such transportation.

And it is for the direct consequences of his own act, and not for the act of God, that *such master* is responsible.

Thus, if the minor, who is transported, dies at the termination of the outward voyage, no damages can be recovered by his father, of the master, for the loss of his son's services, *after* his death.

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

CASE, based on c. 154, § 23, of R. S. The defendant was master of a vessel.

The evidence in the case tended to show, that the defendant shipped on board of his vessel, the plaintiff's minor son, knowing him to be a minor, and transported him out of the State, without the consent of his father. Within a few days after his arrival at the port of destination, the son died.

Several requested instructions by the defendant were refused. On the subject of damages, the presiding Judge ruled thus: —

If the jury should find, that the defendant, without the *consent* of the plaintiff, transported his minor son out of the State, *knowing him to be a minor*, and that he died at the time and place and in the manner testified to by the witnesses, they would be authorized to assess damages for the loss of the services of said minor from the day he was transported out of the State by the defendant, (exclusive of the wages earned on the voyage,) *until he would have arrived to the age of majority*, if he had lived, making all reasonable and proper deductions for the expense of boarding, clothing, schooling and doctoring him; and also making

proper allowance for the *probabilities of sickness and death*, had he not been transported out of the State by the defendant.

The defendant excepted to the instructions.

Abbot, in support of the exceptions.

Palmer, contra, cited Sedgwick on Damages, c. 23, ¶ 1, p. 90, note; 2 Richardson, 455 and 648.

APPLETON, J. — The R. S., c. 154, § 23, imposes upon "any master or commander of any ship or vessel, who shall knowingly carry or transport out of this State any person under the age of twenty-one years, or any apprentice or indented servant, without the consent of his parent, master or guardian, a fine not exceeding two hundred dollars," and makes him further liable to such parent, master or guardian, in an action of the case. This suit is brought by the father, for the damages sustained in consequence of the defendant's having knowingly carried or transported his minor son out of the State. The son died within a few days after his arrival at the outward bound port, but no allegation to that effect is set forth in the writ.

The material question presented for determination is, whether the rule given to the jury for their guidance in assessing damages is correct. The instruction complained of, was "that if they should find, that the defendant, without the consent of the plaintiff, transported the plaintiff's minor son out of this State, knowing him to be a minor, and that he died at the time and place and in the manner testified to by the witnesses, they would be authorized to assess damages for the loss of the services of said Loren B. from the day he was transported out of the State by the defendant, (exclusive of the wages earned on the voyage,) until he would have arrived to the age of majority if he had lived, making all reasonable and proper deductions for the expense of boarding, clothing, schooling and doctoring said Loren B.; and also making a proper allowance for the pro-

babilities of sickness and death, had he not been transported out of the State by the defendant."

The cases where punitory or vindictive damages are allowed are few, and little reason is perceived for enlarging their number. The true measure of damages is, compensation for the pecuniary injury or loss, which directly results from the cause of action. The circumstance, that besides giving an action for "damages sustained," a penalty is imposed, would lead to the conclusion, that vindictive damages were not intended to be given.

The instruction given, practically, made the defendant an insurer of the life of the plaintiff's son, and as he died, required the jury to assess the probable value of his net earnings to the time of his majority, calculating the ordinary chances of life. It makes him responsible for his death, though the result might have been the same, had he remained at home.

By the common law no value is ever put upon human life, to be recovered by way of damages in an action. *Carey* v. *Berkshire R. R. Co.*, 1 Cush. 475. In England, by stat. 9 & 10, Vict. c. 93, an act was passed "for compensating families of persons killed by accident, the second section of which enacts, "that in every such action the jury may give such damages as they may think proportionate to the injury resulting from such death, to the parties respectively, for whose benefit such action shall be brought." In the construction of this Act it was held, that the jury in assessing damages, are confined to injuries of which a pecuniary estimate can be made, and cannot take into consideration the mental suffering occasioned to the survivors by the death for which damages are sought to be recovered. "The measure of damage," says COLERIDGE, J., in *Blake* v. *Midland Rail-way Co.*, 10 Eng. Law & Eq. 436, "is not the loss or suffering of the deceased, but the injury resulting from his death to his family."

If an action cannot be maintained for the loss of life, at common law, it would seem, necessarily, to follow, that they

could not be indirectly assessed, when if directly claimed they would be denied. In *Baker* v. *Bolton*, 1 Camp. 493, which was an action for negligence, whereby the plaintiff's wife was killed, Lord ELLENBOROUGH said "the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil Court, the death of a human being could not be complained of as an injury; and in this case *the damages as to plaintiff's wife must stop with the period of her existence.*" So here, if the father cannot recover for the negligent or wilful killing of his son, he should not be permitted to recover the probable pecuniary value of his future net earnings. If, when death is the direct and immediate consequence of a wrongful or negligent act, compensation is not recoverable, still less can it be, when at the most, it is but an indirect or remote and uncertain result.

The statute gives damages to the parent, master and guardian. The relation of the plaintiff to the person carried away or transported, indicates the measure of damages, and that they are to be assessed upon common principles in each case. The parent is entitled to the services of his child, and is liable for his maintenance. A similar relation exists between the master and his apprentice. It is for this reason, that each can maintain an action. The law does not give pecuniary compensation to the father for wounded feelings or mental agony. Nor is the defendant to be punished for the act of God.

The true rule, as to the measure of damages, may be ascertained by recurring to those cases, where actions have been brought by a master for the loss of service of his servants against those by whom they have been enticed away. In *Hambleton* v. *Vere*, 3 Saund. 169, it was held, that the master in an action for procuring his apprentice to depart from his service, could only recover for the loss of service up to the commencement of the suit, for the apprentice

might have returned after action brought. In an action on the case for enticing away the plaintiff's servants, the measure of damage is the injury done him by causing them to leave his employment. "He is entitled to recover," says RICHARDSON, J., in *Gunter* v. *Aston*, 4 Moore 12, "damages for the loss he sustained by their leaving him at that critical period." In *Hayes* v. *Borders*, 1 Gilman, 46, it was held, that the plaintiff was entitled to recover for the value of the services lost, up to the time of the commencement of the suit, and the reasonable expenses necessarily incurred in getting his servant back and damages for loss of time and trouble, and injury sustained till the commencement of the suit, in consequence of the wrongful act complained of. In *McCarthy* v. *Guild*, 12 Met. 291, it was held, in an action under a statute of Massachusetts, which declares "that any owner or keeper of a dog shall forfeit to any person injured by such, *double the damages by him sustained*, that when a father brings an action for an injury done his minor child, he is only entitled to recover for the loss of his services and the expenses of his cure.

In *Wright* v. *Gray*, 2 Bay. 464, and in *McDaniel* v. *Emanuel*, 2 Rich. 455, the actions were brought for the loss of slaves in consequence of the tortious acts of defendants. But a slave is regarded by the law of South Carolina as a mere chattel, not as a man, clothed with the attributes and entitled to the rights and enjoyments of a common humanity. Trover may be brought for his conversion. Trespass may be maintained for an injury done to him. The right of property in the master over him is the same as over his ox or his horse, and if injured or destroyed he is entitled to compensation. But neither the father nor the master have any such right over, or property in, the son or the indented apprentice. The cases cited by the learned counsel for the plaintiff do not apply. *Exceptions sustained.*

New trial granted.

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

LUFKIN *versus* PATTERSON.

The mere proof that the master sailed a vessel "on shares," will not authorize one of the part owners to be a witness for the master, in a suit against him for wages of one of the crew.

In an action for *services rendered,* no damages can be recovered for the violation of a contract.

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

ASSUMPSIT to recover *balance of wages* alleged to be due for plaintiff's minor sons, on board brig R. Patterson, of which defendant was master.

There was evidence tending to show, that the full amount of the wages agreed upon had not been paid, and that one of the plaintiff's sons had been discharged in a distant port before the termination of the voyage.

The defendant called as a witness, Robert Patterson, a part owner of the brig, who was objected to by plaintiff on the ground of interest; but on proof, that the brig was sailed by the defendant "on shares," at the time the services were performed, he was admitted by the Court.

The Court instructed the jury, that the plaintiff could not recover for damages, claimed for alleged breach of contract, because the writ contained no such count in which such claim for damages was set up.

The plaintiff excepted to the ruling and instruction.

Dickerson, in support of the exceptions.

Heath, contra.

TENNEY, J. — This action is for the recovery of the balance of wages of the plaintiff's minor sons on board the brig R. Patterson of Belfast, of which the defendant was master. The plaintiff obtained a verdict, and filed exceptions to the ruling of the Judge, in admitting as a witness, Robert Patterson, one of the owners of the brig; and also to the instruction to the jury, that the plaintiff could not recover in this case for the alleged breach of the contract, the writ containing no appropriate count for such a claim.

From the facts, that the witness was an owner in the

brig, and that the defendant was the master, the presumption arose, that the former was interested in the earnings, and would be affected by the contracts, of the latter as master, touching the expenses incurred in her ordinary operations. But he was allowed to testify, upon its appearing, that the defendant sailed the vessel *on shares*. This fact alone would not make him a competent witness for the party, who called him. The defendant might have had even the control of the brig, under the contract, by which he took the same on shares, and have been the owner *pro hac vice*, and still be holden to render the owners a share of the *net* earnings, after deducting the charges for manning the vessel, and other expenses. In the absence of proof of the terms of the agreement, the presumption of interest, arising from ownership is not removed, and the witness was not competent.

2. The case finds, that the action was brought for an omission of the defendant to make full payment for services, which he had received of the plaintiff; and it does not appear, that any other cause of action was alleged. No claim was made in the writ for special damages arising from the failure to fulfil the contract, by making payment according to its import, and the instructions to the jury were not erroneous. *Exceptions sustained.*

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

MCGILVERY *& al., in Equity, versus* STACKPOLE.

Where a voyage is broken up by shipwreck, the *wages* of the master terminate when the vessel and cargo pass out of his control.

For any subsequent services and expenses in securing and transmitting the funds belonging to the owners, he is entitled, as *agent*, to reasonable compensation.

But such *services* must be in the implied employment of the *owners*, and not merely for himself.

BILL IN EQUITY.

THE plaintiffs were the owners of seven and the defendant of one eighth of the schooner Friendship, and was also master.

McGilvery, the ship's husband, resided at San Francisco in California. Richardson, the other plaintiff, and the defendant lived in the State of Maine, but on July 30, 1850, were at San Francisco.

On that day the schooner was fitted with stores, furniture and supplies, and sailed with a load of passengers from San Francisco for Guaymas, thence to Mazatlan for orders for some port in the Pacific, and back to San Francisco.

The captain received from McGilvery $300, to pay disbursements on account of said schooner. The wages of masters at that time and place were three hundred dollars per month.

On August 14th, following, the Schooner was wrecked on Cape St. Lucas, without fault of the master, and the vessel and stores were subsequently sold by him for $1539,00. In superintending and closing up this business, he was occupied until August 25th.

The captain took passage in the first vessel that came along, which happened to be bound for Panama, and from thence he went to New York and to his home in this State.

When called upon to pay to the owners the proceeds of the sale, the respondent claimed that it had all been absorbed in disbursements and expenses for the owners.

The answer set forth that with the proceeds of the sale and money paid to him by McGilvery, the respondent "made his way in the most expeditious mode in his power to New York; that a portion of his journey was through a wild and inhospitable country, at great expense and at the peril of his life; and that the residue of said journey was attended with great labor and hazard to life and health, rendered still more hazardous by having in his possession the funds aforesaid."

He claimed a fair and reasonable compensation for bringing home in safety the proceeds of the sale.

The account appended to the answer showed that the respondent paid out $706 93
on the voyage, and charged for his own services until his arrival at New York, being 4 months and 12 days, at $300 per month, 1320 00
and paid for passage from Panama to New York, 100 00

$2126 93

He credited the owner with amount of sales, $1539 00
Money received at San Francisco, 300 00

$1839 00

The items in controversy were the charge for passage to New York, and that for his services after the disposition of the vessel and stores at the place where the schooner was wrecked.

It was agreed by the parties, that in case a bill in equity would not lie, the plaintiffs might amend by changing their bill into an action of account; and that judgment should be entered according to the rights of the parties upon such principles of law as are recognized by the Court sitting as a court of equity.

Crosby, for respondent.

W. Davis, for plaintiffs.

HOWARD, J. — The ultimate purpose of this suit is to obtain an adjustment of accounts between the parties, as part owners of a vessel. The plaintiffs resided at San Francisco, California, and one of them, McGilvery, was the major and managing owner; and the defendant was both part owner and master. The case is submitted upon the bill, answer, and agreed statement of facts.

The vessel was fitted out at San Francisco, and sailed laden with passengers, in July, 1850, for Guyamas, on the Gulf of California, thence to Mazatlan for orders to some port on the Pacific, and back to San Francisco. Before reaching the first port of destination she was wrecked, at

Cape St. Lucas, on the coast of California. She was there sold by the master, with her apparel, furniture and supplies. His conduct in managing the vessel, and making the sale, is conceded to have been unobjectionable, and such as the emergencies demanded.

Soon afterward the defendant left with the avails of the sale for Panama, in a vessel bound for that port. Thence he crossed the Isthmus, and took passage to New York, and returned to his residence in this State. He now claims to retain the entire proceeds of the sale, which are less than the amount of his account, which was rendered as a part of his answer. This account is admitted to be correct, with the exception of an item of $100, "paid for passage from Panama to New York," and a large portion of the item for services as master, up to his arrival in New York, covering *four months and twelve days.*

The vessel was stranded and wrecked in one month after the defendant's employment as master commenced. But his wages would continue so long as he continued to render services under the contract. When the voyage was broken up, and when he could no longer act in the capacity of master, his compensation would cease.

It appears, that the master and mate staid by the wreck, and rendered important services to protect and secure the property of the owners, until it passed into other hands, by the sale and delivery, on or about the 25th of August, 1850. To that time, wages were paid to the mate by the master, with the approbation of the owners. To the same time it would be but just, that the wages of the master should be computed. If he had rendered further service, or incurred expense in securing, transporting or transmitting the funds belonging to the owners, he would for that be entitled to a just remuneration. For when the voyage is interrupted by shipwreck, or other casualty, the master of the ship becomes of necessity an agent for the owners, and all concerned, with authority to act for them, as if upon special request. But there is no evidence, in this case,

upon which he can base any claim for such services or disbursements. In going to Panama, and thence to New York, and to Maine, he was not in the employment of the owners, but was following his own bent; and though with funds belonging to them, yet not in pursuance of any obligation arising from his relation as master or joint owner, but rather, as it would seem, in avoidance of palpable duties. And so, if he encountered perils on the way, as is contended, it was not in an enterprize in which the part owners were concerned, or in the accomplishment of which they are to be affected.

We have wholly failed to perceive upon what principles of law or equity, the defendant can be entitled to the amounts charged and claimed as "paid for passage from Panama to New York," and for services after the relation and duties of master had been terminated, by events that had transpired at the place of disaster. After disallowing these sums, and deducting from the proceeds of the sales, the balance of the account of disbursements as charged, and the compensation of the master, to be computed, as before stated, and one eighth belonging to him as owner, there will remain in his hands six hundred and thirty-one dollars and eighty-one cents, belonging to the plaintiffs. For that sum, with interest from the date of the writ, as claimed, they are entitled to a decree, with costs; and it is adjudged and decreed accordingly.

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

BLACK *versus* MCGILVERY.

Under c. 211, of laws of 1851, no warrant can issue for the seizure of the vessels containing spirituous liquors designed for illegal sale.

If an officer in executing a search warrant for spirituous liquors designed for illegal sale, under that chapter, seizes the vessel in which it is contained, he is liable therefor.

But no action can be maintained against him for the liquors contained in such vessels.

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

Trespass.

The suit was brought to recover the value of certain casks belonging to the plaintiff, and if entitled to recover for the liquor contained in them, the writ was to be amended accordingly.

The justification set up was, that the defendant was aid to an officer, who held a warrant made under c. 211, of the laws of 1851, requiring him to search the premises mentioned therein, and seize the spirituous liquors there deposited for illegal sale, &c. The vessels seized contained the obnoxious liquors, all belonging to plaintiff.

The liquors seized were shown to be kept by plaintiff for sale in violation of c. 211, of laws of 1851, and were ordered to be destroyed.

It was stipulated, that the Court were to render such judgment upon the evidence admissible as the legal rights of the parties required.

W. Davis, for defendant.

A. T. Palmer, for plaintiff.

Shepley, C. J. — The plaintiff appears to have been the owner of certain intoxicating liquors and of the casks or vessels containing them.

The liquors were seized by virtue of a warrant issued by a justice of the peace, under the Act approved on June 2, 1851, c. 211, and the vessels appear to have been taken with them.

Neither the Act nor the warrant, under which the defendant acted, as an aid to the officer, authorized the seizure or forfeiture of the vessels containing the liquors. Such a construction of the Act as would embrace private property, not named, and cause a forfeiture of it, cannot be admitted.

Neither the warrant nor the judgment of the Justice au-

thorized their seizure or destruction, and the defendant can derive no protection from them.

The proof presented, shows that the liquors were kept by the plaintiff for the purpose of sale by him, contrary to law; and in such case, as was decided in the case of *Preston* v. *Drew*, 33 Maine, 558, no action can be maintained to recover for their value.

It is not therefore necessary to decide, whether that section of the Act, which authorized their seizure, was in conformity to the provisions of the constitution.

Defendant defaulted to be heard in damages.

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

DESHON *versus* PORTER.

The grant of a water privilege cannot be modified by any of the rules of construction, where the intention of the parties is clearly expressed by the language of the deed.

A grant of a water privilege for a *specific purpose*, will restrict the grantee, or those claiming under him, to its *use* for that *purpose* alone.

A provision in *such deed*, that the grantee shall keep in repair a *specified part* of the dam from which the water is to be taken, furnishes no evidence, that it is a grant of a *similar proportion* of the water, as such a construction would be repugnant to the language used in the grant.

ON FACTS AGREED.

CASE, for diverting the water from plaintiff's flume, &c.

The Court were authorized to draw inferences as a jury might, and enter judgment according to the legal rights of the parties.

One Mark Blaisdell formerly owned the entire premises, and had a grist-mill thereon. In 1831, he conveyed to one Henry D. Smith a parcel of land near to the grist-mill, about one-half acre, "likewise a water privilege for tanning purposes in all its various branches, which privilege is

to come out of the grist-mill dam, (one twelfth part of said dam to be kept in repair by said Smith.")

The plaintiff has the rights which were conveyed to Smith.

The acts done by defendant were by authority of the owners of all that part of the land and privilege owned by Mark Blaisdell, which were not conveyed to Smith. The deed to them was made in Feb. 1842, but not recorded till 1853, and after the commencement of this suit.

The plaintiff had a flume connected with the grist-mill dam, but he did not use the water privilege for tanning purposes, he had two circular and an up and down saw and planing machine, and used the water for such machinery.

Smith when he purchased erected a tan-yard and carried on that business there till 1845. Whether it took more or less water to drive the plaintiff's machinery, than Smith used, could not be ascertained.

The defendant, by direction of the owners aforesaid, planked up the head of plaintiff's flume, and prevented him from using the water for his machinery.

Dickerson, for the defendant.

1. The intention of the parties is to be learned from the deed, and the *use* of the water is therein restricted to a specific purpose. No consideration of public policy can change the agreement of the parties. *Mayor* v. *Commissioners of Spring Garden,* 7 Bur. 348; *Schuylkill Nav. Co.* v. *Moore,* 2 Whart. 477; *Dewey* v. *Bellows,* 9 N. H., 282; *Ashley* v. *Pease,* 18 Pick. 273; *Tyler* v. *Hammond,* 11 Pick. 193; *Cutler* v. *Tafts,* 3 Pick. 272; *Sprague* v. *Snow,* 4 Pick. 54; *Field* v. *Houston,* 21 Maine, 69.

2. The quantity of water necessary to carry on "tanning purposes in all its various branches," is uncertain; and as the deed obviously authorizes the grantee to use such quanty, whatever it may be, he could not be limited to the use of one twelfth of the water.

3. The situation of the parties at the time of the conveyance shows that the grant limits the use of the water to a particular purpose.

Palmer, for plaintiff.

The plaintiff denies the right of the defendant to question his use of the water, as the deed under which the right of interference is set up, was not recorded till after our suit was commenced, and in the deed itself nothing is covered or conveyed, which is claimed by the plaintiff. But assuming that they have a right to stop all the water not conveyed by Mark Blaisdell's deed to Smith, what was that grant?

The language of that deed was but a measure of the proportion of water granted. It is apparent that the term privilege is used in no other sense except as a water power. The construction is to be settled upon the deed itself, if it can be. The circumstances attending the transaction, the situation of the parties, are legitimate means of assistance. 3 Man. 352; 15 Pick. 23; 19 Pick. 445; 2 Pick. 366.

The policy of the law does not favor the tying up by *construction* so valuable an agency as water to a specific use. *Bullen* v. *Runnells*, 2 N. H. 262.

The appropriation to a particular use must be by express terms, and an express prohibition against any change, for such particular use is against common right, policy and progress of improvement. 1 Bar. & Ald. 238; 15 Johns. 218; 15 Man. 313; 6 N. H., 22; 9 N. H. 458; 2 Whart. 477; 12 Conn. 317.

TENNEY, J. — It is admitted, that the defendant planked up the flume, as alleged in the plaintiff's writ, and thereby the water was diverted from the plaintiff's machine shop; and that this was done under the authority of Henry Matthews and others, who owned the grist-mill and privilege at the dam, subject to the plaintiff's rights under a deed from William R. French to him, dated August 21, 1851, which in addition to a parcel of land connected with a mill-site, described therein, grants, "likewise a water privilege for tanning purposes, in all its various branches, which privilege is to come out of the grist-mill dam, (one twelfth part of said dam to be kept in repair by said Deshon.")

It appears from the deeds introduced, that on January 12, 1831, Mark Blaisdell conveyed to Henry D. Smith, certain land, situated near a mill privilege, and the right to use water, described in the same terms used in the deed of French to the plaintiff. In this deed of Mark Blaisdell, Martha Blaisdell, his wife, relinquished her right of dower in the premises described. On November 6, 1834, Henry D. Smith conveyed in mortgage to William French, 2d, the father of the plaintiff's grantor, with a parcel of land, a part of that described in the deed of Mark Blaisdell, *the right to use the water, in the terms employed in the deed to him.* It appears from the evidence that this mortgage was foreclosed. There is no deed in the case from William French, 2d, to the plaintiff's grantor, or other documentary evidence of a transmission of title, but under the admission of the defendant, William R. French must have acquired his father's right to the water, by inheritance or some other mode. Henry Matthews, Chesley Matthews and Joseph Matthews claim under a deed dated February 22, 1842, recorded August 27, 1853, from Martha Blaisdell, who represents herself as having title under the will of Mark Blaisdell, her late husband, and the right conveyed to her by Mary Smith, and the heirs of Mark Blaisdell. This deed describes several parcels of land, and then is saved and excepted from one of them, "so much of the same as was conveyed to Henry D. Smith, by Mark Blaisdell, deceased, by deed dated January 12, 1831." It is objected by the plaintiff, that the deed of Martha Blaisdell, to Matthews and others, was not recorded till after the institution of this suit. It is not perceived that this can affect the question in controversy, as it is not contended that the plaintiff has any interest in land conveyed by this deed.

From these deeds, and the admissions in the case, no doubt can be entertained that Mark Blaisdell was the source of title of both parties; and that the right which is in dispute of the plaintiff, "to a water privilege, for tanning pur-

poses, in all its various branches," &c., is under the deed of Mark Blaisdell to Henry D. Smith.

In giving a construction to the part of the deed touching the water privilege, it is proper, in the language of Judge SEWALL, in *Sumner* v. *Williams*, 8 Mass. 162, "that the situation of the parties, the subject matter of their transactions, and the whole language of their instrument, should have operation in settling the legal effect of their contract."

At the time of the deed from Mark Blaisdell to Henry D. Smith, the grantor was in possession of the land, and the mill privilege; and thereon in operation was a grist-mill, with two run of stones. Smith was a tanner, and wished to obtain a privilege on the same stream on which to erect a tannery, and carry on his business with the aid of water power, so far as was necessary or desirable. And it would seem, that it was supposed, that he would need so much of the water, and at such seasons of the year, as to make it proper that he should be at the expense of keeping the dam in repair, in the proportion that his expected use therein would bear to the whole use. After the purchase, he put in operation his works connected with the tannery, and continued them till he disposed of his interest.

The principal question is, what intention of the parties is to be derived from the language of the deed, taken in connection with the situation of their business, and what may be supposed to be their respective objects and wants?

Certain general rules of construction in relation to the grant of water power, make a part of the law, when not controlled by the plain and unambiguous meaning of the language employed in the grant. One rule is, that the grant of a mill-site, where mills are standing, or where the terms of the grant indicate, that it is the intention of the grantee to construct such, the latter may appropriate the privilege to any purpose at pleasure, with the right to change the purpose, whenever he may choose. And where the language is not so clear as to free the case from doubt, whether, the intention was to give a measure of the quantity to be used, or to con-

fine the use to a specific object, the former is more favored, because all grants should be construed most against the grantor in such cases, and most for the general interest of the public, in order to give encouragement to the improvements which may be anticipated in an enterprising and growing community. But these rules have no influence in a question of the construction of a deed, where the intention of the parties is clearly expressed in the written agreement made by themselves.

In the deed from Mark Blaisdell to Henry D. Smith, the object of the grant of the water power is as direct and simple as language could make it, without the use of restrictive words. There is nothing tending to show, that any other purpose was then entertained, or would be thought of afterwards. The deed contains no words indicative of an intention to give a general measure of the quantity of water power granted, such as "so much as would be required," &c. "the quantity necessary," or "sufficient," for the purposes of tanning.

The grantor was the owner of the grist-mill, then in operation. He would have no interest to favor the erection of another mill of the same kind, but to prevent it; and consequently may be supposed to desire to restrict the grant, so as to secure him from the exposure to the loss of patronage. A tannery, in all its various branches, so far from diminishing the business of the grist-mill, would tend to increase it, by bringing to its vicinity, those who might avail themselves of its advantages. The grantee was a tanner, and desirous of obtaining a situation, where he could carry on the business of his trade with success in all its various branches. And the construction of his works and the subsequent occupation, while he owned it, manifested no other purpose than that expressed in the deed.

By adopting the construction contended for by the plaintiff, serious difficulties might arise in questions relating to the quantity, secured to the grantee, if he were to substitute other works for those connected with such as were needed

for the purposes of tanning. The language furnishes no measure whatever for any other object than that of tanning. The grantee was not in the least restricted in his use of water for that purpose, but could enlarge his operations *ad libitum*. The grantor was willing to give full power for the extension of the tanyard, and for the increase of the machinery, to be wrought by water in the tanning business in all its variety, believing from the nature of the subject matter, that it could not be carried so far as to be injurious, beyond the consideration received. On the other hand, if the tannery could be abandoned for other works, the deed is silent as to what works can be substituted, and those holding under the grant would be at liberty to erect a grist-mill, a saw-mill, or a factory, which might require for successful business a large proportion of the water, which would run in the stream. And when the owner of the dam and the grist-mill should find it worthless, by the withdrawing of the necessary quantity of water to work it, and in a suit against the owners of the mills or factories, erected under the grant, it is not easy to perceive what rule of quantity, the Court could give to the jury, for the water, which the defendant could take; nor could the jury as matter of fact, know from any experience of their own, what rule to apply. There could be no evidence which could enlighten them, when it is considered, that at the time the grant was made, no tannery had been erected at that place, and as there was no limit to the extent of the tannery to be put in operation, or to the variety of its different branches, the terms, "a water privilege for tanning purposes in all its various branches" as a measure of the amount of water, for any other purpose than that expressed, utterly fails. 18 Pick. 272.

The provision in the grant, that the plaintiff was to keep in repair one twelfth part of the dam, cannot restrict the grantee to the use of that proportion of the water. Such would be repugnant to the plain language used; and this cannot aid the plaintiff's construction.

The grantee of Mark Blaisdell and his assigns had a right to take the water from the grist-mill dam for a specific purpose. The fee in the dam was in Blaisdell, and it passed from Martha Blaisdell, his devisee, to Henry Matthews and others. The right obtained under Mark Blaisdell's deed was an easement in the dam and the water, to be enjoyed according to its meaning indicated by the deed.

The plaintiff took the water from the dam, and was using it for a purpose not authorized by the grant; and the defendant, acting under the direction of the owners of the dam, violated no rights of the plaintiff in closing it and diverting the water.

According to the agreement of the parties, the plaintiff must become *Nonsuit.*

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

COUNTY OF AROOSTOOK.

STATE *versus* PUTNAM.

Whether the Court on motion will *quash* an indictment, is within its *discretion*, and a refusal furnishes no ground of exceptions.

The fact, that one is the duly appointed agent of the town, furnishes no protection against prosecutions for selling liquor, if the property in and the profits of selling it, are his.

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

INDICTMENT against defendant, for being a common seller of spirituous liquors, between April and September, 1853.

A motion was made to quash the indictment for not being certified by the foreman of the grand jury, whose name was Benjamin B. Smith, and the indictment was certified by "B. B. Smith." The motion was denied.

The defence was, that the defendant was licensed by the selectmen of Houlton where he lived, and the alleged offence was committed.

A certificate was produced from the selectmen of that town, showing that the defendant was the agent during the time covered by the indictment.

It appeared by the testimony of one of the selectmen, that at the time of the appointment, it was agreed that the defendant should purchase the liquors, and have the profits made on the sales for his pay for selling them.

The Judge instructed the jury, that if such was the agreement, and the sales by defendant were made in pursuance thereof, the license furnished the defendant no protection against the indictment.

To the ruling and instructions of the Judge the defendant excepted.

Peters, in support of the exceptions.

Evans, Attorney General, *contra.*

APPLETON, J. — It is within the discretion of the Court in which an indictment is pending, to quash it or to leave the defendant to his motion in arrest of judgment. The refusal to quash an indictment is not a proper subject of exception. The party indicted has his remedy by motion in arrest of judgment, or by demurrer to the indictment. *State* v. *Stuart,* 23 Maine, 111; *Com.* v. *Eastman,* 1 Cush. 189; *State* v. *Barnes,* 29 Maine, 561.

The testimony of Smith was received without objection. From that, it appeared, when the certificate of his appointment as agent was given the defendant, that it was agreed between him and the selectmen of Houlton, that he should purchase the liquors and have the profits made on the sale thereof for his pay for selling them.

It is apparent if the liquors sold, were the defendants, and if the profits derived from their sale were his, that he could not in such case be deemed as acting as agent. It would be a novel kind of agency, where the agent purchases

and owns the goods which he sells, and retains all the profits from the operation. The sales by the defendant of his own liquor for his own profit, cannot be considered as having been made by him as agent for the town, who neither owned the liquors nor participated in whole or in part in the profits derived from such sales. The Act of 1853, c. 48, § 8, provides "*that no agent shall have any interest in such liquors or in the profits of the sales thereof.*" To allow the defendant under the circumstances of this case the protection, which he claims as agent, when the case finds he was not in fact agent, but was the principal in all the sales made and alone interested in the profits, would be to repeal the statute.

The instructions given were in entire accordance with the language and intention of the Act, and the exceptions thereto must be overruled. *Exceptions overruled.*

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

STATE *versus* TAGGART.

An indictment is properly certified by the foreman of the grand jury, although in affixing his signature, he makes use of only the *initials* of his christian name.

A motion to *quash* a *defective* indictment, may rightfully be denied.

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

INDICTMENT.

The record of the Court showed that Benj. B. Smith was chosen foreman of the grand jury which found the indictment, which was certified to be a true bill by "B. B. Smith, Foreman."

The counsel for defendant seasonably moved to quash the indictment, because it did not appear to be certified by the foreman of the grand jury. That motion was denied, and defendant excepted.

Tabor, with whom was *Peters*, in behalf of the exceptions, cited 1 Chitty's Crim. Law, p. 32, also p. 363 of same; 3 Cowen, 463; 5 Johns. 84; 4 Johns. 119.

Evans, Attorney General, *contra.*

There is no law nor usage, requiring signatures, either official or otherwise, to be written out at full length. The practice of abbreviating, or using initials only, is exceedingly common, almost universal, and yet no instance can be found, it is believed, where any instrument or judicial process has been held inoperative for such cause.

Writs and executions, are in a vast number of cases signed by the clerk of the courts in this manner. The only question in any case, where a question can be raised, must be, whether it be the proper signature of the officer, it purports to be.

The *mode* of signature, whether by initial letter, or otherwise, is of no moment. Is the indictment certified by the person with his signature, who was really the foreman, is the sole question to be considered.

The Court have judicial knowledge who is the foreman of its juries. They are empannelled in open Court, and answer to their names, pronounced in full. The indictments are delivered into the Court by the person sworn and recognized by the Court as foreman, purporting to be signed by him in that capacity. They are received by the Court from the hands of the person thus signing, and who has first responded to his name, and ordered to be filed.

For authorities, if any are to be expected, upon a question like this, some may be found:—

In *State* v. *Stedman*, 7 Port. (Ala.) R. 496, cited in U. S. Dig. Supplement, vol. 2, p. 146, title Indictment, I, b, § 40, it is said, "where Alexander R. Hutcheson was appointed foreman of the grand jury, and a bill of indictment was indorsed Alexander R. Hutch*in*son, it was held, that if necessary, the Court would intend the two names to indicate the same person."

See *State* v. *Kean*, 10 N. H. 347.

The indictment against Professor Webster, for murder, contested on every point by his counsel, was certified "Dan'l Rhoades, Foreman." No exception to it was taken. Undoubtedly the name of the foreman on the record was "Dan*iel.*" Pamphlet Report by Dr. James V. Stone.

The bill of exceptions in the case at bar, is signed only by the initials of the christian name of the presiding Judge, with no addition of office. How are the Court to know that this is the signature of one of their number? They know officially who the Judge is, for the commission is promulgated in open Court, with the christian name in full, but how do they know that they are one and the same. Are the exceptions to be therefore dismissed? Or will not the Court rather intend the two names to indicate the same person.

APPLETON, J. — When the grand jury, after examining the evidence, have found bills of indictment, they bring them publicly into Court, the clerk calls the jurymen by name, who severally answer to signify that they are present; and he then asks them if they have agreed upon any bills and bids them present them to the Court. The foreman hands such bills as may have been found to the clerk, by whom they are passed to the Court.

The records of the Court show, that Benj. B. Smith was chosen foreman of the grand jury, which found the indictment. The indictment is certified to be a true bill by B. B. Smith, foreman. The counsel for the defendant moved to quash the indictment, because it did not appear to have been certified by the foreman, which motion the Court denied.

This motion assuredly should not prevail, if the indictment was in fact signed by the foreman. There is no rule of the common law, there is no statutory provision rendering all official acts null when signed with the initial letters of the christian name of the public officer, whose signature may be required. In the celebrated case of *Commonwealth* v. *Webster*, the bill was signed by Dan'l Rhoades, fore-

man, yet the objection, that here was an abbreviation of the name, was not taken. In principle no distinction is perceived between an abbreviated signature and one where only the initial letters of the christian name are used. In *Regina* v. *Dale*, 5 Eng. Com. Law and Eq. 360, it was held no objection to the validity of a recognizance to keep the peace, that it described the justices before whom it was taken by the initial letters of their christian name. "There is no authority," says ERLE, J., "for saying, that all legal proceedings in which the christian name is imperfectly stated are null and void; nor is there any in which this objection has been taken on proceedings in the administration of the criminal law." And in the same case Lord Campbell remarked, "as to the point, that the initials only of the christian name are mentioned, it is an answer to the objection, that it has not been taken and cannot be taken in criminal proceedings."

No evidence was offered to show the signature not to be that of the foreman. No issue to that effect was tendered. The motion assumes, that from the facts that the records show the name of the foreman was Benj. B. Smith, and that the indictment was signed B. B. Smith, foreman, that the Court were bound to infer that the signature was not that of the foreman, that is, that some person other than he, had assumed and exercised his official functions, and that the grand jury had sanctioned such assumptions by allowing spurious bills signed by an intrusive foreman, to be presented to the Court, as the genuine result of their deliberations. Inferences so broad do not seem fairly deducible from premises so narrow. Upon principle, therefore, the decision of the presiding Judge was correct. Even if the indictment had been defective, the Court was under no legal obligation to quash the indictment, for the party has his remedy by demurrer or motion in arrest. *State* v. *Stuart*, 23 Maine, 111. The exceptions present no legal ground of complaint.

Exceptions overruled.

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

COUNTY OF WASHINGTON.

PIKE *versus* BALCH *& als.*

Where a voyage is broken up by ungovernable circumstances, the master, acting in good faith for all concerned, and under supreme necessity, is authorized to sell the ship and cargo.

But the master acts for the owners or insurers *only*, because they cannot act for themselves; his acts will be valid to the extent of their *extreme necessity*.

Before resorting to a sale of the cargo, if its situation will admit of it before it will probably be lost, he should communicate with the owners; and to effect such communication, he is bound to use any available means within his power.

Where he has sold the cargo, whether, under all the circumstances, he has exercised a sound judgment and discretion, is a question of fact to be determined by the jury.

Sales at auction fall under the provisions of R. S., c. 136, § 4.

And property exposed at such sale does not become *vested* in the highest bidder by being fairly *knocked off* to him.

The auctioneer, after he has knocked off property, if he recognizes a higher bid, may re-open the sale.

Until some of the requirements of the statute at such sales are fulfilled, the right to the property sold does not pass, even to the highest bidder.

Whether certain proceedings at an auction sale, proved to have transpired between the *purchaser* and another person present, did not prevent fair competition and so made the sale invalid, may properly be left to the determination of the jury.

Salvage can only be obtained in courts of admiralty jurisdiction.

Where one claims *title* to property under an unlawful sale, he cannot afterwards claim *possession* against the owner for disbursements made and services rendered in saving the property.

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

REPLEVIN.

PLEA, *non cepit*, and a brief statement that the property described in the writ was the property of defendants and not the property of the plaintiff; and that plaintiff had no right to the possession of the property at the time of the service of the writ.

The officer who served the writ in this case, had another writ of replevin against the same defendants in favor of one William Todd; and the property taken on both was a cargo of lumber which had been shipped by the plaintiff and William Todd, on board the schooner Baltimore, for New York. These shippers belonged to Calais where the cargo was taken in. In a week or more after the vessel left port, she went ashore in a calm and fog, on an island called the "old man," off Little Machias Bay, and was much damaged upon the rocks, and full of water.

The accident occurred on May 18, 1852, upon that part of the island exposed to the open sea. A protest was noted, surveyors called, and on the next day, the captain caused the vessel to be stripped of her sails and rigging, to be advertized and the vessel and cargo sold at public auction the same afternoon. The defendants claimed title to the cargo through that sale.

One point made was, as to the fairness of the sale, but the principal question at issue, and upon which most of the evidence bore, was its *necessity.*

No means were taken to notify the plaintiff of the disaster, or to request any advice as to what measures should be taken.

It appeared, that when the captain went to a notary at Machias Port, to make his *protest,* he was advised that there was a telegraphic station at Machias, which communicated with Calais, and that his ride would not have been an hour longer by coming that way; and was advised to go there and give notice to the owners, but the captain thought it of no use as the danger to the cargo was so great.

It was testified that the vessel might have been got off by a steamboat, but how far it was, where one might be obtained, did not appear.

A tender was made by plaintiff, on May 26, 1852, for the amount paid for the cargo, and expenses of taking it out, which not being accepted, and the defendants claiming the cargo as their own, this suit was commenced.

Several requests were made by the defendants for instructions to the jury, among which the 2d, 3d, 7th, 8th, 9th and 10th were as follows; viz:—

2. *That* the true criterion for determining the occurrence of the master's authority to sell, is the inquiry, whether the owners or insurers, where they are distant from the scene of stranding, can by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel and cargo in time to direct the master before they will probably be lost; *that*, if there is a probability of loss, and it is made more hazardous by every day's delay, the master may then act promptly, to save something for the benefit of all concerned, though but little may be saved; *that* there is no way of doing so more effectual than by exposing the vessel and cargo to sale, by which the enterprise of such men is brought into competition with such as are accustomed to encounter such risks, and who know from experience how to estimate the probable profits and losses of such adventures.

3. *That*, where a vessel is wrecked or stranded on an island in the open ocean, and the vessel and cargo are in imminent peril of immediate loss, and there is a telegraph station within a distance of twenty miles by sea and land from the scene of the wreck or stranding, it is not the duty of the master to leave the vessel and cargo and proceed to such telegraph station, and communicate with the owners prior to a sale for the benefit of all concerned.

7. *That*, if the jury should find, that the sale of the cargo of schooner Baltimore was fairly conducted and the lumber was fairly knocked off to Stevens, for himself and the other defendants, as the highest bidder, for $241; and that was the fair value of the property, and the highest bid heard and known by the auctioneer; although a higher bid may have been made, not loud enough for the auctioneer to hear, or not until the cargo had been knocked off to Stevens; the title to the cargo became thereby *vested* in *them*.

8. *That*, if they shall find, that the cargo was fairly knock-

ed off to Stevens, as the highest bidder, at the best price which the property was fairly worth in the exposed situation it was at the time of the sale, it would not be the duty of the auctioneer, on a suggestion that a higher bid had been made, which he did not hear, to reopen the sale, and offer the property again for a higher bid.

9. That, if they shall find that the cargo was fairly knocked off to Stevens as the highest bidder, for himself and the other defendants, the property *thereby* became *vested* in them, and any arrangement which Stevens may have made with Cole subsequent to its being so knocked off, by the payment of a sum of money for the purpose of pacifying Cole, could not invalidate the sale, or deprive the defendants of the benefit of their purchase.

10. That if they shall find, *that* the sale of the cargo to the defendants was *invalid* by reason of the master's not consulting the owner, and taking his direction before the sale, and that the absolute title of the defendants thereby fails; and shall also find that the cargo was relieved from its peril and brought into a place of security, and saved by the enterprise, labor, expense and risk of the defendants; they were entitled to a liberal reward out of the property saved; and had the right of possession of the property until their claim to *salvage* should be adjusted, settled and paid according to the principles of the maritime law.

The presiding Judge gave the second request, substituting for the words "the earliest use of the ordinary means to convey intelligence," "any available means in the power of the master."

The third request was refused, with the remark that it was for the jury to say whether the master exercised a sound judgment and discretion in the matter.

The seventh was given with the qualification, that if a higher bid was in fact made, which was known to, or recognized by, the auctioneer, and the sale was reopened or proposed to be reopened, if desired, the property would not vest in defendants.

The eighth was given, with the remark, that it was not the duty of the auctioneer on a *mere suggestion* that there had been a higher bid; but if it was affirmed that there was a higher bid, and he was satisfied of its truth, it was then his duty to reopen the sale.

The ninth request was complied with, excepting the qualification, that if the transaction between Stevens and Cole was before the sale was closed, then it was for them to say whether it was not preventing fair competition at the sale.

The tenth, for the purpose of the trial, was refused.

A verdict was returned for plaintiff, and damages were assessed at $1,00. The jury also expressed an opinion that defendants were entitled to salvage, but this part of the verdict was stricken out.

If the Court should be of opinion, that the defendants had a legal claim for salvage, and had the right of possession of the property until their claim of salvage should be adjusted, settled and paid according to the principles of the maritime law, then the plaintiff was to become nonsuit, and a return of the property ordered; but if they had not the right of possession, then judgment was to be entered on the verdict, unless the presiding Judge erred in refusing or modifying some or any of the requested instructions by the defendants, in which event there was to be a new trial.

J. A. Lowell, for defendants.

1. The second request should have been given, without the change made in it by the Judge. *Brig Sarah Ann*, 13 Pet. 387; 2 Sum. 206; 3 Rob. Admr. Cases, 243; Am. Law Reg. Nov. 1852, p. 48.

2. The instructions in the third request should have been given; and the remarks of the Judge in refusing to give it, were erroneous. *Brig Sarah Ann*, before cited.

3. The seventh request was sound law and should have been given *without the qualification*. U. S. Dig. vol. 9, p. 59; 1 Louisa. Rep. 11; Long on Sales, Rand's ed. c. 5, p. 228, and pp. 240 and 245; 2 Kent's Com. 2d ed., 537. So also should the eighth request have been complied with.

4. The ninth request was proper, as it was proved, that the management between Stevens and Cole, was subsequent to the cargo's being knocked off to Stevens, as the highest bidder.

5. The Judge, in order to settle the facts of the case, withheld the 10th requested instruction, in doing which he erred. *Sch. Emulous and Cargo*, 1 Sum. C. C. R. 207; *The Centurion*, Ware's Rep. 477; *Brig Sarah Ann*, before cited; 2 Bouvier's Law Dict. 377, title, Salvors; 2 Saund. Plead. and Ev. 760; *Ingraham* v. *Morton*, 15 Maine, 373; *The Emblem*, Davies, 61; *China* v. *Russell*, 2 Blackf. 172; *Walpole* v. *Smith*, 4 Blackf. 304.

6. The jury have negatived all fraud at the sale, by saying that the defendants should have salvage. *Gardiner* v. *Morse*, 25 Maine, 140; *Phippen* v. *Stickney*, 3 Met. 384.

F. A. Pike, for plaintiff.

1. The master had no authority to sell the cargo under the circumstances. 2 Am. Leading Cases, 442; *Center* v. *Am. Ins. Co.* 4 Wend. 45; *Hall* v. *Franklin Ins. Co.* 9 Pick. 466; *Bryant* v. *Com. Ins. Co.* 13 Pick. 543, and 18 Pick. 83.

2. It is the master's duty to use any available means in his power to communicate with the owners. Various phrases have been used by the Judges, but they all express one thing, as appears by the cases already cited. Vid. also *Wilson* v. *Miller*, 2 Starkie's R. 1; *Freeman* v. *East India Co.* 5 Barn. & Ald. 617; *Petapsco Ins. Co.* v. *Southgate*, 5 Peters, 601.

3. When the sale is not justified by the circumstances, it is simply void, and cannot affect the owner's right to recover. *Eaton* v. *Amer. Ins. Co.* 7 Cowen, 582. The facts show that the master could have communicated readily with the owners, either by telegraph or a messenger, and not have delayed the sale one hour. And when there is an opportunity for the owner to act, the authority of the master ceases.

4. The sale itself was fraudulent. Auction sales are

within the statute of frauds. Until the auctioneer makes his memorandum in writing, the bidder at such sale is not bound. *Martin* v. *Dana,* 13 Met. 385; *Burke* v. *Haley,* 2 Gilman, 614; *Cleaves* v. *Foss,* 4 Maine, 1; *Alna* v. *Plummer,* 4 Maine, 258; 2 Starkie Ev. 68.

5. No claim to salvage can be set up. In setting up ownership, the defendants waived salvage. Even a mortgagee or pledgee, when they attach the mortgaged or pledged property, waive their previous claims. *Libby* v. *Cushman,* 2 Maine, 429; *Brock* v. *Ingersoll,* 11 Met. 232; *Paul* v. *Hayford,* 22 Maine, 236; 2 Hill on Mortgages, 20.

6. But this is not the proper court to try such questions. Admiralty jurisdiction of salvage cases is exclusive. *Brown* v. *Fair American,* 1 Pet. Admr. Rep. 91.

7. Besides they have forfeited all claims to salvage by converson of the property. Salvage is forfeited by embezzlement on the part of the salvors. *Sch. Boston and Cargo,* 1 Sumner, 328; *Hope,* 3 Robinson, 215; *Brown* v. *Fair American,* 1 Pet. Admr. Rep. 87.

8. But even if salvors, they were not entitled to possession of the property. It is not necessary to secure such claim. *Dr. Lushington* v. *Glasgow Packet,* 2 W. Robinson's Admr. Rep. 312. This property was not *derelict,* and any peculiar rights that attach to salvors of derelict property cannot attach to this.

HATHAWAY, *J.* — The questions presented in this case are upon certain requests made by the counsel for the defendants for specific instructions to the jury, and the instructions thereupon given by the presiding Judge.

"If the voyage be broken up, in the course of it, by ungovernable circumstances; the master, in that case, may even sell the ship or cargo, provided it be done in good faith, for the good of all concerned, and in case of supreme necessity, which sweeps all ordinary rules before it." 3 Kent's Com. 173.

The questions presented by the second request, and the

rulings of the Judge thereon, pertain to the duties of the master in such a contingency. The defendants' counsel complains, that his second request was not entirely complied with, and that the instruction given was too severe in its requirements of the master.

The instruction given was the same as requested, except, that the Judge substituted the words, "by any available means in the power of the master," for the words in the request, *to wit*, "the earliest use of the ordinary means to convey intelligence." In case of necessity or calamity, during the voyage, the master becomes the agent of the owners and insurers of the ship and cargo. He is bound to act in good faith, and for the benefit of all concerned, and is not justified in selling either ship or cargo but in case of extreme necessity. *N. E. Ins. Co.* v. *Brig Sarah Ann*, 13 Peters, 387. "The merchant should be consulted if possible. A sale is the last thing the master should think of, because it can only be justified by that necessity which supersedes all human laws. Abbott on Shipping, 367–8, and notes to 7th Am. ed.

In *Hall* v. *Franklin Ins. Co.*, 9 Pick. 466, PUTNAM, J., delivering the opinion of the Court, said, "the master's authority to sell must be confined to a case of extreme necessity, which leaves no alternative, which prescribes the law for itself, and puts the party in a positive state of compulsion to act. The master acts for the owners or insurers, because they *cannot* have an opportunity to act for themselves. If the property could he kept safely until they could be consulted, and have opportunity in a reasonable time to exercise their own judgment in regard to the sale, the necessity to act for them would cease." The same doctrine was held in *Gordon* v. *M. F. & M. Ins. Co.*, 2 Pick. 249, and in *Peirce* v. *Ocean Ins. Co.*, 18 Pick. 83, and in *Bryant* v. *Commonwealth Ins. Co.*, 13 Pick. 543, in which case the law, as given by Abbott, that "the merchant should be consulted if possible" was cited by the Court with approbation as authority. *The American Ins. Co.* v. *Center*,

4 Wend. 45, was a case of *technical* total loss of a vessel insured, in which it was said, that the right of a master to sell was more extensive in this country than in England. Chancellor Kent remarking upon that case, in note D, p. 173, of his Commentaries, 5th ed., approved the doctrine of *Hall* v. *Franklin Ins. Co.*, 9 Pick. as asserting and supporting the stricter doctrine of the English law, which he held to be "best supported by reason and authority."

In *Robinson* v. *Georges Ins. Co.*, 17 Maine, 131, EMERY, J., delivering the opinion of the Court, said, "notwithstanding our desire to make all just allowances for the difficulty of deciding absolutely right, by masters of vessels, in embarrassing cases occurring in foreign countries, we consider, that the authority of the master, to put in peril the interests of the owner in the ports of the United States, must be narrowly watched."

The instruction requested, is in the language used by WAYNE, J., in his opinion, in case of *N. E. Ins. Co.* v. *Brig Sarah Ann*, before cited, and undoubtedly, as a general rule, "the earliest use of the ordinary means to convey intelligence" in such cases, would be the most available and effectual means in the power of the master, but all general rules are subject to exceptions, and where the calamity occurs in a place so situated and limited in its ordinary means of transmitting intelligence by mail, that a resort thereto would be obviously fruitless and nugatory, it is not going beyond the requirements of well established law to hold the master bound to avail himself of such other means as may be in his power, and by which notice might be speedily communicated to the owners.

The subject of the third request was entirely matter of fact to be considered and determined by the jury, and the request was properly refused.

The seventh, eighth and ninth requests were concerning the duties of the auctioneer, and the effect of his proceedings. Auction sales are within the statute of frauds. *Davis* v. *Rowell & al.*, 2 Pick. 64. "No contract for the sale

of any goods, wares or merchandise, for the price of thirty dollars or more, shall be allowed to be good, unless the purchaser shall accept part of the goods so sold and actually receive the same, or give something, in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the party to be charged by such contract, or by his agent thereunto by him lawfully authorized." Statute, c. 136, § 4. The auctioneer is the agent of both parties, and is bound to act for them both, with equal fidelity; and his entry of the name of the purchaser on his book or memorandum containing the particulars of the contract, is a sufficient signing within the statute. Until some one of those things required by the statute, as necessary to complete the contract of sale, be done, a time for repentance remains, and the sale is not perfected. *Kenworthy* v. *Schofield*, 2 Barn. & Cres. 945; 2 Johns. Chan. Rep. 659; *Cleaves* v. *Foss*, 4 Greenl. 1; *Alna* v. *Plummer*, 4 Greenl. 258. Neither of those things necessary to complete the contract of sale having been done, the business remained unfinished and open for further proceedings.

The instructions given upon the eighth request were quite favorable enough for the defendants, and were unexceptionable.

The seventh and ninth requested instructions were erroneously given, and might have furnished good cause for exceptions to the plaintiff if the verdict had been against him. The property did not become vested in the bidder by being fairly knocked off to him. There was something more to be done before his rights of property became vested. There can be no doubt of the propriety of the qualification to the seventh request; and the qualification of the ninth was correctly given according to the doctrine of *Goodwin* v. *Morse*, 25 Maine, 140, which is sound law; the question was properly left to the jury.

By the tenth request the defendants seem to make a contingent claim as salvors. "Salvage is the compensation that

is to be made to other persons, by whose assistance a ship or its lading may be saved from impending peril, or recovered after actual loss." Abbott on Shipping, 554.

This case presents the defendants as claiming to be the absolute owners of the property, not as claiming a lien upon it for salvage. They saved it for themselves, not for the plaintiff. If this were a proceeding by the plaintiff in a Court of admiralty jurisdiction, to obtain possession of the property saved, and the Court believed, that although the sale was invalid by fault of the master, yet, that on the defendants' part, the purchase was *bona fide*, there might, perhaps, be a decree for possession on condition of paying the defendants their disbursements and expenses in saving the cargo according to the rules by which Courts of Admiralty are governed in such cases, as stated by STORY, J., at the close of his opinion in case of the brig *Sarah Ann*, 2 Sumner, 206; unless the conduct of the defendants in the matter, had been such as to deprive them of the benefit of such equitable consideration.

It appears by the testimony of Wilson, that when the plaintiff's title and claim to the property were made known to the defendants, and the plaintiff offered to pay their disbursements, and the expenses of getting the lumber on shore, and sought information of the amount, the plaintiff's title was not recognized by the defendants, his offer was not accepted, the information sought was not given, and the defendants claimed the lumber as their own property.

The defendants virtually tendered an issue upon the mere title, and the plaintiff had his right of action at law. Abbott, 556, with notes to 7th Am. ed; *Clark* v. *Chamberlain*, 2 Mee. & W. 78.

In the language of the tenth request, "If the sale was invalid by reason of the master's not consulting the owner and taking his direction before the sale, and the absolute title of the defendants thereby fails;" then the necessity for the sale did not exist. *Hall* v. *Franklin Ins. Co.* be-

fore cited. And if the master sold without necessity, he sold without authority, and the persons who bought under such circumstances would not acquire a title as against the merchant, but must answer to him for the value of the goods. Abbott, 368, and notes to 5th Am. ed.

Upon the facts presented in this case, if the defendants have any equitable claim for compensation, for services and disbursements in saving the cargo, their remedy is to be sought in a court of admiralty jurisdiction.

In the rulings of the Judge who presided at the trial, no error is perceived, by which the defendants were aggrieved, and as agreed by the parties, there must be judgment on the verdict. *Exceptions overruled.*

Judgment on the verdict.

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

FREEMAN *versus* WELD *& al.*

A *second assignee* of an equitable title to real estate is authorized to maintain a bill in equity, *in his own name*, against one holding the same by a fraudulent title, to compel a conveyance of the estate.

Where such *assignee* derives his interest by virtue of a levy, a deed to *him* of the land levied on, from the one holding the equitable title under such levy, will authorize him to maintain such bill, without any assignment of the judgment on which the levy was made.

BILL IN EQUITY to enjoin the defendants from prosecuting certain suits at law, brought by them against the complainant, in the S. J. C. of Washington county, and to compel them to convey a certain lot of land, described in the bill. There was a demurrer to the bill and joinder.

The bill alleged that a suit was pending in the District Court of said county of Washington, on Feb. 12, 1846, wherein Daniel Weld and David Weld were plaintiffs and co-partners, under the style of Daniel Weld & Son, against one Tucker; *that* the plaintiffs in that suit, for a valuable consideration, and by their instrument of assignment by them

subscribed, assigned to Caleb Burbank "said suit with authority to control the same;" *that* judgment was obtained and a levy made upon the lot of land described in the bill in common and undivided, as the property of said Tucker; and *that* Tucker did not redeem the land levied on within the year of redemption.

The bill also alleged that the complainant bought of Burbank, by deed of quitclaim, for a lawful consideration, his interest in the land, and also the other half of the same lot from the owner thereof; and that he went on to lumber on the lot, and has been greatly annoyed by suits of trespass brought against him by defendants, and now pending in Court, and their threats to annoy and trouble him in consequence of his operations on said lot; *that* they pretend to hold and claim the half in common and undivided, which was levied on, by a conveyance from Daniel Weld, or Daniel Weld & Son.

It was further alleged that Daniel Weld is dead, who was the father of the defendants; *that,* prior to his death, and subsequent to the assignment to Burbank, and to the levy, Burbank called on him to make and execute a good title of the one half of the lot, in consideration of the assignment of said suit; *that* he was prepared to prove that in consequence of said request and demand on said Daniel, and through him on David, one of the defendants, the junior partner of Daniel Weld & Son, he, Daniel, attempted to procure a conveyance to Burbank, and called on said David to join him in so doing, and that said David utterly refused. The defendants were also charged with knowledge of the assignment to Burbank, and that they fraudulently and wrongfully procured a conveyance from said Daniel Weld, or Daniel Weld & Son. Wherefore the complainant prayed, &c.

Thacher, in support of the demurrer, relied on two grounds.

1. That the complainant, standing in the relation of a second assignee, is not authorized by statute to maintain this bill.

2. That having only a quitclaim deed of the land levied on, but not an assignment of the judgment, he has no authority to maintain the bill.

Freeman, pro se.

HATHAWAY, J. — The facts stated in the bill, and admitted by the demurrer, show that the equitable title to the estate in controversy, was in the plaintiff, and that the defendants, holding the legal title, fraudulently refused to convey, and claimed to hold the estate as their own property.

The demurrer is overruled.

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

INHABITANTS OF WESLEY *versus* SARGENT *& al.*

In determining the true location of a line by a survey and plan, where the one does not correspond with the other, the less certain must yield to the more important criterion.

Thus, where upon a division line, the bounds of the adjoining townships are all determined by admeasurement, and by references to their corners as thus ascertained, and the range lines as projected upon the plan made on such survey, do not correspond therewith, the plan must be controlled by the admeasurement.

A direction to a surveyor by the proprietors of lands, to ascertain and determine certain lines of their townships, will not authorize him to establish a new line, or change the true one; and if he returns to them an erroneous location and they act upon it afterwards, without a knowledge of the error, they are not bound thereby.

Where a township is incorporated into a town by its *number*, the act has reference to the *true* lines of such township, although an erroneous line is the only one actually indicated upon the earth.

Of the costs of a survey.

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

TRESPASS, to recover the value of a lot of mill-logs. It was agreed, that the defendants were liable, if the logs were cut within the corporate limits of the town of Wesley.

After the evidence was out, it was stipulated, that the

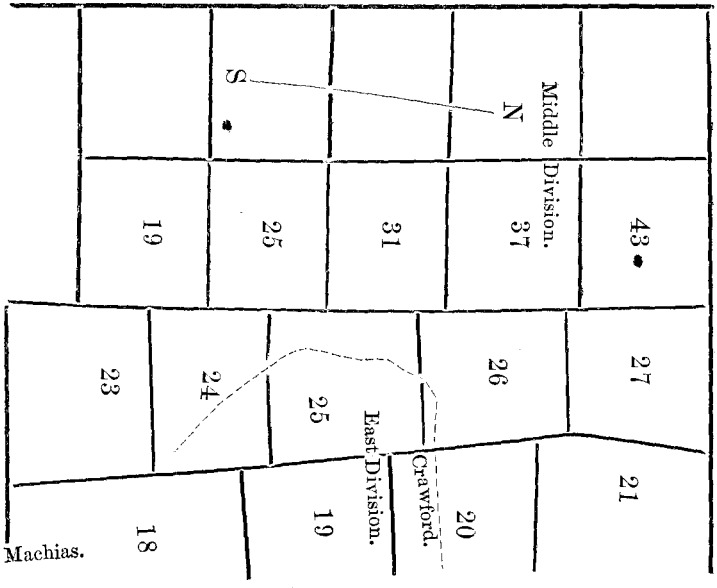
full Court should render such judgment thereon as the law required, or grant a new trial.

The question involved the *true* northerly line of township No. 25, in the east division.

The territory in dispute is within the Bingham Penobscot Purchase.

The plaintiffs relied upon the Act of incorporation of Wesley, and the northerly line of township, No. 25, as run by B. R. Jones in 1828, under the direction of John Black, the agent of the proprietors, and who had before surveyed for him.

Before that time there were some settlers on township 25, and in 1828, Mr. Black sent to Jones a sketch of townships in the east divison laid down as in the diagram.



The dotted line represents Black's Road to Machias.

With the sketch were these directions:—"Before you lay out any more lots on Great Meadow Ridge, or on the road leading therefrom toward Machias, it will be well in running some town lines, to ascertain the precise situation of the settlement. You will take your departure from whatever

point you think best, but if the line between Nos. 19 and 20 is correct, from that you can easily fix the line between Nos. 25 and 26. Having determined the township lines, and ascertained the position of the great meadow ridge settlement, you will please to lay out some lots for the accommodation of settlers on the ridge, and likewise on the road laid out toward Machias. You will attend to this business as soon as you can, and when you have finished the job, you will send me a copy of your field book and plan."

Under these instructions Jones testified, that he first found the south-west corner of No. 20, or Crawford, by running from a point about half way of its southerly line where he had before run, and the line was spotted, the corner he was satisfied with; from this corner he run 160 rods, and there found or made a corner for the north-east corner of 25; that there were appearances which satisfied him there was a corner there previously, and from thence he run to the Black road, 526 rods, and was satisfied this was the north line of 25, and it agreed with all the State plans; he run these lines with the greatest care; he did not recollect of spotting it, but might have done so; he did not run this line across the township, and he made a return with plan to Col. Black.

Other evidence was introduced by plaintiffs tending to show the recognition of the Jones line.

By the Act of incorporation of Wesley in 1833, its northern boundary is thus defined; "beginning on the east line of township No. 31 in the middle division, at a point two miles north from the north line of township No. 25 in the east division; thence running eastwardly, parallel to said north line to the town of Crawford," and from thence township 25, east division, is included in Wesley.

The defendants relied upon an Act of Massachusetts, passed in 1786, describing the tract of territory designated for lottery townships, and constituting the Bingham Penobscot purchase, and introduced a book containing a copy of the State plan of said tract with all the townships laid down

thereon. (No copy of this plan came into the hands of the reporter.)

He also introduced one Addison Dodge, whose testimony tended to show, that in 1833 he was sent by Col. Black to run the line between the middle and east divisions, and to mark the corners of the townships on that line; that he found an old corner at the north-west corner of 23, and also one at the north-east corner of 43. At 43 it was marked in 1791; that he found an old line between 31 and 25 of the middle division, and a corner at the termination of it marked I. P. 1793; that the distances did not vary much from the State plan he had with him at the time; that he made the west line of 27, eight miles, and made a corner; that he run eight miles and 106 rods to the south-west corner of 26, east division; that he run six miles and 34 rods to the south-west corner of 25, east division; that he measured five miles and 30 rods to south-west corner of 24, east division.

It appeared that the same witness was requested by Col. Black in 1834 or 5, to run out township No. 25, east division; to find the north-west corner of it, and to add two miles on the north, and run a line parallel to the north line of 25, and if it could not be found, to take the lines he had run previously and run it out. The northerly line run by Jones part way across the township, when run through to the division line, did not correspond to the corner he made in 1833, on that division line. According to his running, from the intersection of the south line of 31, middle division, with the eastern line of that division, to his north line of 25, east division, was two miles and 27 rods, while the State plan made it one mile and 214 rods; and that he made it from the south line of 31, middle division, to north-west corner of 24, east division, four miles and 23 rods, while the state plan made it four miles and 140 rods. The north line of 23, east division, was an old line, and the south line of 31 middle division, was an old line. At the north-east corner of 43 was an old monument. He formerly surveyed in the east division, and run the lines on the town-

ships therein, but never found any line run by Peters in the east division, except the ends of the lines upon the *division* line.

It appeared that beyond the north line of Wesley, as claimed by the plaintiffs, there was in No. 26, 14522 acres. In the disputed strip there was 3850 acres, and between the south line of the disputed territory and Dodge's north line of 25, were 7520 acres. South of the latter line in Wesley was 25695 acres.

Much other evidence was in the case.

Walker, and *Downes & Cooper*, for defendants.

P. Thacher, for plaintiffs.

1. The proprietors of No. 25 and adjoining townships had a right to fix the boundaries of that and other townships, to suit their own convenience or pleasure, where it could be done without interfering with rights vested.

2. Jones, proprietors' surveyor, by his letter of instructions of July 8, 1828, was expressly authorized to fix the north line of No. 25, east division, and he ascertained and fixed that line precisely according to the instructions given him by Black, the proprietors' agent.

3. The north line of No. 25, east division, so found by Jones, was afterwards repeatedly recognized by the proprietors as the true north line of that township, and for these reasons, they are estopped to deny it. *Stone* v. *Clark*, 1 Met. 378.

4. This line being well known and established, as the true north line of No. 25, east division, at the date of, and for many years prior to the Act of incorporation, the Legislature must be presumed to have intended Jones' line in such Act.

5. By the defendants' own showing, Dodge was never authorized to run any different line. His doings as to the north line of No. 25, east division, and the north line of Wesley, were wholly *sua voluntate* and bound nobody. Nor have the proprietors recognized more than partially his surveys or lines.

6. It was not competent for the proprietors by subsequently running a different line, even though the first was in any respect erroneous, to change the boundaries of the township as intended and fixed by the Legislature. Nor can they change the locations of the public lots or reservations, authorized and recognized by themselves, especially as other rights have intervened. *Brown* v. *Gay*, 3 Maine, 126; *Norris* v. *Hamilton*, 7 Watts, (Penn.) 9; 1 U. S. Dig. p. 474, art. 30, 32, 33, p. 477, § 77.

7. There is however no reason to doubt that Jones' survey was correct, and that his north line of No. 25, east division, is the true one. The defendants' testimony, so far as it is relevant, is controlled and rebutted by their own acts and declarations.

SHEPLEY, C. J. — The town of Wesley was incorporated by an Act approved on January 24, 1833, with a northerly bound "beginning on the east line of township No. 31, in the middle division, at a point two miles north from the north line of township No. 25, in the east division, thence running eastwardly parallel to said north line to the town of Crawford;" and these connected with other bounds include township No. 25, in the east division.

Rufus Putnam by virtue of an Act of the Legislature of Massachusetts, passed in the year 1786, made and returned surveys and plans of those divisions and of the townships included in them. The lines forming the exterior bounds of those divisions, appear to have been run and marked; while the range and check lines of the several townships included in the eastern division, do not appear to have been. The line between the two divisions, being an exterior line, appears to have been run, and the corner bounds of the several townships adjoining it appear to have been ascertained and stated by Putnam from actual admeasurement. The length of the westerly line of township No. 25, is by him stated to be six miles and thirty-four rods. By extending that line northerly to the line run by Jones for the north

line of that township, its length would be increased more than a mile, if the south line of the township be correctly exhibited on the plan taken in this case; and there is no satisfactory proof that it is not.

The west line of township No. 25, is by Putnam's survey and plan stated to be four miles and one hundred and forty rods on township No. 25, and one mile and two hundred and fourteen rods on township No 31, middle division. If the lines run by Jones were esteemed to be correct, township No. 25, east division, would be bounded on township No. 31, middle division, more than three miles, instead of one mile and two hundred and fourteen rods, as stated by Putnam. So, if Jones' line were regarded as correct, the west line of township No. 26, north of township No. 25, would be but seven miles and eighty-four rods instead of eight miles and one hundred and six rods, as it should be by Putnam's survey, assuming the north line of township No. 26, to be correctly exhibited by the plan taken in this case; and there is no testimony to prove that it is not.

As the westerly lines of the townships included in the eastern division, and adjoining the line dividing that from the middle division, were run by Dodge in the autumn of the year 1833, from an ancient monument at the north-west corner of township No. 23, to an ancient monument at the north-west corner of township No. 27, each township upon that line was found to have its measure nearly according to Putnam's survey.

The line run by Jones for the north line of township No. 25, according to Putnam's plan, would correspond with the south line of Crawford, but there is nothing to determine the distance between those two lines, except the space between them on the plan, while on the line between the two divisions the bounds of the townships adjoining that line, appear to have been determined by actual admeasurements, and by references to their corners as thus ascertained. These are of more certainty and of much greater importance than the space between the south line of Crawford

and the north line of township No. 25. The less certain and important must yield to that which is more, when all cannot be correct.

There can therefore, be no sufficient authority for adopting the line run by Jones as the true northerly line of township No. 25, according to the survey and plan of Putnam.

It is however contended, that it must be regarded as the true north line, because it was the first line run upon the earth, and marked by monuments by authority derived from the agent of the owners of the land. The letter from their agent, Black, of July 8, 1828, states it "will be well by running some town lines to ascertain the precise situation of the settlement." "Having determined the township lines and ascertained the position of the great meadow ridge settlement, you will please to lay out some lots for the accommodation of settlers on the ridge, and likewise on the road laid out towards Machias."

The power conferred upon Jones was that of ascertaining the lines of the townships, not that of making them anew or altering them. When the letter speaks of "having determined" them, no more was meant than having ascertained or determined where they had before been established. If the north line of township No. 25, had not before been established upon the earth by marked monuments, it had been by Putnam's plan and admeasurements and by references and measured distances from the corners of other townships in the middle division. Jones does not appear to have been employed for the purpose of running and establishing the line of any township or marking its position on the earth, but only to ascertain their true position as already established, to aid him in the accomplishment of another purpose. If he was misled by the position of the south line of Crawford, and therefore regarded the north line of township No. 25, as being further north than it really was, the owners cannot be bound by that erroneous survey. When Dodge run upon it subsequently in 1834 or 5, and

set monuments, he appears to have done so upon the assumption, that it had been correctly run. But when on coming to the line between the two divisions he became satisfied that it had not been, he abandoned it and proceeded to run the line from the monuments placed by him in 1833, for the north-west corner. The line therefore can have no effectual aid from the survey of Dodge.

It is further insisted, that the line run by Jones being the only one designated upon the earth as the north line, when the town of Wesley was incorporated, the Act of incorporation must have had reference to that line; and that it would thereby become established.

That Act refers to the townships in the middle and eastern divisions, and to them by their numbers. Those divisions and numbers existed only by the survey and plan of Putnam. Without a reference to them they could not be found. And when in the Act of incorporation, reference is made to the "north line of township 25, in the east division," it is obviously to the true north line; not to any particular line which had been run, and regarded by certain persons as the true line. The reference is not to the north line as run by Jones, or as established in a particular manner, but to the true north line.

The fact that Jones transmitted to Black a copy of his survey, and that no objection to it was made for five or six years, can have no material effect; for he appears to have supposed, that it might be correct, until the error became known by the survey of Dodge.

The conclusion is, that the line run by Jones, partly across from east to west, for the north line of township No. 25, was not the true north line; that it was not run by him by authority of the owners, for the purpose of having that line established; that it has not been recognized by the owners as the true north line, with a knowledge of all the facts; that the Act incorporating the town of Wesley

had reference to the true north line, and that it did not establish the line run by Jones as the north line.

Plaintiffs nonsuit.

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

After the promulgation of this opinion, the plaintiffs objected to the allowance of the *entire* costs of the survey, in the taxation of the bill of costs before the presiding Judge at *Nisi Prius*. There was a docket entry, when the surveyor was appointed, that the expense should be finally determined by the Court. It was objected that the survey was made upon the motion of defendants, and at their pleasure, and against the wishes of plaintiffs, and that it did not necessarily follow, that because a party recovered costs, that he recovered *all;* and that this item should be apportioned; but CUTTING, J., presiding, ordered that the whole expense of the survey, $123,75, should be borne by plaintiffs. To which order exceptions were taken and allowed.

At the next law term, after argument of the question raised, the exceptions were overruled.

TRUSTEES OF PUTNAM FREE SCHOOL *versus* FISHER.

Without *actual* occupation of some portion of the premises by the grantee under a recorded deed, the real owner is not *disseized* thereby.

Under the plea of the general issue, the tenant cannot give in evidence a conveyance by the demandant of any portion of the premises to one under whom he does not claim, and which does not show that the demandant was not *seized* according to his writ.

Where the tenant would *disclaim* a *portion* of the premises demanded, it must be made up and filed according to the provisions of the laws of this State, or it cannot be available. Such disclaimer cannot be incorporated into the plea of the general issue.

And if, where a disclaimer was thus incorporated, the demandant recovers the value of more land, without improvements, than he really owned, a new trial could not avail the tenant, as the cause must be tried again upon the same pleadings.

WRIT OF ENTRY.

This action was commenced in 1847, to recover the northerly half of lot No. 7, in the 4th range of lots in the town of Charlotte. It has been before the Court upon exceptions to certain rulings of the Judge presiding in the trial, and is reported in 34 Maine, 172, where will be found a diagram of the premises and a statement of the case.

At the last trial in 1853, the tenant pleaded "he never disseized the demandants in manner and form as they have declared against him, and *disclaims* to hold any estate or possession in so much land included within the description of the demandants' declaration, as lies southerly of the stone wall and the continuation of that line from the town to the county road, being the dividing line between the tenant and the Jacob Gardiner lot, (so called) and puts himself on the country."

He also claimed to hold the part by him defended, by virtue of a possession and improvement for more than six years, and requested the jury to inquire as to the increased value.

The demandant asked for a determination of the value of the premises without any improvements.

The jury found the tenant did disseize according to the count in the writ, and found the increased value of the land under the improvements, $1200, and without them, $265,72.

And the cause now came before the full Court, on a motion to set aside the verdict, as being against law and the evidence.

No report of the evidence is necessary to an understanding of the grounds of the decision.

Fuller, in support of the motion.

Granger, contra.

SHEPLEY, C. J. — The case is presented on a motion to have the verdict set aside. The testimony presented respecting the title to the greater portion of the lot demanded, is not such as to authorize it, unless a disseizin was cre-

ated by the conveyance in mortgage made by David Fisher, on July 2, 1822, to Isaac Hobart. That deed was duly recorded on August 28, 1822. It does not appear, that Hobart ever entered upon any portion of the lot under it, or that any change of possession took place in consequence of it, until after it was assigned to Samuel Fisher, in 1842. To make a recorded deed operate to disseize the owner, the grantee must actually occupy some portion of the premises. *Peters* v. *Foss*, 5 Greenl. 182. If it would have that effect after it was assigned to Samuel Fisher, sufficient time had not since elapsed to prevent a recovery.

It is further insisted, that the verdict should be set aside, because the demandants will recover the whole of the premises, when it appears, that David Blanchard was the owner of that part of the lot separated from the rest by a highway and containing about seven acres.

The general issue was pleaded and joined without any special plea or brief statement of defence, that demandants had conveyed a part of the lot to a third person.

Under such pleadings it has been decided by the case of *Stanley* v. *Perley*, 5 Greenl. 369, and by others, and by one recently, that a conveyance made by a demandant to a person, under whom the tenant does not claim, and which does not show, that the demandant had not been seized within the time alleged in his writ, cannot be received as evidence. If made within twenty years before the commencement of the suit, it cannot disprove the alleged seizin of the demandant and cannot therefore be admitted under a plea of the general issue. The deed from the demandants was therefore incorrectly admitted. Without its admission the demandants would have been entitled to recover that lot conveyed to Blanchard. The verdict should not be set aside to prevent a recovery of it, for the tenant could derive no benefit from it on that account.

It is further insisted, that the verdict should be set aside, or the demandants will recover a small triangular piece,

which the tenant did not claim, and to which he disclaimed any title or possession.

By statute, c. 145, § 9, it was provided, if the tenant claimed only a part of the premises demanded, that he should describe such part in a statement, signed by him or his attorney, and filed in the case, and disclaim the residue. He might also disclaim the whole of the premises demanded without such formal proceedings. This statute was amended by the Act approved on August 10, 1846, c. 221, which provided, that if any defendant would avail himself of the provisions of that ninth section, his pleadings and brief statement should be filed within the time required for filing pleas in abatement, and not after except by special leave of the Court.

The pleadings present no proper disclaimer of that triangular piece, either according to the rules of the common law or the provisions of the ninth section before it was amended. There is a disclaimer of it incorporated with, and constituting a part of the plea of the general issue with a conclusion to the country. A regular and formal disclaimer pleaded in bar should not be incorporated with another plea, which must terminate with a conclusion to the country; and it should conclude with a verification. But such a plea to a portion of the premises demanded, could not be received since the revised statutes were in force. The disclaimer as presented, being entirely deficient of the elements required by those provisions of the statute, was of no validity. No issue was made, or could be properly made upon it. There is no exhibition of any leave granted to file it under the provisions of the statute as amended. If it had contained the elements required, it would have been presented too late to be available.

If in the assessment of the value of the land without the improvements the demandants may recover for the value of a few more acres than they owned, this will be occasioned by the state of the pleadings, which would not be changed by setting the verdict aside. There may be much reason for

doubt, whether those portions of the premises were included in the estimate of value made by the jury.

Judgment on the verdict.

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

SPRAGUE *versus* GRAHAM.

A mortgagee in possession for foreclosure, who neglects to render an account of rents and profits on lawful demand, and claims a greater sum than is due upon the mortgage, is liable for costs in the suit to redeem.

BILL IN EQUITY to redeem a parcel of land.

The principles of law involved in this case were determined at a former hearing, 29 Maine, 160, and in the opinion then given, the facts all appear.

It now came up on the report of the master appointed at that time. No additional testimony was introduced before the master, in relation to the payment of the notes given by McConaghy to Brockway, except a note presented by the plaintiff, which had been taken up, and the signer's name erased. The note was given by Charles Brockway to Thomas James, December 7, 1839, for $352, payable January 1, 1842, on which was indorsed, August 10, 1842, $85. The respondent objected to the admission of the note as showing the time when the *sale* of hay took place, but agreed that it was *cut* in August, 1842.

The case was therefore left by the master upon the testimony which was before the Court at the previous hearing, with the admissibility of the note, and its effect as matter of law.

The amount of rents and profits found in the hands of defendant, was as follows;—for 1846, $150,60; for 1847, $9,35; for 1848, $105; for 1849, $45, to which several sums the master reported that interest should be added from the first of Jan'y next following its reception.

SHEPLEY, C. J. — When this case was before the Court at a former time, the principles were stated by which the rights of the parties were to be determined. 29 Maine, 160. It is now presented upon a report of the master, which does not determine whether the notes for $500, made on July 11, 1842, by Joseph McConaghy, and payable to Charles Brockway, were justly due to him on August 21, 1845, when he indorsed them, and assigned the mortgage made to secure payment of them, to the defendant. A decision of that question is desired of the Court.

The farm was not conveyed by Brockway to McConaghy subject to the mortgage then existing upon it, held by Thomas James. The release deed contained a covenant of special warranty against all claims arising under the releasor. If there was nothing in that deed, or in the bargain between those parties, respecting the note and mortgage due to James, there would exist no obligation on the part of McConaghy to pay that debt for Brockway. It would be left in full force against him, without any right to call upon McConaghy to pay it, and if he paid it by a conveyance of the farm to Levi A. James or otherwise, he would be entitled to call upon Brockway for repayment.

The testimony of Brockway respecting it is contradictory, and not easily reconcilable with the actual transactions. When considered together, and in connection with established facts, it fails to prove that his sale of the farm was made to McConaghy, subject to the mortgage to Thomas James, or that he was to be relieved from payment of his own notes by McConaghy. He says, "I think the understanding was, that he was to pay it, or if I paid any thing, he was to allow me for it." In another answer he says, "I think I can state it for a fact, that it was the understanding, he was to lift the mortgage, and if he took up that note to James, it was not to go in part payment of his note to me for $500." In answer to a former question, he had stated, "I did deed to him *bona fide* and took a mortgage at the time, and expected some of the money for it right

away, and if I had got the money, Mr. Thomas James would have had it, *as I wanted to pay him,* as he had a mortgage on the same property. I mean he would have got the first payment I was to have from McConaghy." Being examined again in the year 1848, and asked whether McConaghy had paid him any thing on his notes to him for $500, he states, "he has not, except the note of $300, or what was due on it at the time Levi James let McConaghy have it, and which I hold myself accountable to McConaghy for, and which is mostly paid by me to McConaghy."

The argument for the defendant insists, that he made a mistake, and intended to speak of the notes which Levi A. James gave to McConaghy. This cannot be admitted, for there had been no payment then made upon the notes of Levi A. James, and part of the note due from Brockway to Thomas James had been paid. The witness being next asked how he paid McConaghy on account of that note, says, "McConaghy was owing me, we had not settled, we jumped at the settlement, I gave him my note of $5, and he gave me receipt against *my said note of* $300, which was supposed to be lost." It was therefore, by his explanation, his note of $300, and not the notes of Levi A. James for $300, of which he was speaking. Neither of them were in fact for that sum. Brockway's position was such, that he had strong inducements to deny, that he had received pay from McConaghy for his notes of $500, and taking all his testimony into consideration, it is apparent, that he received the note due from him to Thomas James, and the notes which Levi A. James gave to McConaghy, through Murphy acting for him, at the time when McConaghy conveyed the farm to Levi A. James to complete a contract made for it, between Brockway and James. Brockway attempts to show that he satisfied McConaghy for paying his note to Thomas James, by a settlement of an old account in the spring of 1848, "which had been standing years and years," but the rights of other parties could not be affected by it, and the account of it is not very satisfactory.

It is however insisted, that from the transactions between them it is apparent, that McConaghy was to pay the note due to Thomas James and discharge that mortgage without requiring repayment of it from Brockway. That it cannot be believed, that their intention was to have the farm conveyed for $500 free from incumbrance. That would appear from the testimony to have been somewhat less than its value, but to add to that the amount due to Thomas James would seem to have been as much greater than its value. Their condition as to property, their connexion by marriage, with the fact, that the purchaser was not to be put into possession of the farm and that he could not obtain possession of it without a payment of the amount due to Thomas James, renders it probable, that the farm would have been conveyed for a less rather than a greater sum than its real value.

The conclusion is, that the mortgage and notes from McConaghy to Brockway were satisfied by Brockway's receiving, through his agent Murphy, the note due from him to Thomas James and the notes given by Levi A. James for the purchase of the farm. That the plaintiff is entitled to redeem by paying to the defendant whatever may be due on a judgment recovered on one of the last named notes, deducting therefrom any amount for which the defendant may be accountable for rents and profits received.

The case is recommitted to the master to ascertain and state the amount thus due from or to either party, taking an account of rents and profits since the last account was taken.

The defendant having neglected to render an account of rents and profits on demand, and having claimed more than was due upon the mortgages, must be subject to the payment of costs.

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

Granger, for the plaintiff.

Fuller, for the defendant.

RUSSELL *versus* CLARK.

In an action against an officer for levying an execution against a judgment debtor, upon property claimed by the plaintiff, the officer cannot give in evidence the declarations of the debtor not made in the presence of the plaintiff.

Nor in such action can the declarations of a third person, while in possession of the property in controversy, as to his own acts and the intentions of the debtor in regard to the property, be given in evidence, unless uttered in the presence of the plaintiff, or made known to him.

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

TRESPASS.

The case will readily be understood from the opinion.

Harvey was excepting counsel.

TENNEY, J. — This action to recover damages for the alleged taking of a horse, wagon and harness, was brought against the defendant as constable of the town of Weston, who attached the property on a writ in favor of Elijah Gove *v.* John P. Decker. The defence is upon the ground, that Decker bought the property of the plaintiff a short time before the purchase of the writ on which the attachment was made. And the question before the jury, was whether Decker had become the owner of the property or not. Exceptions are taken to the exclusion of testimony offered by the defendant.

Henry Russell, a brother of the plaintiff, and Decker, came with the horse and wagon in dispute to the house of one Scribner, situated about three miles from Jackson Brook, and Russell took the horse and wagon and went to Jackson Brook, Decker remaining four or five hours at Scribner's house, and while there he told Scribner that he was started and was on his way to California. This evidence being objected to was excluded. It appeared that Henry Russell came to Jackson Brook with the horse and wagon, and the defendant offered to prove, that while there he stated that he and Decker were started for California, and that Decker was going to Penobscot river to sell his horse and wagon,

and then they were going to California. It appeared that the plaintiff had been at the place where the last statement offered to be proved was made. And that he knew that the horse in question was there, but it is not shown that Decker was there at all, or that the plaintiff was there when the statement was made, or that it was known to him.

The plaintiff, having once owned the property, is entitled to recover, unless it was proved that Decker had acquired title thereto at the time of the attachment. Assuming that the statements respectively made by Decker and Henry Russell were so connected with their journeys then in progress, as to become a part of the *res gestæ*, a question upon which we give no opinion, was the evidence admissible? Neither the acts nor the declarations of Decker, done and made when the plaintiff was not present, could in the least affect him. The declaration of Henry Russell, if Decker was present and assenting thereto, would be equally incompetent. But being made when Decker was not present, they cannot be evidence even, that Decker had started with the intention of going to California, or that he was going to Penobscot river, to sell his horse and wagon before they should go to that place. And being said in the absence of the plaintiff, the evidence was properly excluded. *Exceptions overruled.*

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

TALBOT *versus* COPELAND *& als.*

The location of the dividing line between two townships, made by the owner of one, can have no effect upon the rights of the owner of the other, unless he was a party to such location.

Where a number of townships were owned by the same proprietors, acts done by them on one showing its boundary, with reference to a particular purpose, can have no controlling influence to determine the boundaries of an adjoining township.

Nor, if such owners established the corner bound of one of their townships, can the corner of the adjoining township be necessarily determined by the distance therefrom represented on their plan.

That a *plan* may be admissible to show the boundaries of a deed, it must be referred to as a part of its description. Without such reference, it cannot be protracted upon the earth to show the location.

The actual running of one of the lines of a township by the owner, and a reference thereto by the grantor, may be conclusive upon the grantee as to that line; but without reference to a plan, it can have no effect in determining the other boundaries of the township.

Where the dividing line between two townships was not originally run, and no monuments set up indicative of it, its location is to be determined by measure according to the deed.

And in such a condition the owner of the township having the older title will first receive his quantity by admeasurement.

WRIT OF ENTRY to recover a parcel of land lying on the northerly end of township No. 20, which was particularly described; and also to recover $3000, for rents and profits and for destruction and waste within six years before the commencement of the action, which was on Aug. 1, 1846.

At the trial in 1851, the jury not being able to return a verdict, it was agreed to submit the case, upon the evidence admissible, to the decision of the full Court.

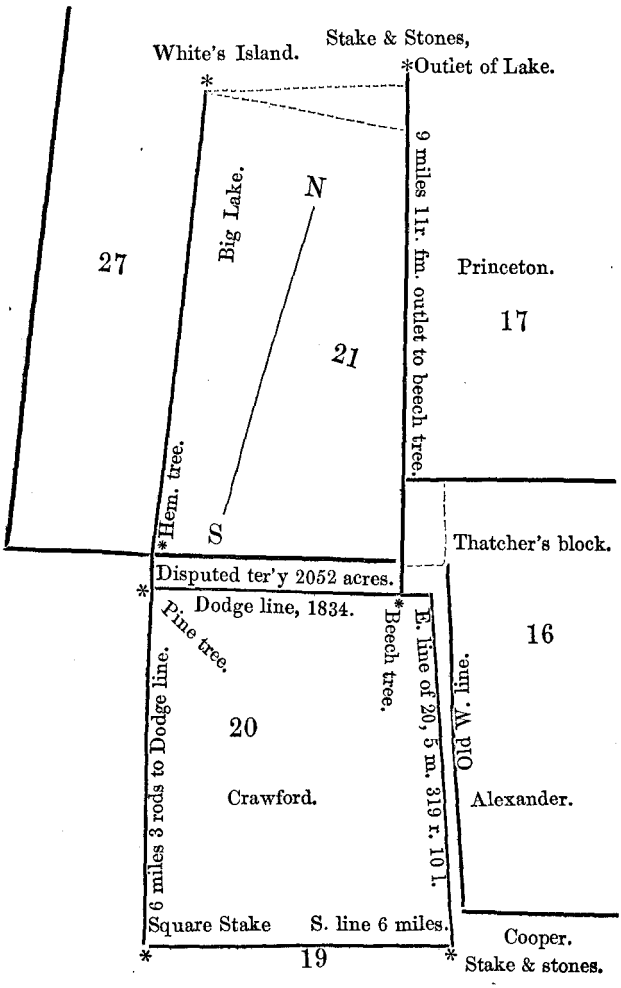
The controversy is, as to the dividing line between townships Nos. 20 and 21, in the eastern division of Bingham's Penobscot purchase. The plaintiff owns No. 20, and the defendants No. 21. Both claim under the same grantors. The demandant's title was by deed dated Feb'y 9, 1834; and the tenant's by deed dated May 30, 1844.

The conveyance to demandant and one Dickinson, whose title the demandant subsequently acquired, was of the town of Crawford, (No. 20,) and was abutted on the adjoining townships, and was six miles on each side, and referred, as the title intended to be conveyed, to that derived by the grantor from the Commonwealth of Massachusetts.

In 1786, the Commonwealth of Massachusetts located the lottery lands, of which these townships were a part, and Rufus Putnam returned his survey and plan of them, which was before the Court. In that location the dividing line between these townships was not run.

The nature of the evidence bearing upon the matter in issue, and the points taken by the parties, may be learned

from the opinion, which will be better understood from the following diagram: —



Downes & Cooper, for tenants.

J. Lowell and *J. Granger*, for demandants.

The opinion of the Court, at the time of the submission of this case, consisting of SHEPLEY, C. J., TENNEY, WELLS and HOWARD, J. J., was drawn up by —

Talbot *v.* Copeland.

TENNEY, J. — The demandant claims to derive title to the premises described in the writ from the representatives of the late William Bingham; and the tenants defend upon the right supposed to be acquired by them through several mesne conveyances from the same source.

The foundation of the demandant's title is a deed to himself and one Dickinson, and is dated Feb'y 9, 1834. This describes a "parcel of land lying in, and being the town of Crawford in the county of Washington and State of Maine, numbered twenty, and butted and bounded as follows, viz: on the north six miles by townships numbered twenty-one and sixteen; on the east six miles by townships numbered sixteen or Alexandria, and fifteen; on the south six miles by township numbered nineteen; and on the west six miles by townships numbered twenty-five and twenty-six, containing twenty-three thousand and forty acres," excepting therefrom certain parcels particularly described in the deed, "meaning to convey nineteen thousand five hundred and twenty acres, more or less, according to a survey and plan of said town by Rufus Putnam, surveyor," "meaning to convey to said Dickinson and Talbot the same title which said Bingham derived from the Commonwealth of Massachusetts." No survey, plan or surveyor is otherwise referred to in the deed. And the deed from the Commonwealth of Massachusetts to William Bingham refers to no survey or plan.

The title of the tenants is under a deed dated May 30th, 1844, to them of several townships, including township numbered twenty-one, reserving from the latter certain parcels specified in the deed; all containing one hundred and six thousand one hundred and twenty-three acres, more or less, according to the survey of John Peters and Addison Dodge, surveyors, "meaning to convey the same title which the said Bingham derived from the Commonwealth of Massachusetts."

No controversy is made by the parties, that township No. 20, is southerly of and contiguous to No. 21; and is the

property of the demandant; and that the tenants are the owners of the latter township. It is agreed that, in the original location of the fifty townships of the east division of the lottery lands in Maine by Rufus Putnam, including those in controversy, the dividing line between Nos. 20 and 21, was not run or marked upon the earth. The true location of this dividing line is the great point in controversy.

The demandant contends, that he has exhibited proof of a line as the northern boundary of township No. 20, run by the authority of his grantors, and marked as such upon the earth, prior to the execution and delivery of their deed to him and Dickinson. This line terminating at a hemlock tree at one end, is called the hemlock tree line.

The tenants deny, that any line was run by the authority of the grantors in the deed to Dickinson and Talbot corresponding with the hemlock tree line. But they contend on the other hand, that the proprietors under whom both parties claim, did cause to be run and perfected a line as the northern boundary of No. 20, which is farther south than the one claimed by the demandant; and being indicated at one of its terminations by a pine tree marked, is called the pine tree line.

No evidence in the case shows that the hemlock tree line was extended the entire width of the range which embrace the townships Nos. 20 and 21; or that such line, so far as it was run, was made with any such design as is claimed by the demandant, any farther than the intention is manifested by the marks indicating the line. The surveyor, who it was attempted by the demandant to be shown run this line under the direction of the general agent of the proprietors, from whom both parties claim title, denies that he undertook to run a line at that place, as the boundary in question, or did in fact run wholly or partially any such line. This line not being perfect in its extent at best, and not having been proved to have been made as a boundary between Nos. 20 and 21, is disregarded.

The evidence relied upon by the tenants, to show that the

surveyor appointed under the authority of the proprietors aforesaid, did run and mark the pine tree line perfectly from one side of the township to the other, is very full and clear. But it is equally clear that this line was run after the proprietors had parted with their title in No. 20, and there being no evidence that the demandant, or any one interested in that township was a party to that survey at the time it was made, his rights cannot in any degree be affected by the location of this line. No evidence was adduced that any other attempt had been made, which is entitled to have an influence to establish the boundary in question.

It is contended, however, by the demandant, that the proprietors at a time when the title to townships Nos. 20 and 21, and all others contiguous thereto, was in them, did acts upon the other townships which establish the boundary between Nos. 20 and 21. An attempt was made by him to prove that the lines of township No. 16, adjoining those now owned by the parties, were run according to certain prescribed directions of the proprietors; and in doing this a certain tract called the Thatcher block, was located upon that portion of No. 16, which is represented upon the Commonwealth's plan made by Rufus Putnam, as projecting further west than other portions of the same; and that the southern line of this block is very nearly or quite a continuation of the hemlock tree line. And it was insisted, as matter of law, that the hemlock tree line was therefore the true northern boundary of No. 20. The proprietors were at liberty to run such lines upon No. 16 as they chose to do, influenced by any motives which they might have entertained. The lines so run could have no effect beyond the object sought by them, and the results which were the necessary consequence. They could have made the location of the Thatcher block on any lands to which they had title, and such location could not be conclusive upon any question of boundary, beyond the purpose designed.

Again it is insisted, that if the proprietors, previous to the conveyance to the demandant and Dickinson, established

the south-west corner of Princeton, represented on Putnam's plan as No. 17, of which there was evidence, the north line of No. 20 must be the same distance south of this corner which it is represented to be on the plan. The proprietors may establish monuments indicative of the boundaries of townships owned by them, and the parties to a conveyance having reference thereto will be governed by them, but they cannot necessarily have any other effect.

The monuments may be erroneously fixed, and other facts having no reference to adjoining townships, may have an important connection therewith. As in the case of the Thatcher block, the location of a monument for one purpose cannot legitimately have a controlling influence upon a question entirely distinct, and not shown at the time to exist. It is very clear, that if such lines and monuments as were attempted to have been made and fixed upon the townships and as boundaries of such townships had been proved, the legal result insisted upon would not follow; and as facts, they are in their nature inconclusive upon the question involved.

Another principle has been invoked by the parties, and each contends, that by its application, a satisfactory result may be obtained. When a tract of land in townships or distinct parcels is represented on a plan or map which is referred to as a part of a description of the same, and the outer boundaries of the whole are exhibited with precision by lines and monuments upon the face of the earth actually existing, and nothing designates the interior boundaries of the townships or parcels on the earth; in order to fix the latter the plan or map is protracted upon the earth with accuracy. And the several townships or parcels thus found and marked will be located with certainty. *Brown* v. *Gray*, 3 Greenl. 126; *Mosher* v. *Berry*, 30 Maine, 83.

By the plan of the Commonwealth of Massachusetts, made by Rufus Putnam, and dated 1786, the north-east corner of No. 21 is a natural monument, supposed to be immovable, being a stream of water which issues from the lake above.

Evidence is reported tending to fix the north-west corner of No. 21, upon White's island, which is in the Schoodic lake, located by John Peters, prior to the deed of the Commonwealth of Massachusetts to William Bingham, conveying this township with others. In that deed, townships numbered 21 and 17, are described as bounded northerly on Schoodic river and lake, including the islands therein lying south of a continuation of the said east and west line run by John Peters.

Assuming this line to be such boundary, and adopted by the Commonwealth of Massachusetts as the line intended to be represented by the corresponding line on the Commonwealth's plan, it will unquestionably, as a whole, be farther north than the north line of No. 21, protracted upon the earth from the plan alone, notwithstanding the length of the east lines of Nos. 20 and 21 together is greater than the west lines thereof upon the earth and the relative length of each upon the earth is the reverse of that shown by the plan. This excess in one and deficiency in the other may be divided according to the rule already stated; and by a compound modification make the course of a line dividing the townships Nos. 20 and 21 the same as that shown by the plan. *Loring* v. *Norton*, 8 Greenl. 61.

By the application of the principle contended for, to the assumed fact, that the northern boundary was actually located as before stated, the dividing line between the two townships, on the same course with that laid down upon the Commonwealth's plan, will be as far south at least in every part of it as the south line of the tract described in the demandant's writ, and will entitle the tenants to hold possession of the same.

But the principle contended for is not applicable to the facts reported in this case.

There is no evidence that Rufus Putnam located upon the earth, in his survey, the northern line of township No. 21, or erected monuments indicative thereof. And there are reasons of an affirmative character for supposing that he

never did so. The north-west corner of that tract, on the hypothesis that such a line was run, instead of being on the main land, as represented by the plan, is upon an island far eastward of the west margin of the lake. By the plan made by the surveyor appointed by the Court, the west line of No. 21 is for a considerable distance in the lake, which extends westerly of this line several miles, whereas the same line on the plan is far west of the lake. Errors so gross could not have existed if monuments had actually been erected, indicating the northern boundary of No. 21.

In order to make any plan the part of the description in a deed, such plan must be distinctly referred to as such. *Prop'rs Ken. Purchase* v. *Tiffany*, 1 Greenl. 219. Neither of the deeds under which the parties severally claim from the Commonwealth, or those from William Bingham, which are respectively the foundation of the title of each party to the townships Nos. 20 and 21, refer to any plan whatever as a part of the description. Consequently the rights of the parties cannot be affected by the doctrine which otherwise might have an influence.

If the northern line of township No. 21 was actually run by John Peters, before the conveyance from the Commonwealth to William Bingham, and is referred to therein as the true line of that township, it may be material in fixing the limits thereof, as between the Commonwealth and its grantee, and those claiming under the latter; but without reference to any plan it cannot control in any degree the southern boundary of the same township, and thereby affect the rights of the demandant to township No. 20. The plan of Putnam, inadmissible of itself, as descriptive of the land conveyed, cannot be legitimate evidence by the proof of a line referred to, in the deed of the Commonwealth to William Bingham.

There is then no proof of the establishment of a line by proper authority between townships Nos. 20 and 21, before the delivery of the deed to Dickinson and Talbot; or since that time, by the authority or consent of any one interested

in the former of those tracts. No plan being referred to as part of the description of either township, the line in controversy cannot be found by the protraction of any plan upon the earth. It is a case where monuments fail; and consequently nothing can extend or limit the distances expressed in the deeds. The conveyance under which the demandant holds title, was made at a time when the grantors were the proprietors of township No. 21, and the tenants have no rights by the deed, to them subsequently executed, superior to those from whom their title is derived.

The southern boundary of township No. 20, or Crawford, is township No. 19, and the actual location of this boundary is not in controversy. At the time the survey was made by the surveyor appointed by the Court, the demandant claimed a point in the west line of townships Nos. 19 and 20, as the southwest corner of the latter, where was found a stake, hewed square. It does not appear that any denial was made in behalf of the tenants, that this stake was such corner; and no evidence is reported tending to show that this was not the south-west corner of that township. The south-east corner of the same township and lines running therefrom northerly, southerly and westerly, existing for about thirty years, are equally well established. The distance from this south-west corner is six miles and three rods to the pine tree line. The distance from the south-east corner to the pine tree line is five miles three hundred and nineteen rods and ten links.

The demandant alleges a disseizin by the tenants, of a parcel of land bounded southerly by the pine tree line, and extending northerly therefrom one hundred and eighty rods.

By the tenant's plea of *nul disseizin*, and issue thereupon joined, they defend the whole tract described in the writ. Under the issue presented, the demandant is entitled to a gore of land described as follows, viz:—Beginning at a point in the pine tree line, represented by the beech tree, upon the plan made by the surveyor appointed by the Court, thence running northerly on the line laid down upon the

plan, fifteen links or three-fifths of a rod, thence on a course which if continued would strike the west line of Crawford, six miles from the south-west corner thereof, to its intersection with said pine tree line, thence easterly to the first mentioned bounds.

According to the agreement of parties, the tenants are to be defaulted, and judgment against them for the tract of land last above described.

FREEMAN *versus* MACHIAS WATER POWER & MILL COMPANY.

In actions *against* a corporation, the plea of the general issue admits its capability of being sued *where* the action was commenced.

No *legal* organization by the corporators, under a charter granted by *this*, can be effected by their action in *another State*.

And where such an organization in another State was attempted, and shares in the capital stock under it were taken by plaintiff, which were afterwards sold by the corporation for non-payment of assessments; and *subsequently* an organization under the charter was completed in this State, and all the *prior proceedings* were confirmed; — *Held*, that if the plaintiff by the new organization became the lawful owner of the *shares*, by the same act he was deprived of them, and could maintain no action upon them for dividends.

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

ASSUMPSIT to recover dividends made upon four shares of the capital stock of defendant corporation; viz. $2 a share, January 28, 1852, and $2,25 per share, January 26, 1853.

The action was originally brought before a justice of the peace, and came up by appeal. The general issue was pleaded.

After the evidence was introduced, it was agreed that the Court might draw from it the inferences which a jury would be authorized to do, and render such judgment as the law may require.

The Act of incorporation was passed by the Legislature of this State in March, 1836, and in April following, an attempted organization was made in the city of Boston, where

the number of shares was determined and the certificates issued.

The plaintiff in December, 1839, and July, 1842, received his certificate on which was indorsed, "all paid in," and upon these shares dividends had been made in 1852 and 3, which were sued for in this action after a demand therefor.

The corporation in 1844, were authorized to assess a tax upon the shares in its stock, and in case of neglect or refusal to pay the sum, were empowered to sell them.

For such neglect the plaintiff's shares were sold, and the plaintiff attempted to avoid the effect of this sale by showing that the proceedings were not according to law, and referred to their votes recorded.

In 1851, the stockholders, fearing that the proceedings under the charter had not been legal, organized anew at Portland, and attempted to make valid all the acts and doings of the corporation before that term by vote duly recorded.

The point on which the decision of the case turned makes it unnecessary to state more particularly the evidence.

P. Thacher, for defendants.

1. It is not competent for plaintiff, claiming to be a stockholder, to object to the validity of the meetings or acts of the corporation. 16 Mass. 94; Angell & Ames on Corp. § § 499, 517; *Miller* v. *Ewer,* 27 Maine, 509; *Meadow Dam Corp.* v. *Gray, and cases cited,* 30 Maine, 547.

2. But no valid objection exists to such meetings or doings, because of any proceedings of the corporators out of the State. *Miller* v. *Ewer,* 27 Maine, 509, and 30 Maine, 547.

3. The tax complained of, was necessary to save the company from ruin.

Freeman, pro se.

APPLETON, J. — It was held in *Penobscot Boom Corporation* v. *Lamson,* 16 Maine, 224, that in a suit by a corporation, the plea of the general issue was an admission of its

legal existence and competency to maintain an action. It is not perceived why the same doctrine is not equally applicable to corporations when sued as defendants. But while the existence of the corporation is thus admitted, the time when it first acquired a valid organization is left undetermined. The only effect of the admission is, that at the time of the institution of the suit, the corporation, a party thereto, was capable of suing or being sued.

It was decided in *Miller* v. *Ewer*, 27 Maine, 509, "that all votes and proceedings of persons professing to act in the capacity of corporators when assembled without the bounds of the sovereignty granting the charter, are wholly void." The charter of the defendants was granted in 1836, and during that year an attempted organization was had in Boston, but according to the principles of that decision it was utterly ineffectual, and upon the facts disclosed, this Court would have been compelled to adjudge that there was no such corporation. The stock certificate which the plaintiff offers as proof of his right, is evidenced by officers then chosen. But if there was no corporation, there can be no stock, for there can be no stock in a non-existent corporation. The plaintiff, upon the grounds by him assumed, shows that he cannot be a stockholder, under any attempted organization without this jurisdiction.

It appears that in 1851 those claiming then to be stockholders, being apprized of their condition, made a new attempt at organization. But before this was done the shares of the plaintiff had been sold for non-payment of certain taxes assessed thereon. At the meeting held at Portland, to reorganize the corporation, Jan. 23, 1851, it was voted "that all the acts and proceedings of the corporators of the Machias Water Power and Mill Co., at the meeting for the organization of the corporation, holden in Boston as aforesaid, as well as all the acts and proceedings of the stockholders and directors at all subsequent meetings which have been holden at Boston aforesaid or elsewhere, are hereby ratified and confirmed, and all bonds, contracts and convey-

ances, which have been made with or by the agents or officers of said corporation, who have been chosen at any meetings holden as aforesaid, and all assessments which have been at any time levied upon the shares of said company, are hereby declared obligatory and valid." By another vote all the acts and proceedings of the corporation without the State are adopted and confirmed equally as if they had been done within the State.

As the plaintiff could not become a stockholder of a corporation before its existence, his legal right to be so can only arise by the retrospective action of the corporation under its new organization. But if that were to be deemed valid to give him any rights as a corporator, it is equally so to take them away. If former proceedings were valid his stock would have passed from him by sale for non-payment of taxes. But as the confirmation extends to all previous proceedings, it embraces equally the sale as the issue of the stock. It deprives him of the stock by the same act which would momentarily invest him with its ownership.

The plaintiff could acquire no stock before the corporation was existent. He owned none therefore before the new organization. He can acquire none by that act, because it equally confirms those proceedings which divest him of stock, as those by which he would be a stockholder. At common law he is not therefore entitled to maintain this action. *Plaintiff nonsuit.*

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

BRADBURY *versus* BRIDGES.

Notice to the drawer of the non-payment of a draft cannot be proved by the *affidavit* of an *attorney at law*, who afterwards deceased, without evidence that the *act* was in the discharge of some official duty, and in the ordinary course of his business.

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

ASSUMPSIT. The suit was commenced August 7, 1849, against the defendant, as drawer, on two drafts in favor of plaintiff, and accepted by one Manly B. Townsend, payable on Nov. 1, 1846.

To one draft no defence was made, to the other, want of notice.

The plaintiff offered the affidavit of Jeremiah Bradbury, dated Nov. 5, 1846, before a justice of the peace, with a copy of a notice to defendant, dated Nov. 4, 1846, and a copy of the draft upon which the notice was sent, annexed to the affidavit, and proved that the defendant resided at Worcester, Massachusetts, when the drafts in suit became due; and that said Bradbury was an attorney at law, residing in Calais, on Nov. 4, 1846, and died on Dec. 4, 1849.

This affidavit was objected to, but received by the Court.

T. J. D. Fuller testified, that in the summer of 1849, the parties were together and the defendant wished the witness to carry him to see Townsend for the purpose of fixing some drafts which plaintiff had, and defendant said Townsend ought to pay the drafts. Plaintiff said he and Sawyer had certain affairs, and if business was not arranged he would sue defendant. The latter did not deny his liability, but it was witness' strong impression that he admitted his liability. He said his sole object of seeing Townsend was to relieve himself from his liability. He said he wished to bring about an arrangement in order to relieve himself from his liability, and that if Townsend allowed him to pay these drafts it would be the most outrageous thing he ever did. The witness heard no suggestion made that the defendant had not received notice.

The Court were to draw inferences as a jury might from the evidence admissible, and render judgment according to law.

J. Granger, for defendant.

1. The affidavit is not admissible, for it has no more force than a written statement, not under oath. The oath was extra judicial.

Having the possession of the paper, the legal presumption is, that it was his property.

The naked fact that he was an attorney at law, does not authorize the inference that he held it for collection, and if it did, giving notice does not fall within the ordinary duties of the legal profession.

This does not come within the rule of admitting entries made in the usual course of business of one deceased.

2. The testimony of Fuller falls short of satisfactory proof of any legal liability of defendant. Whatever allusions were made to his liability, might have reference exclusively to the other draft. No allusion was made to the fact of notice. After a lapse of two years it was hardly to be expected that the witness could recollect the whole conversation, or any considerable part of it.

The whole object of the conversation seemed designed to operate on Townsend.

Bradbury, pro se.

HOWARD, J. — The plaintiff's right to recover on the draft for $149,04, payable at the Frontier Bank, is not controverted; but the defence has reference to the other draft in suit, and rests upon the alleged want of notice to the defendant, as drawer, of its non-payment.

An affidavit of an attorney at law, residing in Calais at the time, but who died before the trial, was offered as evidence of notice. It purported to contain a copy of the notice, which was sufficient in substance, and to have been seasonably deposited in the post-office at Calais, with a copy of the draft attached, and with suitable directions to be transmitted by mail to the defendant.

There is no evidence that the affidavit was made in the discharge of any official duty; and it can be regarded only in the light of a private memorandum of a third person, in reference to a particular transaction. In order to render it admissible in evidence against others, it must relate to some act of the person making it, performed in the dis-

charge of some duty incumbent upon him, and in the ordinary course of his business. *Nicholls* v. *Webb*, 8 Wheat. 337; 1 Greenl. Ev. § § 115, 116.

This case does not present any evidence that the draft was left with the attorney, professionally; or that it was his duty to give notice of non-payment; or that the acts assumed to have been done by him, were in the ordinary course of his business or practice. Nor does it appear, *aliunde*, as in *Patteshall* v. *Turford*, 3 Barn. & Adolph. 890, that the attorney undertook to give the notice in accordance with the memorandum. Standing alone, and thus isolated, his private statement in writing is not admissible in evidence against third persons, in proof or explanation of his acts, upon any principle to be deduced from the cases cited, or the authorities upon which they are based. Nor is it perceived that the administration of justice requires the adoption of a rule, which would admit such memoranda as original evidence, *inter alios*. *Stapylton* v. *Clough*, 22 Eng. Law & Eq. 275.

But there is proof of a demand upon the acceptor, and of his refusal or neglect to pay; and after rejecting the affidavit and memorandum of the attorney, there will still remain the testimony of a witness, who states that, in the summer of 1849, when the parties were referring to the drafts in suit, the plaintiff spoke of sueing the defendant, the latter did not deny his liability. He said, as this witness states, at that time, after expressing a wish to have the witness carry him to see the acceptor, that his sole object in going to see him, "was to relieve himself from liability." The same witness states further, speaking of the defendant, "it is my strong impression that he admitted his liability." And further, "it was said by the defendant, that he wished to bring about an arrangement, in order to relieve himself from his liability." "I heard no suggestion made that the defendant had not received notice."

Upon this evidence a jury would be authorized to infer that the defendant had been regularly notified as drawer;

and we are authorized, by agreement of parties, and are constrained to make the same inference. He did not distinguish between the drafts, as to his liability, and we can make no distinction, upon the evidence.

The plaintiff is entitled to judgment upon both drafts, and according to the agreement, a default of the defendant must be entered.

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

HOWE *versus* SAUNDERS.

Of the mode of declaring upon a note where a new promise is made *after* the limitation bar has attached.

On a witnessed note, an action cannot be maintained after the lapse of twenty years from the time it was made payable, it being supposed to be paid by presumption of law.

But a partial payment, or any acts of the promisor, by which *such presumption* is rebutted within twenty years of the *commencement of the suit*, will authorize the maintenance of an action on such a note.

ON FACTS AGREED.

ASSUMPSIT. The writ was dated on Feb. 16, 1852, and made upon a note signed by defendant, of the following tenor and indorsements.

"For value received, I promise to pay Charles Peavy, or order, the sum of eighty-one dollars, and fifty-five cents, on demand with interest. Eastport, Nov. 30, 1830."

On the back of the note was the following:—"Charles Peavey, without recourse. March 7, 1832. Received of the within seventy-five dollars."

Within one year previously to the making of the writ, according to the deposition of D. T. Granger, the defendant went into deponent's office, in Eastport, and he exhibited to him the note, and showed him the amount of it, and the indorsement, and what it would be with and without interest. The defendant made no objection to the note or to the indorsement on it. He said the interest amounted to a good

deal; that he was a poor man, and unable to pay much; that he thought he ought not to pay any thing more than the balance of the principal of the note, and if Mr. Howe would take that in full, he would pay him that amount. The indorsement of seventy-five dollars, was in the handwriting of plaintiff.

The Court were authorized to draw inferences of fact, as a jury might, and enter such judgment as the law and evidence may require.

Talbot, for defendant.

1. The statute of limitations is a defence to this note, unless there was a payment upon the note within twenty years prior to the date of the writ. The indorsement furnishes no such evidence, for it is in the handwriting of the plaintiff. R. S., c. 146, § 23.

2. There is no evidence of such payment. The testimony of the witness does not come up to the point required. No payment was admitted, nor does the case show any such payment to have been made.

D. T. Granger, for the plaintiff.

SHEPLEY, C. J. — The note presented in this case having been made payable more than twenty years before the commencement of the suit, the statute of limitations will prevent a recovery of it, unless a new promise within twenty years can be inferred from the testimony and indorsements made within that time. The indorsement having been made by the plaintiff, is not, by the provisions of the statute c. 146, § 23, to be "deemed sufficient proof of payment." It may however, be considered in connexion with other testimony, tending to prove an actual payment of the sum indorsed.

The note was made on Nov. 30, 1830, for $81,55, and was attested by a subscribing witness. The holder could have had no motive to make an indorsement of $75, unless an actual payment of that sum had been made. Within a year before the suit was commenced, the note and indorse-

ment were exhibited to the defendant and became the subject of conversation. The defendant made no objection to the genuineness of either, but said he thought he ought not to pay any more than the balance due of the principal. There could have been no balance of principal due if there had been no payment made.

None of the provisions of the statute, providing for a limitation of six years, can apply to an action commenced upon a promissory note signed in the presence of an attesting witness. § 7. The only limitation applicable to this note, is that of twenty years. § 11. The application of that limitation, as an effectual bar, may be avoided by proof, that would rebut the presumption arising from the common law after the lapse of twenty years. *Denny* v. *Eddy*, 22 Pick. 533; *Brewer* v. *Thomes*, 28 Maine, 81.

If the provisions of the eleventh section be regarded as an absolute bar, unless the action be commenced "within twenty years after the accruing of the cause of action," as intimated in the case of *Joy* v. *Adams*, 26 Maine, 330, no rule is better established, than that a payment made upon a note or bond, operates as a renewal of the contract at that time. There has been some difference of opinion, whether the right to recover rested upon the new promise inferred from the payment, or whether such payment should be regarded as evidence only of a renewal of the original promise. *Barrett* v. *Barrett*, 8 Greenl. 353; *Ware* v. *Webb*, 32 Maine, 41; *Austin* v. *Bostwich*, 9 Conn. 496; *Martin* v. *Williams*, 17 Johns. 330; *Newlin* v. *Duncan*, 1 Harring. 204; *Oliver* v. *Gray*, 1 Har. & Gill. 264; *Bell* v. *Morrison*, 1 Peters, S. C. 351; *Lonsdale* v. *Brown*, 3 Wash. C. C. 404; *Ames* v. *LeRue*, 2 McLean, 216. The more satisfactory rule may be, when the new promise is made or arises, after the right to maintain a suit upon the original cause of action has been entirely extinguished, or when the new promise varies from the original, there should be a count upon the new promise, and the original cause of action used as proof of a valuable consideration for it.

And in other cases, the declaration may be upon the original promise only.

In this case, there being no limitation but that of twenty years, operating upon the contract, the rule which applies to other contracts and debts subject to the same limitation, must be applicable to it. In such cases the action may be maintained when there has been a payment, or the presumption has been rebutted by any acts within twenty years before the commencement of the suit. *Oswald* v. *Legh*, 1 T. R. 270; *Joy* v. *Adams*, 26 Maine, 330; *Howland* v. *Shurtleff*, 2 Met. 26; *Brewer* v. *Thomes*, 28 Maine, 81; *Clark* v. *Hopkins*, 7 Johns. 555. *Defendant defaulted.*

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

BALCH *versus* PATTEE.

The *time* of the completion of a levy of land, is shown in the return of the officer by the *date* of his acts and doings in relation thereto.

And although he certifies that the levy was completed at a *subsequent date*, when nothing was done or necessary to be done by him to complete it, such certificate is nugatory.

If the execution and levy are not recorded till three months have expired from the time the levy was perfected, the title to the land still vests in the creditor as against the judgment debtor.

Upon the promise of defendant, who cut grass against the plaintiff's will, on a piece of land claimed by him, that if the land was his he would pay for the grass on establishing his title, an action is maintainable.

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

ASSUMPSIT. The action was to recover pay for certain grass cut by defendant and carried away. The plea was the general issue.

To show that the land on which the grass was cut belonged to him, the plaintiff introduced a levy of an execution in favor of himself against Tobias A. Hall.

By the return of the officer, it appeared to have been completed, and seizin and possession delivered and accepted

on February 17, 1851. But the officer certified at the bottom of his return that the levy was completed on March 11, 1851. The levy was recorded on June 10, 1851.

The plaintiff introduced evidence tending to show the quantity and value of the hay; that the same was cut by defendant in summer of 1851 and 2; and that he promised to pay plaintiff for the hay, if the place on which it was cut belonged to him; and that defendant had used the principal part of the hay before this suit.

It was proved that defendant said he derived his authority to cut the grass from Mrs. Hall, and he concluded she owned the land; but she claimed nothing under the levy.

On this evidence the Judge directed a nonsuit, and plaintiff excepted.

Burbank, in support of the exceptions.

Thacher, contra, contended that the nonsuit was rightly ordered; that the levy was self contradictory and void. But if admissible, assumpsit was not the proper form of action. There was no express contract, nor had the grass been converted into money. *Jones* v. *Hood,* 5 Pick. 285; *Boston* v. *Binney,* 11 Pick. 1; *Richardson* v. *Kimball,* 28 Maine, 13.

Furthermore that assumpsit would not lie where there was a conflict of title and estate. *Miller* v. *Miller,* 7 Pick. 133, and Perkins' notes; 14 Mass. 94; *Wyman* v. *Hook,* 2 Greenl. 338.

TENNEY, J. — The plaintiff claims to have been the owner of the land, where the hay was cut and removed by the defendant, by virtue of the levy of an execution in his favor against Tobias A. Hall, which levy seems to have been made perfect on February 17, 1851, and seizin delivered by the officer to the creditor, and acknowledged to have been received by him on the same day, all of which appear upon the back of the execution.

The officer having certified at the bottom of his return, that the levy was completed on March 11, 1851, when noth-

ing appears to have been done, or was necessary to give any additional effect to the proceedings, must be regarded as nugatory.

The record of the extent, and the execution was made in the office of register of deeds on June 10, 1851, which was more than three months after the levy was effectual. But the extent upon the real estate was not thereby defeated as against the debtor. R. S., c. 94, § § 10, 19, 20 and 21; *McLellan* v. *Whitney*, 15 Mass. 137. No fatal defect appears in the appraisers' or officer's return, or any of the proceedings shown upon the execution, and the debtor's interest in the land vested in the plaintiff, and he became possessed of the same.

The defendant, claiming no right in the land, is in no better situation than the debtor in the execution could have been, under the like circumstances.

Evidence was introduced tending to show, that the defendant cut the hay in the summer of 1851 and 1852, and that he promised the plaintiff to pay therefor, on the condition, that the place on which it was cut was the property of the plaintiff, and that he had used the hay prior to the commencement of this suit. The title of the plaintiff to the land, being shown, and no question, that the hay was cut upon the land covered by the extent, the promise is to be treated as one which was absolute, and the plaintiff was entitled to have the evidence presented to a jury.

Exceptions sustained,— Nonsuit taken off, and the action to stand for trial.

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

WASS *& als., Pet'rs for Partition, versus* BUCKNAM *& al.*

The division of an estate in the Probate Court, in which a parcel is set out to an heir long before dead, is invalid.

The entry of one tenant in common upon, and his subsequent possession of the common estate, is regarded as the entry and possession of all, unless an exclusive right is asserted, and an intention manifested to hold it *adversely* to the co-tenants. Mere possession and receiving rents is not evidence of an *ouster*.

A *seizin* by a married woman in her own *right*, without a seizin *in fact*, will entitle her husband at her death to become tenant by *curtesy*.

While *such tenancy* continues, no *adverse* possession of the estate can be set up against those entitled to the remainder after the termination of his estate.

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

PETITION FOR PARTITION, wherein William Wass, Benj. C. Coffin, and Lucy S. Coffin, wife of said Benjamin, requested ten fifty-sixths of a parcel of land containing twenty-nine square rods and the dwellinghouse thereon, situated in Columbia, and occupied by Geo. A. Bucknam and Elizabeth Bucknam, the respondents. The boundaries were set forth.

At the April Term, 1854, the respondents pleaded that the petitioners were not seized at the time of filing their petition as tenants in common with the respondents of the premises; but that the respondents and those under whom they claimed had been in the open, exclusive and adverse possession of the same for more than forty years prior to the filing of said petition.

In the division of the estate of John Bucknam, who died in 1799, the premises fell, one-half to his wife, and the other half in equal parts to the daughters Mary and Anna. His wife died intestate in 1804, leaving seven children, Mary, above named, and John, having previously died without issue, intestate. The names of the surviving children were William, Jeremiah, Ichabod, Samuel, Robert, Nathan and Anna.

Ichabod was the husband of Elizabeth, one of the respondents, and the father of the other.

Anna, in 1795, married one William Wass, and died in 1809, and her husband also died in 1851. Four children

were the issue of this marriage, two of whom are the petitioners.

On the decease of the wife of John Bucknam, a division of her estate was made in the Probate Court, a record of which was offered in evidence by the petitioners, and received subject to objection, but the full Court rejected it as inadmissible, as it purported to assign a share to one who had long been dead.

It was in evidence, that upon his mother's death, Ichabod assumed the control and management of the *premises*. In 1811 he built up the cellar wall and rented the premises part of the time; in 1816 he was married and moved upon them and continued to occupy them until his death, in 1846.

He frequently let a portion of them by the year, and no one beside Ichabod was ever known to demand or receive any rent. While such was the occupation of the premises, the husband of Anna lived near by, and made no claims at any time; and that from time to time Ichabod repaired and rebuilt the house, overhauling the inside, and re-modelling it in part. And at intervals all through his life he was making changes and repairs thereon. Some of the minor children lived with him until after his mother's death.

It appeared that Mrs. Coffin was born in 1799, and William Wass, the other petitioner, in 1802.

The petitioners also put in, subject to objection, a warranty deed from Jeremiah Bucknam to William Wass and Ichabod Bucknam, of all the heirs' right to the house and lot belonging to the wife of the late John Bucknam, excepting that part belonging to William in right of his wife. This deed was executed and recorded in 1830.

On so much of the evidence as was admissible the full Court were to decide the cause according to law.

P. Thacher, for respondents.

1. The evidence shows an actual ouster of the co-tenants by the respondents and Ichabod Bucknam, under whom they claim, from 1804 to the commencement of this process. *Cummings* v. *Wyman*, 10 Mass. 464, and notes to Rand's

ed.; *Brackett* v. *Norcross*, 1 Greenl. 91; *Ricart* v. *Ricart*, 13 Pick. 253; Angell on Lim. 2d ed. pp. 460—468; *Prescott* v. *Nevers*, 4 Mason, 326.

2. The respondents and said Ichabod having been in actual possession for more than forty years prior to the commencement of this action, claiming to hold the premises in his and their own right, the same having been adverse, open, peaceable, notorious and exclusive, this action cannot be maintained. Stat. of 1848, c. 87, Laws of 1848; Stat. of 1852, c. 240, Laws of 1852.

3. There was no such seizin of Anna Wass, the petitioners' ancestor, and her husband in her right during coverture, as would constitute her husband tenant by the curtesy upon her decease. 4 Kent's Com. 29, 7th ed.; *Jackson* v. *Johnson*, 5 Cowen, 74; 1 Bright's Husband and Wife, 116.

4. Being disseized at her death, the estate in curtesy could not attach to her husband, and no such estate intervened. 4 Kent's Com. 29, note, 7th ed.; 1 Greenl. Cruise, title v, c. 1, note, § 6.

At most it was a right not asserted, and became extinguished by adverse possession. The common law is not changed by R. S., c. 147, § 2, clause 2. *Witham* v. *Perkins*, 2 Greenl. 400.

5. The petitioner, Wass, might have brought his action for possession in 1823, when he became 21; the petitioners, Lucy S. Coffin and her husband, in 1820, when the disability of infancy ceased, being an infant when the right accrued, the disability of marriage never attached. Wass, petitioner, was therefore barred in 1848, and Coffin and wife, petitioners, in 1840. *Witham* v. *Perkins & al.* 2 Greenl. 400; Angell on Lim. p. 523; Roscoe on Real Actions, pp. 498, 505—507.

6. The deed from Jeremiah to Ichabod Bucknam and Wass, the elder, is irrelevant and inadmissible. Nothing passed by it, as the grantor was out of possession at its date, and Wass was never in under it.

7. The return of the committee appointed to divide the

estate of Mary Bucknam, the elder and younger, is void, as it undertakes to assign portions to one many years dead.

Lippincott, with whom was *Fuller*, for the petitioners.

HOWARD, J. — The premises of which partition is sought, were a portion of the estate of John Bucknam; and were divided by commissioners in 1799, between his widow Mary, and his daughters Mary and Anna; one half part being assigned to the widow, and one quarter, in common, to each of the daughters. Mary, the daughter, died before her mother, intestate and without issue, and her portion was inherited by her brothers and sisters, including Anna, and her mother, in the proportion of one-eighth to each. On the death of the mother in 1804, her estate, embraced in the petition, was inherited by her seven children, including Anna, in common.

Anna was married to William Wass, senior, about 1795, and died in 1809, leaving their four children, two of whom are the petitioners, William Wass and Mrs. Coffin. They claim one quarter, each, of the estate of their mother, before mentioned. Their father, William Wass, senior, died in 1851.

It does not appear in what manner, or by whom the premises were occupied during the life of Mary Bucknam, the widow, and after her husband's death. But after her decease, her son, Ichabod Bucknam, the father of one of the respondents, and the husband of the other, assumed the control and management of the premises, occupying and improving them; repairing the buildings and letting portions occasionally and receiving rent, until his death in 1846. After his death the respondents "have continued so to occupy till this time," as stated in the report.

The return of the commissioners appointed to make division of the estates of Mary Bucknam, and her deceased children, John and Mary, is regarded as invalid, for the purposes of the present inquiry. It assumes to assign portions of those estates to persons not then living, and of course not competent to claim or take by such assignment.

The entry of one tenant in common into the common estate, and his subsequent possession, is presumed to be the entry and possession of all the co-tenants, unless otherwise explained and controlled. Each has a right to the possession of the whole estate; and such is the character of their estate that such possession is necessary for the full enjoyment of their legal rights respectively. So if one occupy the whole estate, it is not necessarily, nor by presumption of law, adverse to his co-tenants; but is in accordance with his title, and consistent with his rights, and in support of their common title. He is presumed to be in of right, and not for the purpose of excluding his co-tenants, or with the intention of effecting an ouster or disseizin.

There is no satisfactory evidence that the respondents, and those under whom they claim, ever asserted an exclusive right, or manifested an intention to hold the estate adversely to their co-tenants. The evidence of the character of their occupation and improvement, is consistent with the legal rights and interests of all concerned. Whether there were any surplus rents and profits, or in what manner the rents received were disposed of, does not appear.

Anna, the mother of the petitioners, was seized in her own right, of her interest in the premises, in common with the co-tenant, under whom the respondents claim, his seizin as co-tenant being as well for her as himself; and upon her death, her husband became tenant by the curtesy, and her children were entitled to the remainder, and to her interest upon the termination of the particular estate of the husband by his death. *Jackson* v. *Sellick*, 8 Johns. 202, 207; *Davis* v. *Nason*, 1 Peters, 507, 508; 4 Kent's Com., 29, 30. Where it is shown that the rigid doctrine of the English law, requiring the wife to be seized in fact and in deed, in order to entitle the husband to his curtesy, has been modified and relaxed in favor of his right.

If, during the life of the husband there was an adverse possession of the estate for more than forty years, as claimed by the respondents, it would not defeat the petitioners.

So long as they were out of possession, and without the right or power to acquire it, as was the case during the tenancy of the husband, no possession of another could be adverse to them, and no law of limitations could affect them. The law will not suffer a party to be so far circumvented, as to be deprived of his interests under its sanctions, and for the imputed laches of others, while it renders him incompetent to assert his rights. 2 Salk. 423; *Dow* v. *Danvers*, 7 East, 321; *Jackson* v. *Schoonmaker*, 4 Johns. 401; *Witham* v. *Perkins*, 2 Maine, 400.

The possession of the respondents, and those under whom they claim, not appearing to have been "adverse, open, peaceable, notorious and exclusive," constituted no bar to the rights of the demandants, either under the provisions of the Revised Statutes, c. 147, or the statutes of 1848, c. 87, and 1852, c. 240, even if no tenancy by the curtesy had intervened after the death of their ancestor. But as such tenancy did intervene, their rights must be deemed, for this purpose, to have accrued when such intermediate estate expired. R. S., c. 147, § 3, second and third clauses.

The construction of the Acts of 1848 and 1852, before cited, in reference to the question of constitutionality, is not called for by the facts disclosed, and becomes unimportant to the decision in this case. *Webster* v. *Cooper*, 14 How. 488, 502.

The petitioners are entitled to partition, according to their prayer.

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

BRIDGES *& als. versus* STICKNEY.

The damages recoverable in an action for the breach of a contract, are limited to such as are the immediate and necessary result of such breach.

No damages can be claimed for the loss of a contract collateral to the one broken.

If, in a contract with defendant, another contract of the plaintiffs with a third person *is recited*, and to enable the plaintiffs to execute it, the agreement of the defendant to furnish certain supplies was made, the defendant does not thereby become a party to such *recited contract*.

Although the plaintiffs stipulate for the performance of such *recited contract*, *that* will not operate to bind the defendant to its performance.

Neither does the assignment of the *recited contract* to defendant, for security for what he has undertaken, make him responsible for the loss of it, unless *such loss* arises from his neglect and misconduct respecting it.

Whether a party is entitled to damages for the loss of a contract recited in the one broken, is a question to be determined by the Court and not by the jury.

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

ASSUMPSIT for an alleged breach of the following contract, made Oct. 1, 1849, between John Stickney of the first part, John Bridges, jr., Nath'l Conant and Robert L. Bridges of the second part. "Whereas the persons of the second part have associated themselves to do business, for the purposes hereinafter named; they having entered into an agreement with Nehemiah Marks, of St. Stephen, to clear out and make navigable for driving logs, Bolton brook, (so called,) and when completed are to receive the sum of $3500, in timber share, and have also agreed to log on said Marks' land upon Bolton Lake, (so called,) for the period of ten years, and pay timber share per year at the rate of two dollars per thousand, superficial feet, and for spruce one dollar per thousand feet; and now for the purpose of aiding and assisting the persons of the second part to clear out said brook and also for logging, the person of the first part agrees to furnish them with such articles of supplies, that shall be needed by them in clearing out said brook and for the lumbering operation, and to continue so to supply for the term of three years, unless through any neglect on their part, or inability in any way on their part, to perform as shall be considered unsafe to make any further advances to them of the second part; then the person of the first part may withhold, and he may prosecute the clearing out of said brook, or the lumbering operations, should he elect or choose to do so.

"And the persons of the second part agree to receive the supplies as stated, and clear out said brook as per their agreement with said Marks, and to log each year with not less than four six ox teams upon Bolton lake or brook, and to use all due diligence therein in cutting, hauling and driving said logs into the boom in Baring, as per their permit or license with Marks. The person of the first part is to have the sawing and manufacturing in his mills in Baring of all the logs cut or hauled by, through or under them in any way or manner, under the permit from said Marks.

"To secure the person of the first part for advances and supplies, the persons of the second part indorse over their agreement with said Marks, and are to give a bill of sale or lien each year on all of their logs that shall be cut and hauled by them or under them." The Marks contract was assigned to defendant.

The plaintiffs introduced evidence tending to show, that they went on to clear out the brook in the fall of that same year, and commenced lumbering the ensuing winter, and that defendant neglected and refused to furnish the needed supplies; also evidence tending to show the value of the Marks contract, and the loss thereof, all which was objected to by defendant. Evidence was introduced by defendant, by which he sought to excuse himself from furnishing the supplies, and upon the question of damages.

Plaintiffs claimed not only damages for breach of the contract made with defendant, but for the loss of the benefits of the Marks contract, which they could not fulfil, in consequence, as alleged, of the defendant's failure in furnishing the supplies.

Many instructions were requested by defendant, but only one is necessary to be stated, which was:—

That the true rule of damages in this case is the difference between the price of the supplies and advances stipulated in the contract, and what it would have cost the plaintiffs to procure similar supplies and advances, and also any sum additional it might have cost the plaintiffs to have manu-

factured the timber, and delivered it at salt water. This was withheld. But the presiding Judge did instruct the jury, *that*, if they found that defendant committed a breach of the contract, he is liable to make good the immediate and necessary loss resulting from such breach; *that* the loss or damage the defendant is liable for, must be the immediate and necessary result of such breach; *that*, if the plaintiffs lost all benefit under the Marks contract, and such loss was the immediate and necessary result of defendant's breach of his contract with the plaintiffs, then the jury might estimate the value of that contract at that time. Plaintiffs claim, that that was a very valuable contract; *that* timber share had greatly advanced; *that* the Marks lands contained a large quantity of very valuable timber, that has come to be very desirable; and that they have suffered great damage from its loss. In estimating the damage for the loss of that contract, the stand point is the time of the breach of defendant's contract with plaintiffs. What was the value of that contract in 1850, with all its rights and advantages, looking at all the surrounding circumstances, as they then existed? *That* they would not be authorized to take into consideration any advances or depreciation which has occurred in the price of timber shares since the alleged breach of defendant's contract with the plaintiffs; *that*, if the plaintiffs had failed in any respect to comply with the terms of their contract with the defendant, or if by reason of their negligence or inability to perform on their part, it had become unsafe for the defendant to continue to furnish them with supplies, then he was authorized to withhold, and by so doing, would not be liable in damages.

The jury returned a verdict for plaintiffs for $4802, and defendant excepted to the rulings, &c. of the Judge.

J. Granger, in support of the exceptions.

1. The Judge erred in admitting the evidence objected to on the question of damages. It was a mere matter of opinion and conjecture.

It was hypothetical and not based upon any facts that

existed at the time of the alleged breach of the contract declared on.

The loss of the Marks contract was not a proper subject for damages. The probable profits that the plaintiffs might have derived under that contract was a matter too remote, uncertain, contingent and speculative for any proper basis for the recovering of damages. Chitty on Contracts, 870; *Bishop* v. *Williamson*, 8 Greenl. 162; *Barnard* v. *Poor*, 21 Pick. 378; *Miller* v. *Mariners' Church*, 7 Greenl. 51; Sedgwick on Damages, (2d ed.) 68, 69, 78, 108; *Fogg* v. *Harding*, 7 Cush. 522.

2. The instructions given as to the rule of damages were erroneous.

They were calculated to mislead the jury; to withdraw them from the consideration of the whole case, and authorize them to select a part of the case, and award damages on that part independent of other parts that might control it. The instructions were erroneous in authorizing the jury to give damages for the loss of anticipated profits under the Marks contract. *Loker* v. *Damon*, 17 Pick. 284; *Thompson* v. *Shattuck*, 2 Met. 215; *Fox* v. *Harding*, 7 Cush. 522; *Deyo* v. *Waggoner*, 19 T. R., 241; *The Schooner Lively*, 1 Gall. 314, 325; Sedgwick on Damages, 68, 69, 108, 159, 165; *Blanchard* v. *Ely*, 21 Maine, 343; 2 Kent's Com. (5th ed.) 480, and notes; *Smith* v. *Condy*, 1 Howard, U. S. R., 28; *Boyd* v. *Brown*, 17 Pick. 543; *Watson* v. *The Ambergate, Nottingham & Boston Railway Co.*, English Equity and Common Law Reports, vol. 3, p. 497, (L. & B's ed.)

3. The loss of the Marks contract was owing to plaintiffs' own fault, and in no way attributable to defendant. The liability of the defendant could not legally be increased or diminished by any reference to the pecuniary condition of the plaintiffs.

4. The instructions to the jury were erroneous in submitting to them the question, whether the loss of the Marks contract was the immediate and necessary result of the breach of the defendant's contract with plaintiffs, as there

was no sufficient evidence in the case to authorize the submission of that fact to the jury, and because that fact was immaterial.

5. The Judge should have instructed the jury as matter of law, that no damages could be recovered under the Marks contract.

T. J. D. Fuller, contra.

SHEPLEY, C. J. — The suit is upon a contract made between the parties on October 1, 1849. The principal claim is for damages alleged to have been occasioned by a breach of it. The contract recites, that the plaintiffs had before, on September 11, 1849, made a contract with Nehemiah Marks to clear out and make Bolton brook navigable for running logs, and to cut and haul a certain quantity of timber from the land of Marks for ten years; that they were to receive a certain sum for making the brook navigable, and to pay an agreed price for the timber. To enable the plaintiffs to execute that contract, the defendant agreed "to furnish them with such articles of supplies, that shall be needed by them in clearing out of said brook, and for their lumbering operations, and to continue to so supply for the term of three years," unless they on their part should fail to perform.

The plaintiffs agreed to clear out the brook according to their contract with Marks, and to log each year on that land, with not less than four six ox teams. The lumber was to be sawed at defendant's mills, upon certain terms agreed upon; and payment for the supplies was to be made from the first sales of the lumber sawed. The contract with Marks was to be, and was assigned to the defendant, as security for performance by the plaintiffs.

The defendant, by the verdict of the jury, must be regarded as having, without sufficient cause, neglected or refused to perform the contract. The most important question presented at the trial appears to have been the damages which the plaintiffs were entitled to recover.

If the contract between these parties had contained no recital or reference to the contract made with Marks, there could have been no doubt respecting the measure of damages, for a refusal to furnish the supplies, necessary to enable the plaintiffs to perform it. It would have been the difference between the price agreed to be paid, and the market price of the like goods, at the time and place of delivery. *Furlong* v. *Polleys*, 30 Maine, 491; *Beals* v. *Terry*, 2 Sandf. 120. The plaintiffs might also have been entitled to recover damages suffered by reason of any other breach of the contract. Beyond this, they could have had no legal claim, although by reason of their lack of means or credit they might have failed to perform their contract with Marks. For damages can only be such, especially when they are claimed as expected profits, as arise out of a breach of the contract, upon which the action is brought, and not out of one collateral to it.

In an action to recover damages for breach of a covenant against incumbrances, a claim was made to recover greater damages than would be occasioned by the existing incumbrance, on the ground, that the value of the estate was thereby diminished to a greater extent. The right to do so was denied. The opinion states, "and in general, the damages for a breach of covenant or obligation must be such as the party suffers in respect of the particular thing, which is the subject of the contract, and not such as have been accidentally occasioned, or supposed to be occasioned, in his business or affairs." *Batchelder* v. *Sturgis*, 3 Cush. 201.

In the case of *Fox* v. *Harding*, 7 Cush. 516, while considering the right of a party to recover damages for the loss of profits, it is said, "if the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages." "But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in

consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as part of the damages occasioned by a breach of the contract in suit."

In the case of *Masterton* v. *The Mayor of Brooklyn*, 7 Hill, 61, the rule of the civil law is stated and approved.

"In general, (says the civil law,) the parties are deemed to have contemplated only the damages and interest, which the creditor might suffer from the non-performance of the obligation in respect to the particular thing, which is the object of it, and not such as may have been incidentally occasioned by other affairs; the debtor, therefore, is not answerable for these, but only for such as are suffered with respect to the thing which is the object of the obligation; *damnum et inter esse ipsam rem non habitam.*" 1 Ev. Poth. 81.

NELSON, C. J., in his opinion says, "when the books and cases speak of the profits anticipated from a good bargain, as matters too remote and uncertain to be taken into the account, in ascertaining the true measure of damages, they usually have reference to dependant and collateral engagements, entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may, and often, doubtless, does exert a material influence upon the collateral enterprizes of the party, and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtile to be reached by legal proof or judicial investigation. And besides, the consequences when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself, as to the conduct of the delinquent contractor. His condition in respect to the measure of damages ought not to be worse for having failed in his engagements to a person, whose affairs were embarrassed, than if it had been made in prosperous or affluent circumstances."

These rules for the assessment of damages appear to

have been approved in the case of *Phil., Wil. & Baltimore Railroad Co.* v. *Howard*, 13 How. 307.

So on the other hand the right of a defendant to recover damages is limited to such as arise out of the contract on which the action is founded. *Cram* v. *Dresser*, 2 Sandf. 127; *Deming* v. *Kemp*, 4 Sandf. 147.

The fact that one contract is recited as the occasion for making another to enable a party to perform it, does not make a party to the latter a party to the former. He could not become so without the consent of all the parties to it. Nor can such recital make him a party to it in any sense, or to any person further than he, by his own contract, engages to perform or to aid another in the performance of the prior contract. To such extent as he makes such engagements he becomes responsible for its performance, and no further. There can be no more reason to hold him liable in damages for the loss of the prior contract, unless he has made himself responsible for its performance, than there would be to hold him liable in damages for the loss of a contract subsequently entered into upon the faith that his own contract would be performed. Upon examination of the contract between these parties, no stipulation of the defendant is found, by which he engages to perform the contract with Marks, or to aid the plaintiffs to do it, further than to furnish them with supplies for that purpose, for three years. The lumber was to be sawed in his mill, but that appears to have been a stipulation in his favor, and to have been so regarded in the contract which declares, "the person in the first part is to have the sawing of the lumber."

There are stipulations of the plaintiffs to the defendant, that they will perform their contract with Marks. These were evidently made to secure the defendant payment for the supplies furnished by him, and the advantages expected from a performance of the contract. These stipulations of the plaintiffs to perform the contract with Marks, could not operate to bind the defendant to its performance.

The contract between the plaintiffs and Marks must there-

fore be regarded as collateral to that made between these parties, so far as the defendant has not engaged to aid in its performance by furnishing supplies.

In the case of *Fox* v. *Harding*, the opinion says, "if the plaintiff had offered to prove, that in consequence of the breach of the contract by the defendants, they had lost other contracts, by which they would have realized large profits, and which they had entered into, for the purpose of fulfilling their contract with the defendants, the evidence would have been wholly inadmissible. Such profits are too uncertain, remote and speculative in their nature, and form no proper basis of damages."

With respect to the assignment of the contract made with Marks to the defendant, it may be observed, that one who takes an assignment of a contract between other parties as security, can only be held responsible for its loss, by reason of some neglect of duty or misconduct respecting it. If one should take an assignment of a valuable contract for the charter of a vessel as security for furnishing outfits for the voyage, and should fail to fulfil his contract for outfits, he would not thereby become liable for a loss of the contract of charter.

If the defendant were to be held liable for a loss of the contract made with Marks, that loss could be ascertained only by a conjectural estimate of the profits, to be expected from a performance of it. These must necessarily depend upon the rise and fall of the price of labor, provisions and timber, for the term of ten years, while the defendant's contract for supplies would terminate in three years. When it is considered, that such an estimate is by law to be made at the time of the breach, and not after an experience of prices for the ten years, it will be perceived, that such an estimate must be at best merely conjectural, resting upon no solid foundation whatever.

Any such conjectural profits were to be derived from cutting standing trees. When the performance of a contract for the right to cut trees standing, was prevented by

a person, who carelessly set a fire, by which the trees were destroyed, the Court decided, that profits to be expected from cutting the trees, which had thus been destroyed, could not be taken into account in estimating the damages. The opinion states, "In regard to profits, which might have been realized from cutting the remainder of the standing wood, in pursuance of the contract, we think it is an interest too remote and contingent to be the subject of damages in this action." *Barnard* v. *Poor*, 21 Pick. 378.

If the defendant failed to furnish supplies, the plaintiffs might have obtained them elsewhere, at the expense of defendant, and have thus proceeded to perform their contract with Marks. Their inability to do so, arising out of their lack of means or of credit, cannot change the legal rights of the parties. The law is not varied by any consideration of the wealth or poverty of the parties to a contract.

While the jury were correctly instructed, that the defendant would be liable only for such damages as were the immediate and necessary result of a breach of the contract, they were also instructed, "if the plaintiffs lost all benefit under the Marks contract, and such loss was the immediate and necessary result of the defendant's breach of his contract with the plaintiffs, then the jury might estimate the value of that contract at that time." The error consisted in submitting to the jury, whether the loss of the contract made with Marks, resulted from a breach of the defendant's contract, when the law determines upon the testimony presented, that the plaintiffs were not entitled to recover damages for a loss of that contract.

It is not necessary to consider the other matters presented. *Exceptions sustained, verdict set aside, and new trial granted.*

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

STAPLES *& als. versus* WHEELER *& als.*

Where, in consideration of a sum advanced to defendant, he agreed to go to the gold diggings of California, and give the plaintiff one half of the proceeds of labor there for one year, no deductions are to be made from *such proceeds*, by reason of expenses paid for sickness during the year.

Although, in the description given in the body of a written contract of the persons interested, the name of one who signs it, and makes part of the advances, is omitted, it is, nevertheless, valid with respect to such person.

Without proof of its loss, or a foundation laid for secondary evidence, the contents of a receipt cannot be proved by parol.

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

ASSUMPSIT, on a contract of the following tenor:—

The defendants for advances made to them by plaintiffs of $350, each, agreed in writing to proceed with all possible despatch to the gold diggings in California, there to labor with all diligence and fidelity to get gold in any honest manner for the space of one year from their arrival there. "The proceeds of said labor, whether in digging gold, laboring or speculating, to be divided equally between the parties of the first and second part of the contract." And if either of the defendants should die, his share to be paid from the time of his decease.

Zenas Wheeler only appeared, and pleaded the general issue.

In the written contract, the name of one of the plaintiffs was not found among those named in it, as of the first part, but it was signed by him, and one Lane was called, who testified, that it was signed by all the plaintiffs first, and afterwards by defendants, and that the sum therein stated was paid over to Wheeler at the time the contract was executed.

The defendant objected to this witness, and also to the contract, as not being the one declared on.

The objection was overruled.

Evidence was introduced tending to show the amount of Wheeler's earnings in California, and also to show, that a portion of the time he was sick, and the expenses of his sickness.

The defendant offered parol evidence of a receipt given to George W. Foster, one of the defendants, by A. Pilsbury, agent of plaintiffs, December 12, 1851, for $300, in full discharge of all liability to the California & Machias Mining Co., and of a contract entered into by said Foster with said company. The absence of the receipt was not accounted for by any evidence or affidavit, and the proffered evidence was rejected.

The presiding Judge instructed the jury, *that* under the written contract, they should first ascertain the proceeds of the labor of Wheeler in California; *that* they should then ascertain the amount of the expenses incurred by Wheeler, during the time of his sickness; *that* they should deduct this last sum from the proceeds of Wheeler's labor and render their verdict for one half of that balance.

The verdict was for $858,21, and the jury find the expenses of defendant's sickness to have been $500, and that the interest on the last sum would be $94,33.

Both parties excepted, the defendant to the rulings against him by the Judge, and the plaintiffs to the instruction given to the jury; and it was stipulated, that if in the opinion of the Court, the expenses of his sickness should not be deducted from the proceeds of Wheeler's labor, then the verdict is to be amended by adding one half of the sum so expended, together with one half of the interest thereon, as found by the jury.

Thacher, in support of defendant's exceptions, cited *Southwick* v. *Hayden,* 7 Cowen, 334; Laws of 1851, c. 113; *Lee* v. *Openhiemer,* 32 Maine, 353.

Bradbury, for plaintiff.

HOWARD, J. — By the contract on which this suit was brought, the defendants on the second part, in consideration of the advances of money made to them by the plaintiffs, on the first part, agreed to go to the "gold diggings, in California, and there to labor with all diligence and fidelity to get gold, in any honest manner, for the space of one year from

their arrival there. The proceeds of said labor, whether in digging gold, laboring or speculating, to be divided equally between the two parties hereto." After some provisions, not material to the present inquiry, the contract states, that, "it is further understood, that if either of the parties of the second part should die, his share is to be paid from the time of his decease."

The only question arising on the plaintiffs' exceptions is, whether the expenses of the sickness of Wheeler, in California, should be deducted from the proceeds of his labor before the contemplated division should be made between the parties to the contract. The instructions required the deduction to be made, and the verdict was returned accordingly.

We are not called upon to determine what might have been an equitable arrangement between these parties, but rather, to ascertain the meaning of the contract which they chose to execute. It was not an undertaking in which the parties formed a joint company to share profit and loss; or in which the *net proceeds* only of the enterprise were to be divided. But each party was to have an independent interest in the *proceeds* of the labor.

By the terms, "proceeds of said labor," were intended the amount, income or products of the labor. Such is the plain import of the expression, and it harmonizes with the literal meaning of the term *proceeds*. No provision appears to have been made for sickness, or other incidental expenses of the defendants, except by the money advanced. During sickness, each party would fail of the benefits anticipated from the labor of the defendants; and if they had been disabled by sickness from performing any labor, and so have acquired no proceeds, the plaintiffs would have lost their money advanced, and the defendants their time and expenses. Neither repayment nor remuneration could have been successfully claimed. Each party had its peculiar hazard in the enterprise. One risked the advancement, and the other the voyage, time and labor. Beyond that the contract is silent, so far as risks

and expenditures are concerned. No such deductions as are claimed were provided for by the contract, and none should be made.

The defendants except to the ruling of the presiding Judge, admitting the contract produced, in evidence, against their objections. But although the name of one of the plaintiffs is omitted in that part of the contract describing the persons composing the party of the first part; yet it appears that the one so omitted made a part of the advancement, and signed the contract before it was signed by the defendants, and became a party to it, *de facto* and *de jure*, when it was executed. There is then no material variance, but the instrument described in the declaration, is the same that was offered in evidence, and the same that was executed by the parties.

The parol evidence of a receipt given by Pillsbury, was properly rejected; because the receipt was the best evidence of its own terms, and there was no proof offered of its loss, or which would authorize the introduction of secondary evidence of its contents. And if a receipt such as is copied into the exceptions, had been produced, it could not have been admitted to affect the rights of the plaintiffs; for there was no evidence that it purported to be signed, or in fact was given by Pillsbury, as their agent.

We perceive no valid objection to the admission of the testimony of Lane.

The defendants' exceptions are overruled. But, although we sustain the plaintiffs' exceptions, yet, under the agreement, the verdict is to be amended and increased by adding to the amount the sum of two hundred and ninety-seven dollars and sixteen cents; and the plaintiffs are entitled to judgment accordingly.

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

COUNTY OF HANCOCK.

DONAHOE *versus* RICHARDS *& al.*

The *parent* of a child expelled from a public school, by order of the superintending school committee, can maintain no action against *them* for such expulsion.

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

CASE, against the superintending school committee of the town of Ellsworth, for expelling a minor child of the plaintiff from a district school in that town.

The writ contained three counts. The first count alleged that the act was done maliciously. The second alleged the act to be done wrongfully and unjustifiably, and the third set forth the particular facts in regard to the requirement made of the plaintiff's child to read from the Protestant version of the Scriptures, her declining to do so from conscientious scruples, and that the defendants wrongfully and unjustifiably expelled her from the school, and refused to allow her to return only on condition that she should read from that version.

When the cause came on for trial, the counsel for plaintiff said that he relied, in support of the action, upon the following facts, which he proposed to prove:—

On Nov. 14, 1853, and a long time before and at the time of trial, the plaintiff was a resident with his family in Ellsworth, and entitled to have his children educated at a public school in that town; *that* Bridget, his daughter, aged 15 years, has ever resided with him, and on the 14th of Nov., aforesaid, was a scholar in the district school in said town; *that*, prior to Nov., aforesaid, the defendants being the superintending school committee of Ellsworth, had directed that the English Protestant version of the Bible should be used

in all the public schools of that town, and that all the scholars in the schools, who were of sufficient capacity to read therein, should be required to read that version in school; *that* the plaintiff's daughter Bridget, attending the school in the district where her father lived, from conscientious religious scruples, refused to read that version, but was willing to read instead the "Douay" verson ; *that* Bridget and her father both regarded it sinful to read the required translation, and both have been so instructed by the authorities of the Roman Catholic Church, of which they were members; *that* the defendants, on said Nov. 14, as such committee, directed Bridget to leave the school, and not to return to it, until she would consent to read the said Protestant version, and thus expelled her from said school; and that the plaintiff had been obliged to employ a teacher at his own expense.

It was thought expedient that the questions of law arising in the case should first be settled, and the presiding Judge ordered a nonsuit with the consent of plaintiff's counsel, it being agreed, that if in the opinion of the full Court, the facts stated would support the action, then the nonsuit was to be taken off, and the case stand for trial; otherwise the nonsuit should be confirmed.

Peters, and *R. H. Dana, jr.*, of Massachusetts, for defendants, cited *Spear* v. *Cummings*, 23 Pick. 224, as explained by *Sherman* v. *Charlestown*, 8 Cush. 161.

Rowe & Bartlett, for plaintiff.

APPLETON, J. — This suit is brought by the plaintiff, father of Bridget Donahoe, against the defendants, the superintending school committee of the town of Ellsworth, for expelling her from school for a refusal to comply with the orders of her instructer, to read in the common version of the Bible, designated in the report as the Protestant version — such reading being a part of the general course of instruction, and this version being directed to be used in such course. The question presented, is whether the father, if

such expulsion were wrongful, has thereby received any such injury as will entitle him to pecuniary compensation.

A minor child is subject to the commands of its father during minority, and the father is entitled to its services. Being entitled to such services, he can maintain an action for any wrongful act done to the child, by which it is disabled or made less able to render its due and accustomed service. The loss of service in such case is held to be the gist of the action. *Hall* v. *Hollander*, 4 Barn. & Cress. 660. This principle, however, has been so far extended as to enable the father, when the child is too young to render any service, to recover in case of a bodily injury for the trouble and expense he may have incurred in the care and cure of such child. *Dennis* v. *Clark*, 2 Cush. 347. But in such case he cannot recover for the injury done to his parental feelings, or for the pain and suffering, or the circumstances of insult and aggravation with which the infliction of the injury may have been attended. *Flemington* v. *Smithers*, 2 C. & P. 292; *Whitney* v. *Hitchcock*, 4 Denio, 461. For injury to the person, the reputation, or the property, the suit must be in the name of the child, and the damages be awarded in accordance with the circumstances which may have accompanied and aggravated the wrong.

In this case, there is no act done, by which the ability of the child to render service is diminished. The school is for her benefit and instruction. The education is given to her, and if wrongfully deprived thereof, the loss of such deprivation falls on her. The wrong committed, the injury done, is done to her alone — and if her rights have been violated, she alone is entitled to compensation.

The claim of a plaintiff, under circumstances like those in the present case, has heretofore been examined and determined by courts entitled to the highest consideration, and with an entire uniformity of result. In *Spear* v. *Cummings*, 23 Pick. 224, it was held that the teacher of a town school was not liable to any action by a parent for refusing to instruct his children, there being no privity of contract

between them. In *Sherman* v. *Charlestown,* 8 Cush. 161, SHAW, C. J., referring to the case just cited, remarks that the Court were of opinion, among other reasons, that the action was misconceived, "because the father is not the person injured and entitled to recover damage in his own right." In *Stephenson* v. *Hall & al.*, 14 Barb. 222, it was held that an action will not lie in behalf of a parent against the town superintendents of public schools for expelling and excluding the plaintiff's minor child from the common school; nor for damages sustained by the parent in bringing an appeal to the State Superintendent of Common Schools to get such child reinstated in the school. In this case, after a very careful and elaborate examination of all the authorities bearing upon the question, ALLEN, J., says:—"I have searched in vain for a precedent sustaining an action of this character. I believe it is the first attempt of the kind that has been made in our courts of justice." In no case can a parent sustain an action for any wrong done to the child, unless he has incurred some direct pecuniary injury therefrom in consequence of some loss of service or expenses necessarily consequent thereupon. Upon principle as well as authority, the action cannot be maintained. *Nonsuit confirmed.*

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

DONAHOE, *prochein ami, versus* RICHARDS *& als.*

The duties imposed upon the superintending school committee, as to expelling scholars from a public school, partake of a judicial character, and for an *honest* though *erroneous* discharge of them, they are not liable in a suit for damages to the person expelled.

With such committee, the Legislature have reposed the power of directing the general course of instruction, and what books shall be used in the schools; and they may rightfully enforce obedience to all the regulations by them made, within the sphere of their authority.

For a refusal to read from a book thus prescribed, the committee may, if they see fit, expel such disobedient scholar.

No scholar can escape or evade such requirement when made by the committee, under the plea that his *conscience* will not allow the reading of such book.

Nor can the ordinance be nullified, because the church of which the scholar is a member, hold, and have so instructed its members, that it is a *sin* to read the book prescribed.

A law is not unconstitutional, because it may prohibit what one may *conscientiously* think right, or require what he may *conscientiously* think wrong.

A requirement by the superintending school committee, that the *Protestant version* of the Bible shall be read in the public schools of their town, by the scholars who are able to read, is in violation of no constitutional provision, and is binding upon all the members of the schools, although composed of divers *religious sects*.

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

TRESPASS ON THE CASE.

This action was brought by plaintiff, through her father, as her *prochein ami*, against the superintending school committee to recover damages for maliciously, wrongfully and unjustifiably expelling her from one of the town schools in Ellsworth. The plaintiff was 15 years of age, and was expelled for refusing to read in the school, of which she was a member, the Protestant version of the English Bible, which had previously been ordered to be used therein by the defendants.

The same counts were in the writ as in that of *Donahoe* v. *Richards & al.*, *ante* p. 376, *mutatis mutandis*, the same facts were offered to be proved, and the same directions given, and agreement made as in that case. The plaintiff excepted to the order of the Judge. This and the next preceding case were argued together.

Rowe & Bartlett, in support of the exceptions, in their opening argument, maintained the following points:—

1. Under our constitution, superintending school committees have no authority to pass such an ordinance.

2. The expulsion of a scholar, for refusing to comply with such an ordinance, subjects the committee to an action of damages. Public schools in this State are not merely creations of the Legislature, but exist by special provisions of the constitution. Const. of Maine, art. 8. The term

"public" implies that children of a suitable age will be entitled to enjoy their benefits. Exclude any one on account of color or sect, and they cease to be public. Temporary exclusions may be made for temporary causes; but no perpetual exclusions are allowed.

3. This ordinance excludes a whole class of our citizens from the enjoyment of the schools.

4. The committee acting under a statute in making that ordinance, it can have no more force than an Act of the Legislature. The Legislature has no power to pass an Act, establishing a religious test for admission to, or continuance in a public school, nor to make any requirement of the scholars, which shall exclude any on account of their religious belief; nor to compel, or authorize any town to raise any tax or to expend any money for disseminating any religious book. Such legislation would violate the constitution. Const. of Maine, art. 1, § 3.

5. This ordinance establishes a preference of the Protestants over the Catholics; and creates a religious test.

6. Its opposition to the spirit of the constitution is equally obvious. The religious sentiment is not to be interfered with by government. Perley's Debates on the adoption of the Constitution, pp. 71 to 88.

7. The school committee exercise both administrative and judicial power. If they act oppressively in exercising the former, and exceed their jurisdiction in the latter, an action lies for damages, in favor of the party injured. The wrong done here is similar to that done by a moderator in refusing a vote at an election. The remedy should be similar. It has long been settled, that in such case, an action on the case will lie and that without proof of malice. *Ashley* v. *White*, Ld. Raymond, 938; 1 Smith's Leading Cases, 105, and notes; *Lincoln* v. *Hapgood*, 11 Mass. 350; *Osgood* v. *Bradley*, 7 Maine, 411; *Oakes* v. *Hill*, 10 Pick. 333. But the injury here is much greater than in such a case.

J. A. Peters, and *R. H. Dana, jr.*, of Massachusetts, *contra.*

1. The defendants being public officers, exercising a discretion in the discharge of a public duty, judicial in its character, cast upon them by the law, are not liable to this action, while acting in good faith, without malice, and within their appropriate sphere. *Wheeler* v. *Patterson*, 1 N. H. 88; *Griffin* v. *Rising*, 11 Metc. 339; *Dinsmore* v. *Nilhes*, 7 How. 89; *Dinsmore* v. *Nilhes*, 12 How. 390.

The decision by the defendants on the necessity to "the peace and usefulness of the school," that the plaintiff should be expelled, is conclusive. *Allen* v. *Blunt*, 3 Story, 141.

Lincoln v. *Hapgood*, 11 Mass. 350, cited by plaintiff, is an exception to the rule. It was not decided on authority, and has not been followed in any other State. *Wheeler* v. *Patterson*, 1 N. H. 88; *Jenkins* v. *Waldron*, 11 Johns. 114; *Rail* v. *Potts*, 8 Humph. 225; 5 Hall & Worell, 553. See language of Court in *Spear* v. *Cummings*, 23 Pick. 227.

In Massachusetts, it has not been extended, but always questioned and restricted. *Capen* v. *Foster*, 12 Pick. 485; *Gates* v. *Neal*, 23 Pick. 308; R. S., c. 3, § 9; *Blanchard* v. *Stearns*, 5 Met. 298; *Griffin* v. *Rising*, 11 Met. 339.

In Maine, where *Lincoln* v. *Hapgood* was common law, its principle has never been sustained on argument, and has been corrected by statute. See note to 2d ed. of 7 Greenl. *Osgood* v. *Bradley*.

The language of the Court in the following cases is inconsistent with the notion that the school committees are liable. *Spear* v. *Cummings*, 23 Pick. 224; *Roberts* v. *Boston*, 5 Cush. 205, language on pp. 205 and 209; *Sherman* v. *Charlestown*, 8 Cush. 161, language on p. 165. See also, Statutes of Massachusetts, 1845, c. 214.

But it may be said, that in executing the power conferred on us by the statute, we have gone an unreasonable length, and so far violated the common rights of the plaintiff, as to make our course unconstitutional. We take the ground then, —

2. Continuing the use of the English Bible as a text

book, in the public schools, is a reasonable exercise of discretion. The entire book is the noblest monument of style, of thought, of beauty, of sublimity, of moral teaching, of pathetic narrative, the richest treasury of household words, of familiar phrases, of popular illustrations and associations, that any language has ever possessed.

The contested passages have never been, so far as appears, read in the school. Can any one doubt that the real question is not whether each child shall choose its version, but whether the Bible shall be read at all?

3. The acts of the defendants are justifiable under the statute law of the State. Act 1850, c. 193, art. 5, § § 4, 7 and art. 7, § 2, and by judicial decisions. *Sherman* v. *Charlestown*, 8 Cush. 161; *Spear* v. *Cummings*, 23 Pick. 225; Language of STORY, J., p. 200 of 2 Howard, *Girard Will Case.*

4. This power of the committee is not in conflict with any clause of the constitution, and the Legislature had the right to confer it, under art. 4, § 1, and art. 8 of the constitution.

It is not in conflict with the right of all to enjoy the benefits of free schools. This is not an absolute, exclusive personal right, but a common right, to be enjoyed under conditions and limitations. *Sherman* v. *Charlestown*, 8 Cush. 161; *Spear* v. *Cummings*, 23 Pick. 224.

It is not in conflict with § 3 of the bill of rights, which declares that no one shall be "hurt, molested or restrained, in person, liberty or estate, for his religious professions or sentiments." This section was made *alio intuiter*. *Thurston* v. *Whitney*, 2 Cush. 104.

The plaintiff has not been hurt, molested or restrained, in her person, liberty or estate, for her religious professions or sentiments, in the sense of the constitution. The ground of objection from the payment of taxes is not open to her, but only in the action by the father in his own right. But neither of them have been so hurt, &c., in the sense of the constitution.

Even if the statute has been incidentally the occasion of loss to them, or diminution of any right, it is not, for that reason, unconstitutional, if its object, *intuitus* and direct effect are to carry out a constitutional purpose, by reasonable means, judged necessary by the competent authority, and the conflict with the plaintiff's right is incidental, remote and unintended. In such case it is *damnum absque injuria.*

Illustrations of this position may be drawn from various cases of conflict of constitutional principles with public and private right.

Private property cannot be taken for the public use, except upon compensation being made; yet a franchise may be impaired or destroyed in value, by another franchise erected for the public good, (*Warren Bridge* v. *Charles River Bridge,* Peters' R.,) and all cases of the same nature since, relating to railroads, turnpikes, toll bridges, &c. In New York, houses may be destroyed to prevent the spread of fire, without compensation. See also *Tewksbury's case,* 11 Metc. 55.

Congress alone can regulate commerce and impose duties on imports; yet States may pass health, quarantine and inspection laws, lay tolls on merchandize carried on turnpikes or navigable rivers, for certain purposes, restrict and restrain to some extent, the landing of passengers, and require certain bonds or payments from them, and restrict the sale of certain articles of commerce. (5 Howard, 504, and 7 Howard, 293, and cases there cited.) Although these laws operate to regulate commerce and to impose something like duties, yet they are held constitutional, so far as they are reasonable and proper in extent and application, for the execution of lawful powers in the States.

The Sunday laws are held constitutional, although they operate to deprive the Jews of one sixth of their time for labor. Laws requiring all men to bear arms, in time of war, under penalty of a fine, would be constitutional, notwith-

standing the religious belief of some precluded them from doing so.

The constitution prohibits religious tests as qualifications for public office; yet all judicial officers may be required to administer oaths, although the religious scruples of quakers and others preclude them from ever holding those offices. Blacks may be assigned to separate schools, as a reasonable regulation, although the act causes an inequality and some inconvenience. *Roberts* v. *Boston*, 5 Cush. 198.

The history of the law respecting the public support of religious teaching and worship in Massachusetts, which subsisted under the same clause of the constitution relied upon by the plaintiff, shows that the clause is not so construed as to prohibit a person's being taxed for a public purpose which his religious belief precludes him from availing himself of. *Oakes* v. *Hill*, cited by plaintiff.

The best view of the case for either plaintiff is this, his religious belief precludes his taking the benefit of the schools which he is taxed to support, on account of a regulation therein. The answer is that, as the Legislature is required to support and regulate public schools, the regulation in question is not unconstitutional, inasmuch as it is made in the execution of a legal power, with a proper *intuitus* and direct effect, and cannot be judicially pronounced to be evidently unreconcilable, and its effect on the plaintiff through his religious belief is indirect and incidental.

Rowe, in reply.

Whether this suit can be maintained without proof of malice, is a question which has not yet arisen. It may arise in a subsequent stage. By the copy of the declaration in the writ, which the learned counsel seems not to have read, though it is made part of the case, it seems malice is alleged. We offered to prove that the act complained of was done deliberately, and was to our injury. If it was also illegal, then we had a right to argue, and the jury would be authorized to find, that it was done maliciously. The case of *Wheeler* v. *Patterson*, 1 N. H., 88, cited in defence, recog-

nizes it. The discussion then, of the first proposition of the counsel is premature. As to the case of *Lincoln* v. *Hapgood,* however it may be regarded elsewhere, it is still law in this State, according to the case cited in the opening.

The only question we intended to present, is whether, under our constitution and laws, the committee have a right to make a willingness on the part of a child to receive such religous instruction as they may direct to be given a condition for the admission, or continuance of such child as a scholar in a public school. That question is presented by the case, unless the committee acted hastily and without proper evidence of obstinacy, and therefore we are entitled to maintain our action, which advantage we expressly waive, for the purpose of having the main question settled. This question the learned counsel seems unwilling to meet. He denies that the reading of the Bible is a religious exercise, and quibbles about there being no allegation or proof that Bridget was required to read any doctrinal passages. But by the ordinance of the committee the scholars were required to read the whole. A willingness to read the whole was required of Bridget; and she was expelled because she would not promise to read the whole.

She was required to take part in a religious exercise from which her conscience shrunk, because, as she believed, God's word was perverted in its meaning. But the counsel contends there is little difference in the two versions, only in some half dozen doctrinal passages, which are never read. (How does he know that?) That course of argument might be appropriate before a jury, to convince them that those conscientious scruples were not real, but here it is out of place. If the counsel is right as to the difference, why in the name of common sense and christian charity, did not the Committee allow the child to use her own translation? The moral teaching of each is the same.

How far these translations differ is not a question for this court to decide; it is enough for this case that one of them is such that the reading of it is deemed a sin by the plaintiff.

But the learned counsel, in one portion of his argument meets the main question. He alleges that "the power must be lodged somewhere to determine what books shall be read," so as "to conduce to the greatest good of the greatest number;" that is, if I understand it, as protestants regard instruction in protestant christianity as the most essential branch of education, therefore if the majority of the school be protestants, the committee may enforce such a system of instruction upon all; and Mahomedans, catholics, or Mormons may follow their example if they get the power. "The greatest good of the greatest number." This tyrannical doctrine of pure democracy, we generally hear only from the lips of demagogues. Lawyers and statesmen have usually supposed that one great object of a written constitution was to do away with a principle so obviously unjust, and to substitute for it, the equal good of all. But after asserting this doctrine, the counsel immediately abandons it, by affixing the limitation, that they shall not exercise this power for any sectarian purpose. So that the power of the committee, and the rights of the scholars, depend not upon the nature of their acts or their effects, but upon their secret motives. And a whole sect may be driven out of the school, unless the injured party can prove that the *sole* object of the committee was to give religious instruction. Under the name of history, of metaphysics, or of logic, or philosophy, or for the purposes of "style," the writings of the French infidels of the last century, or of the German rationalists of this, may be introduced into our schools, to the horror of pious orthodox parents, who regard them as poison, not to be touched by a child, and according to the doctrine of the counsel they are without remedy.

Our whole case proceeds upon the ground that the reading of the scriptures was required as a religious exercise. The Bible is the religious book of Christians. If the defendants admit they had no right to use it thus, but contend they had a right to use it for other than these primary purposes, or for the improvement of "style," or the cultivation of the fancy or

imagination," then this fact should be set up, and shown in defence, and the jury should be allowed to pass upon the question for what purpose it was used.

The denial on the other side, that the reading was intended as a religious exercise, and the argument based upon it, seems hardly consistent with the frequent appeals in favor of its use, resting obviously upon the idea that the Bible is the great book of our religion. He says "it will hardly be argued that this is an establishing by law of a subordination or preference of one sect to another. The law makes no such preference. It is based on the principle of majorities. The majority of each town elect the committee, and thus select the books." If I understand the argument then, it is this, that although an Act of the Legislature, requiring the reading of the protestant version in schools would make such a subordination or preference by law, and therefore be unconstitutional; yet the passing such an ordinance by the school committee, elected by the inhabitants of the town under an Act of the Legislature is not unconstitutional, because it is not a law; that the Legislature can confer upon the school committee a power to legislate which they cannot exercise themselves; that the protestants of the whole State cannot make a law to oppress their catholic fellow citizens, but they can confer power to do so upon the protestants of any village.

This evil suffered by the catholics grows out of the doctrine of majorities, says the counsel, and if they find themselves oppressed, they must resort for redress, to the ballot box, and failing there, to the Legislature. I had supposed the ballot box presented a practical remedy for wrongs to majorities only; that the resort to the Legislature, would be of advantage only to those who had the power to influence a majority of its members; and that an oppressed minority could have no relief but under the protection which the constitution guarantees, and this Court affords. But this protection, the counsel says, we cannot have in this case, because the evil was done indirectly and

for the purpose of effecting a legal object. That we deny, and say the case does not warrant such an assumption on his part. If it were otherwise, I should deny the correctness of his doctrine. He admits that religious instruction cannot be enforced *eo nomine*, and does not deny, that under our constitution a man cannot be taxed against his will, for the support of any religious instruction whatever; but contends that children may be compelled to receive, and parents to pay for, any kind or amount of sectarian religious instruction, provided a jury can be made to believe that the imparting of such instruction was not the primary object.

The doctrine advanced is attempted to be supported by cases supposed to be analogous. That the right of property in any thing is but a limited power of using that thing, is a doctrine familiar to all. It is expressed in the maxim quoted; "*Sic utere tuo ut alienum non laedas.*" Upon this principle rest the decisions in *Tewksbury's* and *Alger's* cases, cited by the gentleman, and in all cases of the like nature, as to harbors and rivers, health laws, intramural burials. So too as to another class of cases to which he refers, growing out of grants for bridges and railways; these cases all rest, not on the ground that the less must yield to the greater, but on the ground that there is no invasion of constitutional rights at all.

So in that class of cases under the clause of the constitution of the U. S., conferring upon the general government the power to regulate commerce, there is no question of *individual rights*, but the only contest is which of the two governments, State or National, shall exercise certain powers. This doctrine in relation to *intuities*, on which the counsel lays so much stress, extends thus far, that a State Legislature will not be allowed to usurp powers granted to Congress, under the pretence of exercising those which are reserved to the State.

The reference made also to Jews and quakers gives no strength to the position taken. Our laws allow the Jew to

work on Sunday, provided his Sabbath is on Saturday in fact, and the expulsion of a Jewish scholar from school, for refusal to attend on the Jewish Sabbath would seem too illegal to discuss. And our law expressly excepts quakers and others conscientiously scrupulous about taking oaths, from the necessity of taking them.

It is conceded, that under our constitution, every child has a right to receive instruction at the public schools; that every parent has a right to have his child there taught; it is not contended that there exists any where a right to force religious instruction, *directly*, upon those who are unwilling to receive it; it is not claimed that any right exists to tax one for support of religious instruction, *directly*, without his consent. Perfect religious freedom is the right of every one. Now do these cases show any necessary collision between these different rights? Cannot these plaintiffs enjoy all unimpaired? Cannot all that is required to be taught at our common schools, science, letters and morals, be taught with the use of the Douay version? The morality of the two versions is the same; the catholics prefer the "style" of their own translation.

There was no necessity for the child's sacrificing any portion of the constitutional right of liberty of conscience, in order to secure her right to a common school education. The conduct of the committee was the wanton exercise of arbitrary power. Petty persecution is always a blunder, defeating its own object. To be successful a persecution must be cruel, relentless and crushing, like that which exterminated protestantism from southern Europe, but such as that cannot exist in this country. The course adopted by defendants, and threatened to be persevered in by counsel, seems to me to be as impolitic as it is unjust. We wish to instil into the children of emigrants our own notions of religious liberty. The best way to accomplish that object is to keep them intermingled with protestant children in our public schools.

APPLETON, J. — It was decided in *Donahoe* v. *Richards*, *ante* p. 376, that the expulsion of a minor child from the public schools by the superintending school committee, even if wrongful, was no violation of any legal right of the parent, and would not entitle him to maintain an action therefor; that the wrong in such case is committed against the child, and that if entitled to redress, it must be sought in its name.

The present suit is by the minor, for her alleged wrongful exclusion from school in consequence of her refusal to read in one of the books directed by the defendants, who are the superintending school committee of the town of Ellsworth, to be used in the school of which she was a member.

The questions involved in the decision of this case are their liability, when acting in good faith in the discharge of their duty, to an action at the suit of the individual expelled, even if the exclusion was erroneous — their powers as to the selection of books to be used — their legal right to expel a scholar in case of a refusal to read in a book by them prescribed — the constitutionality of a regulation by which the Bible, or any version of it, is designated as one of the books to be used.

The education of the people is regarded as so much a matter of public concern, and of such paramount importance, that the constitution of this State imposes on the Legislature the duty to make suitable provisions for the support and maintenance of the public schools. "A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized and it shall be their duty to require the several towns to make suitable provision at their own expense, for the support and maintenance of public schools." Const., art. 8.

This requirement of the constitution can only be rendered effectual by the enacting of fitting and appropriate laws. Different acts have been passed at different times to carry into full effect this constitutional duty. In 1850, the previous legislation of the State on this subject was repealed

and new enactments passed, which still remain in force, and under which the defendants justify their acts.

1. The defendants are public officers discharging important public trusts, and in the exercise of this authority necessarily clothed, to a certain extent, with judicial powers. In doing the act of which complaint is made, they were acting under the obligations of official duty and the sanctions of an oath. The plaintiff claims that when thus acting, and without malice or intentional wrong on their part — they can be held responsible in damages for an erroneous decision — an error of judgment either as to the facts or as to the consequences rightly deducible therefrom. In fine, that they should be held liable if they erred in judgment upon a matter submitted to their determination, and upon which they were bound to act.

By the act of 1850, c. 193, art. 5, § 1, the powers and duties of superintending school committees are defined and established, and the authority is given them "to expel from any school, any obstinately disobedient and disorderly scholar, after a proper investigation of his behavior, if found necessary for the peace and usefulness of the school; also to restore him to the school, on satisfactory evidence of his repentance and amendment." After investigation they are to determine what is to be done. If in the discharge of their duty in good faith and integrity, they err, it is only what is incident to all tribunals. To hold them legally responsible, in such a case, would be to punish them for the honest convictions of the understanding in the decision of a matter submitted to them, and upon which, having assumed jurisdiction, they could not rightfully withhold a decision. The general principle is established by an almost uniform course of decisions, that a public officer, when acting in good faith, is never to be held liable for an erroneous judgment in a matter submitted to his determination. All he undertakes to do, is to discharge his duty to the best of his ability, and with integrity. That he may never err in his judgments, or that he may never decide differently from

what some other person may think would be just, is no part of his official undertaking.

The plaintiff rests her right to recover upon the case of *Lincoln* v. *Hapgood*, 11 Mass. 350, where it was held, that an action could be maintained against the selectmen of a town for refusing to receive the vote of a qualified elector, although not chargeable with malice. This decision, though regarded as law in Massachusetts and in this State, is at variance with the law as established in England and in most of the States of this Union, in which the question has arisen. In the opinion of PARKER, C. J., in *Lincoln* v. *Hapgood*, reference is made to *Harmon* v. *Tappenden*, 1 East, 563, where the law was held otherwise. The doctrine of *Harmon* v. *Tappenden* was subsequently affirmed by ABBOTT, C. J., in *Cullen* v. *Morris*, 2 Stark. 577. In *Jenkins* v. *Waldron*, 11 Johns. 114, the Court say that in their opinion it "would be opposed to all the principles of law, justice and sound policy, to hold that officers, called upon to exercise their deliberate judgments, are answerable for mistakes in law, either civilly or criminally, when their motives are pure and untainted with fraud or malice." Such, too, was regarded as the law in New Hampshire, in *Wheeler* v. *Patterson*, 1 N. H. 89, and in Tennessee, in *Ball* v. *Batts*, 8 Humph. 225.

But without impugning the authority of *Lincoln* v. *Hapgood*, in reference to the point there decided, it may be sufficient to remark that the doctrine therein set forth presents no such equitable considerations in its favor, as to require it to be extended to cases, in which it is not directly applicable. Such indeed seems to have been the view of the Court of the State in which that case was decided, in other instances, where its authority was invoked. In *Spear* v. *Cummings*, 23 Pick. 224, it was held that the teacher of a town school was not liable to an action by a parent for not instructing his children; and in the opinion delivered, the Court remarked, that the principle established in *Lincoln* v. *Hapgood*, "is not applicable to the case under consideration

and cannot be relied on as a precedent." In *Griffin* v. *Rising*, 11 Met. 339, it was decided that no action could be maintained against assessors, by an individual who is liable to taxation, for their omission to tax him, whereby he lost his right to vote at an election, unless it be shown affirmatively that they omitted to tax him willfully, purposely, or with a design to deprive him of his vote. In *Wilkes* v. *Dinsman*, How. 89, it was held, in a suit brought by a marine against the commanding officer of a squadron, that the commander was a public officer, invested with certain discretionary powers, and that he could not be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption or cruelty; that his position was *quasi* judicial — that the acts of a public officer in public matters, within his jurisdiction, and where he has discretion, are to be presumed legal — and that it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error. The plaintiff would seem not entitled to recover according to the general principles and analogies of the law. But the very question here presented arose in New York in *Stephenson* v. *Hall*, 14 Barb. 222, in which it was held that the action could not be maintained. In delivering the opinion of the Court, ALLEN, J., says: "The trustees have the power, and it is their duty to dismiss or exclude a pupil from the school, when in their judgment, it is necessary for the good order and proper government of the school so to do. They had no personal interest to gratify or benefit, they were acting for the public without salary or reward. They acted, as they believed, judiciously, in a matter of discretion, pertaining to the duties of their office. If they erred in judgment in such case, they ought not to be liable to an action."

The defendants therefore, however much they may have misjudged their duty, are not liable if they acted honestly.

2. By the act before referred to, under art. 5, § 1, among various powers and duties conferred upon the superintending school committee, they are empowered "fourthly, to direct

the general course of instruction, and what books shall be used in the respective schools."

The right to prescribe the general course of instruction and to direct what books shall be used, must exist somewhere. The Legislature have seen fit to repose the authority to determine this in the several superintending school committees. They may therefore rightfully exercise it.

The power thus conferred, is in the most literal and explicit terms. The power of establishing by-laws is given to the several city governments of the State. This Court is authorized to establish rules for the regulation of business in Court. The only restriction in either case, is that the by-laws and rules thus established shall not conflict with the statutes and constitution of the State. Within these limits, they have all the force and vigor of legislative enactments. So, in this case, the same general and extensive power over this subject matter is granted, and the course of studies and the books prescribed by the superintending school committee are to be regarded as if established and prescribed by the Act of the Legislature.

The power of selection is general and unlimited. It is vested in the committee of each town. It was neither expected nor intended that there should be entire uniformity in the course of instruction or in the books to be used in the several towns in the State. The very distribution of power manifestly shows that no such intention could have existed. The manner of its exercise must depend upon the judgment, discretion and intelligence of the different committees. The actual selection at any given time and place, depends upon the views and opinions of those upon whom the law devolves this duty. The power of ultimate decision must rest somewhere. No right of appeal is granted. No power of revision is conferred upon any other tribunal. Because the right of selection may be injudiciously or unwisely exercised, it by no means follows that it does not exist. This Court cannot make an affirmative rule as to what books shall be selected, nor a negative rule prescribing what shall not be

used, if the right to selection be exercised in conformity with existing statutes and the constitution. The power of selection includes that of making injudicious and ill-advised selections, but there being no right of appeal, the selection is binding and conclusive.

But the argument is pressed upon our consideration that immoral and irreligious books may be selected — that children may be required to read the works of Strauss, or of Bentham, or of Hume. This may be so. But the exercise of power, which is the subject of complaint in this case, is not in that direction, nor is the danger that it will be, regarded as very urgent. The Legislature may undoubtedly make such a selection. So they may repeal any statute by which a crime, however atrocious, is punished, for the right to impose a punishment includes the right to modify or repeal it. If the Legislature, acting within constitutional limitations, should prescribe a course of instruction, however unwise, or books, however immoral, we are not aware of any power on the part of the Court to interfere. The abuse of a power is no argument against its existence. It is of the essence of all power that it may be exercised unwisely or abused by those to whom it is entrusted.

In the case supposed, the remedy is obvious and at hand. It is to be found where are found all the remedies for bad legislation — in the people. They elect those by whom the laws are passed. If the Legislature enact laws unwise, impolitic, removing the restraints on vice, or giving impunity to crime, the people have only to choose those for their agents by whom such legislation will be repealed. But if they will immoral legislation, — that murder shall remain unpunished, or that the reading books of the young shall be such as are adverse to the recognized principles of morality, no power is given to this Court to inhibit or annul such legislation. So if the committee, acting within their authorized limits, shall make an unwise and improper selection of books, the power to correct their misdoings is with those by whom they were elected, and whose wishes they have

violated. This government rests upon the great constitutional axiom "*that all power is inherent in the people.*" It fully and implicitly relies upon them, and if that reliance fails, then this experiment of self-government must be regarded as a failure.

3. If the right to direct the course of instruction and the books to be used is given, the right to enforce obedience to the determining power must manifestly exist, or the determination will be ineffectual. It would be worse than idle to grant this power to direct, if any one can set at naught the action of the committee.

The committee may enforce obedience to all regulations within the scope of their authority. If they may select a book they may require the use of the book selected. If the plaintiff may refuse reading in one book she may in another, unless for some cause she is exempted from the duty of obedience. If she may decline to obey one requirement, rightfully made, then she may another, and the discipline of the school is at an end. It is for the committee to determine what misconduct requires expulsion. That is expressly left to their determination. "It may be urged," says SHAW, C. J., in *Sherman* v. *Charlestown*, 8 Cush. 165, "that if this power exists in school committees, they may exercise it arbitrarily and unjustly; but the answer is, that such a power must exist somewhere, that all power conferred for good may be abused to wrong uses; but this power is intrusted to bodies under all the responsibilities which can bind any public officers to the faithful performance of duty in such a trust. They are chosen by their fellow-citizens for their supposed capacity, impartiality and fitness, and they are liable to be removed by the same constituents."

It is not necessary to consider whether they acted wisely or not; if they acted in good faith in the exercise of their duty, they must be regarded as most clearly within the principles established in *Stephenson* v. *Hall*, 14 Barb. 222; *Dinsman* v. *Wilkes*, 7 How. 89.

4. The plaintiff seeks to avoid those conclusions by denying that the book selected was one in which she could be constitutionally compelled to read upon pain of expulsion, in case of her refusal to obey. She claims exemption from the general duty of obedience, from the particular character of the book in which she was required to read. The question therefore, is whether, if the Legislature should by statute direct any version of the Bible to be read in schools, and should impose the penalty of expulsion, in the case of refusal, such statute would be a violation of the constitution.

The use of the Bible as a reading book is not prohibited by any express language of the constitution.

Is its use for that purpose in opposition to the spirit and intention of that instrument?

If it be not, if it be a book which may be directed within the spirit and meaning of the constitution, to be used in schools, it is obvious that its use may be required of all; for a regulation which any scholar may violate with impunity would cease to have the force and effect of a rule.

The case finds that the superintending school committee directed that the English Protestant version should be used in all the public schools of Ellsworth, and that all who were of sufficient capacity to read therein should be required to read that version in school. This is the requisition of which complaint is made.

The common schools are not for the purpose of instruction in the theological doctrines of any religion, or of any sect. The State regards no one sect as superior to any other — and no theological views as peculiarly entitled to precedence. It is no part of the duty of the instructor to give theological instruction — and if the peculiar tenet of any particular sect were so taught it would furnish a well grounded cause of complaint on the part of those, who entertained different or opposing religious sentiments.

But the instruction here given is not in fact, and is not alleged to have been, in articles of faith. No theological

doctrines were taught. The creed of no sect was affirmed or denied. The truth or falsehood of the book in which the scholars were required to read, was not asserted. No interference by way of instruction, with the views of the scholars, whether derived from parental or sacerdotal authority, is shown.

The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief, than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the pagan creeds. A chapter in the Koran might be read, yet it would not be an affirmation of the truth of Mahomedanism, or an interference with religious faith. The Bible was used merely as a reading book, and for the information contained in it, as the Koran might be, and not for religious instruction; if suitable for that, it was suitable for the purpose for which it was selected. No one was required to believe or punished for disbelief, either in its inspiration or want of inspiration; in the fidelity of the translation or its inaccuracy — or in any set of doctrines deducible or not deducible therefrom.

It is made, by c. 193, § 2, art. 7, the duty of all the instructors of youth whether in public or private institutions, "to take diligent care and exert their best endeavors, to impress on the minds of children and youth committed to their care and instruction the principles of morality and justice, and a sacred regard to truth; love to their country, humanity and universal benevolence; sobriety, industry and frugality; chastity, moderation, and temperance; and all other virtues, which are the ornaments of human society." It will not be insisted that this duty, so beautifully set forth, is other than in entire conformity with the constitution. Neither is it claimed that the Bible, in any of its translations, is adverse to sound morality or those virtues here designated as proper to be inculcated.

The plaintiff, indeed, makes no objection to the Bible as a book which she may not rightfully be required to read in

schools, but only to a particular translation. Indeed, the report finds that she was willing to read from the Douay version. It is apparent that it is highly desirable that in the same class there should be an uniformity of books to be used. But if the book is proper, if consonant to the soundest principles of morality, then is there any translation which can be justly deemed adverse to those principles? Does the version in which the plaintiff was willing to read contravene sound morality, even in the judgment of the defendants? Does the version which the defendants required to be read, conflict, even in the opinion of the plaintiff, with pure morality? If not, then the book itself, alike in the judgment of the plaintiff and the defendants, is one which may be read without reasonable grounds of objection in schools.

But while the book itself would seem to be unobjectionable, the controversy arises merely from a difference between the version directed by the defendants to be used, and that in which the plaintiff was willing to read.

It is the remark of a profound scholar, that there is hardly a sentence in any of the best English authors, about the meaning of which, if a question of property were to depend upon its construction, a doubt might not be raised. The unavoidable difficulties of language, its necessary and irremediable imperfections, are enhanced, in this case, from the circumstance that the Bible was first written in a foreign tongue. The readings of the various canonical books are almost innumerable, amounting in the New Testament alone to above fifty thousand, the inevitable result of transcription by individuals at different and successive times. They consist, for the most part, in the omission or insertion of words, in transpositions, or in differences of termination, where the same word is used. Although the various readings are thus numerous, yet but in few instances do they affect the meaning. There may be a difference in the authority given to different readings, so that probably no two critical scholars could be found who would agree upon an

entire identity of text. Besides variation of the text, even when that is identical, the meanings to be attached to the same word are frequently numerous, variant and dependent upon its position in the text, and its connection with what precedes and follows. Which, therefore, may in fact be the more accurate of various versions is a question of scholarly erudition in respect to which there will be a difference of opinion resulting from the different education and prejudices of individuals, as well as from the intrinsic and ineradicable difficulties of the subject.

When the translation is accomplished, and an agreement as to the English word is established, the meaning is still a matter of conflict, as is evidenced by the dogmatic theology of numerous and discordant sects, who, all resorting to the same common source of instruction, differ so essentially in the meaning to be given to its language.

Such being the case, all that is shown by the selection of one version is simply a preference of one over another, when there must from necessity be a difference of opinion. But in case of numerous translations of a work in itself unobjectionable, a preference may be expressed and acted upon without infringing upon the just rights of others.

All that is done is, that a committee for the time being prefer one to another. Both, undoubtedly, may be used in schools, or both may be excluded therefrom. Or, as uniformity may be desirable, one committee may direct the use of one, and another of a different version, according to their respective views of expediency. The catholics deny the accuracy of portions of the version commonly used by protestants. The protestants assert that in some respects the Douay version is erroneous. Different sects of the protestants express dissatisfaction, in some instances, with both. The adoption of one is no authoritative sanction of purity of text or accuracy of translation. School committees could rarely be found competent to settle those questions. It is simply the adoption of a particular version of a work, which from the idiomatic English of the translation,

and the sublime morality of its teachings, furnishes the best illustration which the language affords of pure English undefiled, and is best fitted to strengthen the morals and promote the virtues which adorn and dignify social life.

The controversy seems to resolve itself into the inquiry whether there is any thing in the constitution, which in case of different translations of a work fitting and proper for schools, forbids the requirement of the use of a particular version as a reading book by those who may conscientiously believe it to have been, in some respects, erroneously made. If so, it is obvious that the particular version must be entirely prohibited, for if the plaintiff has a constitutional right to be absolved from a regulation of the school requiring its reading, because it is in conflict with her religious conscientious belief, it is not easy to perceive why she has not an equally valid ground of objection to hearing it read. If so, as others may have their consciences, it follows, not merely that no translation of the Bible can be used, but that no book can be used which may contain any proposition opposed to the conscientious belief of any scholar.

The language of the constitution, upon which the learned counsel for the plaintiff relies, in support of the grounds by him taken in argument, is found in art. 1, § 3 — and is in these words: —

"All men have a natural and unalienable right to *worship Almighty God* according to the dictates of their own consciences, and no one shall be *hurt, molested* or *restrained* in his person, liberty or estate, *for worshiping God* in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship; and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no *subordination nor preference* of any sect or denomination to another shall ever be established by law, nor shall any

religious tests be required as a qualification for any office or trust under this State."

The clause in the constitution upon which reliance is specially placed, is, that "no one shall be *hurt, molested* or *restrained* in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience, nor for his *religious professions* or *sentiments*, provided he does not disturb the public peace, nor obstruct others in their religious worship." The object of this clause was to protect all — the Mahomedan and the Brahmin, the Jew and the Christian, of every diversity of religious opinion, in the unrestrained liberty of worship and religious profession, provided the public peace should not thereby be endangered nor the worship of others obstructed. It was to prevent pains and penalties, imprisonment or the deprivation of social or political rights, being imposed as a penalty for religious professions and opinions.

It was held by the Supreme Court of Massachusetts, in *Thurston* v. *Whitney*, 2 Cush. 104, that the rejection of a witness as incompetent, by reason of his want of religious belief, was not a violation of the second article of the Bill of Rights, which is similar in its language to the constitutional provisions in this State, to which reference has been made. "It was," says WILDE, J., "intended to prevent persecutions by punishing any one for his religious opinions, however erroneous they might be."

Another clause in the constitution, upon which reliance is placed, is, "that no *subordination nor preference* of any sect or denomination to another shall ever be established by law."

This clause obviously provides for the equality of all sects, and forbids the preference of one over another. It is insisted that here is a preference by law. This relates to an Act of the Legislature, which shall establish the preference of one sect and the subordination of others. The selection of a school book is no preference within this clause. The

choice is left entirely to the popular will. One set of town officers may make one selection, and another may make an entirely different one. The most unrestrained liberty of choice is given. It would be a novel doctrine that learning to read out of one book rather than another, or out of one translation rather than another, of a book conceded to be proper, was a legislative preference of one sect to another, when all that is alleged is, that the art of reading only was taught, and that without the slightest indication of or instruction in theological doctrines.

If this were to be regarded as a legislative preference, much more must those laws, by which the Sabbath is established as a day of rest, in which labor, except for necessity, is prohibited being done, be regarded as a subordination of the religious views of all other sects to those holding that day sacred. Indeed this very objection has, in many States, been raised against the constitutionality of such laws. The case of *Specht* v. *The Commonwealth*, 8 Barr. 312, involved the question whether the members of a sect, who conscientiously observe the seventh day of the week as the Christian Sabbath, are, upon conviction for violating the first day of the week, or Sunday, by working or pursuing any worldly employment, amenable to the penalties inflicted by the Act of the Assembly. In answer to the position that it exalts the religious belief of certain sects over that of others, BELL, J., says: "though it may have been a motive with the law makers to prohibit the profanation of a day regarded by them as sacred — it is not perceived how this fact can vitally affect the question at issue. All agree that to the well-being of society periods of rest are necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed, may enjoy respite from labor at the same time. They may be established by common consent, or, as is conceded, the legislative power of the State may, without impropriety, interfere to fix the time of their stated return, and enforce obedience to their direction. When this

happens, some one day must be selected, and it has been said that the round of the week presents none, which being preferred might not be regarded as favoring some one religious sect. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction, &c. Yet this does not change the character of the enactment. It is still essentially a civil institution, made for the government of man, as a member of society, and obedience to it may properly be enforced by penal sanctions." In South Carolina the question arose, whether Jews could enjoy immunity from the law prohibiting sales on Sunday. This question was very fully considered in *Charleston* v. *Benjamin*, 1 Law Rep. N. S. 7, and it was there held that the right of appointing the Sabbath, as a day of rest from labor, must be regarded as a municipal institution, conducive to civil expedience. "This," says O'Neal, J., "is a mere police or municipal regulation. If the Israelite were allowed to make the objection, that he could not be constitutionally restrained from pursuing public business on Sunday, the infidel would say, all days are alike to me, and therefore I will at all times pursue my business. Such an assumption is so preposterous, that no one would tolerate it." The same views were held in *Shaw* v. *State*, 5 Eng. 262, and in *Commonwealth* v. *Wolfe*, 3 S. & R. 48. It was held by the Supreme Court of Ohio, in *Bloom* v. *Richards*, 2 Warden, 388, that the statute prohibiting labor on the Sabbath, is to be regarded as a mere municipal or police regulation, the validity of which is neither weakened nor strengthened by the fact that the day of rest it enjoins is the Sabbath. By recurring to the debates of the convention by which the constitution of this State was formed, it will be perceived that the establishment of the Sabbath was regarded simply as a civil institution; while it was conceded that it was within the general powers of the Legislature to select a day of rest, on which labor and recreation might be prohibited, it was

denied that they had any right to prescribe this as a day of *worship,* to those who might believe another to be the proper Sabbath. Perley's Debates, 74.

The Jews and the seventh day Baptists regarding Saturday as divinely set apart for rest, find legal impediments to labor on the Christian Sabbath, when they believe it may be lawfully done, and conscientious scruples to their laboring on the preceding day, so that between the law and their consciences they are compelled to abstain from labor on both days; yet this is not regarded as hurting, molesting or restraining them in their persons, liberties or estates, within the meaning or constitutional prohibitions similar to our own; nor as creating a subordination or preference of one sect over another. Much more, then, should not the selection of the Bible as a book in which reading only is to be taught, be regarded as in the slightest degree in conflict with this portion of the bill of rights.

But the objection is urged that this is the creation of a religious test. But no requirements as to belief are made essential to entitle a scholar to the benefits of the common schools of the State. He may be a Jew or Mahomedan, a catholic or protestant, he may believe much or little, according to the instructions received at home — and for no such cause is he to be deprived of instruction. The State opposes no test or other impediment for the purpose of debarring any one from the public schools.

But the claim of the plaintiff is much more liable to the exception that it is creating the subordination or preference of one sect or denomination over another. Her claim to be exempted from a general regulation of the school rests entirely on her religious belief, and is to the extent that the choice of reading books shall be in *entire subordination to her faith, and because it is her faith.* The preference is manifestly given, if, in the selection to be made, the defendants were bound to defer to the doctrines and authority and teachings of the sect of which she is a member. The right of negation is, in its operation, equivalent to that of

proposing and establishing. The right of one sect to interdict or expurgate, would place all schools in subordination to the sect interdicting or expurgating.

If the claim is, that the sect of which the child is a member has the right of interdiction, and that any book is to be banished because under the ban of her church, then the preference is practically given to such church, and the very mischief complained of, is inflicted on others.

If Locke and Bacon and Milton and Swift are to be stricken from the list of authors which may be read in schools, because the authorities of one sect may have placed them among the list of heretical writers whose works it neither permits to be printed, nor sold, nor read, then the right of sectarian interference in the selection of books is at once yielded, and no books can be read, to the reading of which it may not assent. Because Galileo and Copernicus and Newton may chance to be found in some prohibitory index, is that a reason why the youth of the country should be educated in ignorance of the scientific teachings of those great philosophers? If the Bible, or a particular version of it, may be excluded from schools, because its reading may be opposed to the teachings of the authorities of any church, the same result may ensue as to any other book. If one sect may object, the same right must be granted to others. This would give the authorities of any sect the right to annul any regulation of the constituted authorities of the State, as to the course of study and the books to be used. It is placing the legislation of the State, in the matter of education, at once and forever, in subordination to the decrees and the teachings of any and all sects, when their members conscientiously believe such teachings. It at once surrenders the power of the State to a government not emanating from the people, nor recognized by the constitution.

The case finds, that the authorities of the sect of which the plaintiff is a member, regard it sinful to read in the version directed by the defendants — but if a book is to be

excluded for that cause, in one instance, it must be in all, and the use of books would be made to depend not upon the judgment of those to whom the law entrusts their selection, but upon that of the authorities of a church, so that each sect would have precedence as a sect and for that cause.

From the report, it appears that the plaintiff, from conscientious religious scruples, refused to read in the version designated by the defendants as the one to be used, and that she and her father both regarded it as sinful so to do, both having been so taught by the authorities of the church of which they are members.

As the suit is by the child, as her rights only are alleged to be violated, the conscientious religious views of the father are not involved in the determination of this suit. He is no party to it, for the purpose of obtaining compensation, nor is it brought on account of any infraction of his rights. The real inquiry is, whether any book opposed to the real or asserted conscientious views of a scholar can be legally directed to be used as a school book, in which such scholar can be required to read. The claim, on the part of the plaintiff, is that each and every scholar may set up its own conscience as over and above the law. It is the claim of an exemption from a general law because it may conflict with the particular conscience.

The action being by the scholar, the invasion being of its rights, it is apparent, that if the fact of opposition to conscience on the part of a child affords a well-grounded reason for its exemption from the general rules of the school — that it may operate to the exclusion of books to an indefinite extent. As the existence of conscientious scruples as to the reading of a book can only *be known from the assertion of the child, its mere assertion must suffice for the exclusion of any book* in the reading or in the hearing of which it may *allege* a wrong to be done to its religious conscience. The claim, so far as it may rest on conscience, is a claim to annul any regulation of the State, made by its

constituted authorities. As a right existing on the part of one child, it is equally a right belonging to all. As it relates to one book, so it may apply to another — whether relating to science or to morals. Error may reach the understanding by the hearing equally as by vision — by the ear as by the eye. As the child may object to reading any book, so it may equally object to hearing it read, for the same cause — and thus the power of selection of books is withdrawn from those to whom the law intrusts it, and by the right of negation is transferred to the scholars.

The right as claimed, undermines the power of the State. It is, that the will of the majority shall bow to the conscience of the minority, or of one. If the several consciences of the scholars are permitted to contravene, obstruct or annul the action of the State, then power ceases to reside in majorities, and is transferred to minorities. Nor is this all. While the laws are made and established by those of full age, the right of obstruction, of interdiction, is given to any and all children, of however so immature an age or judgment.

Neither can the committee select books, for they do not know all existing, and they cannot foreknow, all contingent and prospective scruples of conscience. If the fact that a book or some portions of it, is not in accordance with the conscientious scruples of some scholar, makes the requirement of its use by such scholar, or the permission of its use by another to whom it is unobjectionable in the presence of the dissenting scholar, the unconstitutional exercise of power, then the constitutional selection of books becomes a variable quantity, dependent on the present and temporary conscience of every scholar in every school.

But while the constitution recognizes "the goodness of the Sovereign Ruler of the Universe," it does not recognize the superiority of any form of religion or of any sect or denomination. It knows no religion, nor form of religion as such, as having any binding force over its citizens, against its will constitutionally expressed. It regards the Pagan

and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Budhist, the Catholic and the Quaker, as all possessing equal rights. The decrees of a council, or the decisions of the Ulema, are alike powerless before its will. It acknowledges no government external to itself—no ecclesiastical or other organization as having power over its citizens, or any right to dispense with the obligation of its laws. Its doctrine is the supremacy of the people, and that "all free governments are founded on their authority, and instituted for their benefit."

The Legislature establishes general rules for the guidance of its citizens. It does not necessarily follow that they are unconstitutional, nor that a citizen is to be legally absolved from obedience, because they may conflict with his conscientious views of religious duty or right. To allow this would be to subordinate the State to the individual conscience. A law is not unconstitutional, because it may prohibit what a citizen may conscientiously think right, or require what he may conscientiously think wrong. The State is governed by its own views of duty. The right or wrong of the State, is the right or wrong as declared by legislative Acts constitutionally passed. It may pass laws against polygamy, yet the Mormon or Mahomedan cannot claim an exemption from their operation, or freedom from punishment imposed upon their violation, because they may believe, however conscientiously, that it is an institution founded on the soundest political wisdom, and resting on the sure foundation of inspired revelation. It may establish a day of rest, as a civil institution, though the effect of it may be to deprive the Jew of one sixth of his time, for purposes of labor or of business.

The claim of exemption from the operation of a general law, as a matter of right, has received the consideration of Courts of the greatest learning and ability. The case of *Simons, Ex.* v. *Gratz*, 2 Penn. 412, involved the question whether the affidavit of a Jew, who was one of the plaintiffs, that he could not appear in Court on Saturday from

conscientious scruples, that day being his Sabbath, and that the cause could not be tried without his assistance, presented a ground for the continuance of the case. In delivering the opinion of the Court, GIBSON, C. J., says, "the religious scruples of persons concerned in the administration of justice will receive all the indulgence that is compatible with the business of government, and had circumstances permitted, this case would not have been ordered to trial on the Jewish Sabbath. But when a continuance for conscience's sake is claimed as a matter of right, the matter assumes a different aspect. It has never been held, except in a single instance, that the course of justice may be obstructed by any scruple or obligation whatever. The sacrifice that ensues from an opposition of conscientious objection to the performance of a civil duty, ought, one would think, to be on the part of him whose moral or religious idiosyncracy makes it necessary; else a denial of the lawfulness of capital punishment would exempt a witness from testifying to facts that might serve to convict a prisoner of murder, or to say nothing of the other functionaries of the law, excuse a sheriff for refusing to execute one capitally convicted. This is an exemption which no one would claim, yet it would inevitably follow from the principle insisted on here." In *Commonwealth* v. *Lesher*, 17 S. & R. 155, the question arose whether it was a good cause of challenge to a juror, by the Commonwealth in a capital case, that he has conscientious scruples on the subject of capital punishment. "The question," remarks GIBSON, C. J., "has been argued in part as if it stood on a challenge by the juror himself. It would be more difficult to sustain such a challenge than that which has been made by the Attorney General. It is declared in the constitution, (art. 9, § 3,) that 'no human authority can in any way control or interfere with the rights of conscience.' But what are those rights? Simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion, and to do or forbear to do, any act the doing or forbear-

ing of which is not prejudicial to the public weal. But *salus populi suprema lex* is a maxim of universal application; and when liberty of conscience would interfere with the paramount rights of the public, it ought to be restrained. Even Mr. Jefferson, than whom a more resolute champion of liberty never lived, claims no indulgence for any thing that is detrimental to society, though it springs from a religious belief or no belief at all. His position is, that civil government is instituted only for temporal objects, and that spiritual matters are legitimate subjects of civil cognizance no farther than they may stand in the way of those objects. He denies the right of society to interfere only when society is a party in interest, the question and the consequence being between the man and his Creator. But as far as the interests of society are involved, its right to interfere on the principle of self-preservation is not disputed. And this right is resolvable into the most absolute necessity, for were the laws dispensed with whenever they happen to come into collision with some supposed religious obligation, government would be perpetually falling short of the exigency. There are few things, however simple, that stand indifferent in the view of all sects into which the Christian world is divided." In *Stansbury* v. *Marks*, 2 Dall. 213, a Jew, who refused to be sworn as a witness, in a cause tried on a Saturday, because it was his Sabbath, was fined by the Court. In *U. S.* v. *Coolidge*, 2 Gall. 384, one who was not a Quaker, but who refused to be sworn on the ground of conscientious scrupes, was in consequence of such refusal committed as for a contempt. The conscientious belief of religious duty furnishes no legal defence to the doing or refusing to do what the State within its constitutional authority may require. If it were so, the obligations of a statute would depend not upon the will of the State, but upon its conformity with the religious convictions of its members. When a conflict arises, as it may, between the requirements of law and the obligations of conscience, each man must determine his course of action according to his views of duty and of right.

The claim on the part of the plaintiff has been argued as a question of strict right. As such, without reference to what may be wise or expedient, it has been considered and determined by the Court.

The trust conferred upon those who have the superintendence of our public schools is hardly inferior in importance to that of the administration of the government. Indeed, the government itself depends in no slight degree upon the education of those by whom it is hereafter to be controlled. Amid the various and conflicting differences on moral, political and religious subjects, there is need of mutual charity and forbearance — of mutual concession and compromise. Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen. It is the duty of those to whom this sacred trust is confided, to discharge it with magnanimous liberality and Christian kindness. While the law should reign supreme, and obedience to its commands should ever be required, yet in the establishment of the law which is to control, there is no principle of wider application and of higher wisdom; commending itself alike to the broad field of legislative, and the more restricted one of municipal action — to those who enact the law, as well as those who, enjoying its benefits and privileges, should yield to its requirements, than a precept which is found with almost verbal identity in the versions which, from education and association, are endeared to the respective parties in litigation, "All things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets."

Plaintiff nonsuit.

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

FOLSOM *& al. versus* MERCHANTS' MUT. MAR. INS. CO.

No action can be maintained upon a policy of insurance, where the assured had no interest in the property insured, at the time when the policy was executed, or when the property was lost.

Any *lien* for his advances which may be given to the merchant upon the *outfits* of a vessel for a fishing voyage, by him sold *unconditionally* to the owner of the vessel, is dissolved, when he parts with the possession of the property sold. If the possession of the *vendee* follows *immediately* the conclusion of the sale, *no lien* can attach.

After *such outfits* have gone into the *entire possession* of the buyer, the seller has no interest in them that is insurable, although a lien upon them for his security, was agreed between them.

A policy of insurance will not be invalid, although the commencement and termination of the risk are not distinctly stated, if the intention of the parties with respect thereto can be satisfactorily gathered from its provisions.

Any obscurity in its meaning may be removed by reference to the situation of the parties.

When the place from which a voyage is to be made is not stated in the policy, evidence that the vessel was at a certain port when the policy was executed, and there received on board the property insured, and sailed from thence on the voyage, determines the risk to commence from that *place*.

A deviation afterwards will avoid the policy.

If, after such commencement of the voyage, the vessel stops at a neighboring port for additional men, under the plea of *usage*, such an usage must be proved, as would show that the parties had reference to it when the insurance was obtained.

Of the proofs required to establish such usage.

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

ASSUMPSIT on a policy of insurance made to the plaintiffs on May 17, 1852, "on account of whom it may concern, loss payable to them," on the outfits of schooner Pilot, for a fishing voyage to the "Banks" and back to port of discharge in the U. S.

The writ contained several counts, one of which averred that the insurance would be collected by plaintiffs, as agents and merchants, for owners of said Pilot, to whom the same may in law belong, subject to the plaintiffs' lien thereon.

The policy was read and a demand upon defendants admitted.

The plaintiffs' evidence tended to show, *that* one Partridge was owner of the schooner, and that the captain, as his agent, obtained the outfits for the vessel for a fishing voyage, from the plaintiffs at their store in Bucksport, and that they were to have a lien on the outfits and voyage for their pay, as was customary; this was the understanding; *that* the vessel was seaworthy and sufficiently manned, and the captain sailed from Bucksport on the 18th, or 20th of May, 1852, with seven men on board, sufficient for sailing the vessel, but two more would be convenient and profitable for purposes of fishing; *that* two men had left them at Bucksport, and *there* their places could not be supplied; *that* they sailed to Isle au Haut, part of the town of Deer Isle, and eight miles from other land, not finding men there, went to Deer Isle proper, and failed there; sailed back to Isle au Haut and could obtain but one man; *that* the captain engaged a pilot and while going out of the harbor, bound on the fishing voyage, on the evening of May 31, on account of the current and going down of the wind, the vessel was stranded at a place called Burnt Thoroughfare, upon the north-eastern side of said Isle au Haut; *that* the vessel was badly damaged with the outfits, and under a survey, was sold; *that* Deer Isle and Isle au Haut were on the track of a voyage to the Banks from Penobscot river and bay.

They also introduced evidence tending to show, that vessels leaving Penobscot river and bay, called frequently at the Islands for men and other things; and that it was a common practice for fishermen, to rendezvous there, and that they have called for men when bound for the Banks.

The protest and survey were also in the case.

When the plaintiffs had introduced all their evidence, a nonsuit was ordered on motion of defendants, because the suit could not be maintained in the name of the plaintiffs, and because of a deviation in the voyage.

The plaintiffs excepted.

J. A. Peters, in support of the exceptions, that the first reason for the nonsuit was not correct, cited, *King* v. *State Mut. Fire Ins. Co.,* 7 Cush. 1; 5 Metc. 386; Phil. on Ins., 2d ed. 2d vol. 593; *Farrow* v. *Com. Ins. Co.,* 18 Pick. 53.

That there was no deviation, he relied upon the usage which was proved, but if not proved satisfactorily to the Court, it was a matter to be determined by the jury, and a nonsuit was improper. 17 Maine, 465; 2 Gill. & John. 136; *Noble* v. *Kennedy,* Douglass, 510; *Bentaloe* v. *Pratt,* Wallace, 64. He also contended, that the risk did not attach until the final sailing from the Isle au Haut; that the vessel was not prepared for the voyage before. Phil. Ins. vol. 1 2d ed. 355. That the vessel left Bucksport for a temporary .purpose, distinct from the object of the voyage, as in the case of a vessel named in *Dennio* v. *Ludlow,* 2 Cains, 3; *Risdale* v. *Newnham,* 3 M. & S. 456, cited in Phil. 1, 364.

Rowe & Bartlett, contra, cited, *Forohaw* v. *Chabret,* 3 Brod. & Bing. 158; 3 Kent's Com. 311, 312, 313; 1 Phil. Ins. 481; *Macy & al.* v. *Whaling Ins. Co.,* 9 Metc. 363.

TENNEY, J. — Two material questions are presented by the exceptions. First, had the plaintiffs any insurable interest in the property described by the policy at the time of its execution, and at the time of the loss of the property? Second, had the plaintiffs so conducted in reference to the property, that they were guilty of a deviation in the voyage?

1. The attempted insurance was upon the outfits of the fishing schooner Pilot, bound to the Banks. This does not embrace goods, as a part of the cargo, but in a fishing voyage consists principally in the apparatus and instruments necessary for the taking of fish, &c., and the disposing of them, when taken, in such manner as to bring home the produce of the adventure. *Hill* v. *Patten,* 8 East, 373. In cod fishing voyages as they are conducted in the United States, the outfits consist of the great and the small *general.*

The *great general* is supplied wholly by the owners, and includes the salt for curing the fish, the bait, premium of insurance and some other small articles and expenses. The *small general* is supplied by each man for himself, and consists mostly of the provisions and fuel. The insurable interest of the owners accordingly consists of their interest in the vessel, and the *great general*, and their proportion of the fare or *stock*. 1 Phil. on Ins. 145, 146.

The master of the vessel testified, that Partridge was the owner of the vessel; that she was fitted by the plaintiffs; outfits came from their store in Bucksport; they have a lien on the voyage and outfits, till they get their pay out of the same; such was the understanding; and on cross-examination he stated, "I obtained the supplies of the plaintiffs as agent, and on the credit of Partridge. I told one of the plaintiffs, that they might have a lien on the outfits and voyage for their pay, for that was customary; took no bill of outfits. That was the amount of conversation about the lien. Mr. Partridge, I suppose, was also liable for the goods."

From the evidence of the plaintiffs, the goods constituting the outfits were sold to the owner of the vessel unconditionally, subject only at most to a lien thereon as security for payment for the price under the contract. The evidence does not show what was designed to be the nature and extent of the lien, any further than the word itself imports. Lien has been defined to be the right of one man to retain that which is in his possession, belonging to another, until certain demands of him, the person in possession, are satisfied. *Hammond* v. *Barclay*, 2 East, 235; Story's Agency, § 352. And it is said by Judge STORY, in the same work, § 356, that when liens arise by contract express or implied, they are more properly pledges than liens. And it is an universal principle, that a voluntary parting of the goods will amount to a waiver or surrender of the lien.

In *Seamans* v. *Loring & al.*, 1 Mason, pp. 138 and 139, it is said by Judge STORY, "a lien may be acquired for ad-

vances by a mere possession, under a contract for that purpose, but it is of the very essence of the lien on goods, that possession accompanies it." "A voluntary parting with the goods will amount to a waiver or surrender of the lien." *Brackett* v. *Hayden*, 15 Maine, 347.

The outfits, from their nature and character, were expected to be worn out by use, and to be so disposed of that their identity would not be preserved. And when they were suffered to go into the possession of the purchaser, and were surrendered by the plaintiffs, if it was at the moment that the sale itself was perfected, the lien did not attach; if it was after the purchase had been concluded, the lien was surrendered. It does not appear that there was any agency of the plaintiffs, designed to maintain their possession, and there was no insurable interest in them after the owner of the vessel had the entire possession.

This lien, from the nature of the property and its intended use, is unlike that secured by contract, and to attach to property designed to be modified in its form, without losing its identity, for the purpose of being made more valuable; in which case the surrender of the possession is qualified, and for an object entertained by the parties to the contract, when it was made, and not inconsistent with the constructive possession of the property. *Bradeen* v. *Brooks*, 22 Maine, 463.

It is averred, in the new count filed by leave of Court, that the sum covered by the insurance will be collected by the plaintiffs, as agents and merchants, for the owners of the vessel, to whom the same may in law belong, subject to the plaintiffs' lien thereon. There is nothing in the case showing that the insurance was intended for the benefit of the owner of the vessel, by the plaintiffs, professing to act as his agents, or that they were ever employed for such a purpose. The policy purports to be insurance only of the plaintiffs' interest in the outfits, and it can cover nothing beyond. *King* v. *State Mut. Fire Ins. Co.* 7 Cush. 1; *Cushing* v. *Thompson*, 34 Maine, 496.

2. Was there a deviation and change of the risk purporting to be assumed, so that the defendants are not liable? The policy does not state in terms from what *time*, or from what *place* the risk is to commence. Nothing is said in the contract of assurance, where the outfits were at the time of the execution of the policy; or where they were expected to be when the policy was to attach; or from what port the vessel was to sail upon the voyage.

It has been held to be requisite, that the policy should specify what risk the insurers assume when the risks commence, and for what period they are to continue, or by what event they are to terminate, though there is no positive regulation by law upon this subject in England or the United States. 1 Phil. on Ins., 436 and 437. When the insurance is on a particular voyage, there is generally no reference to any time. The *termini* are the places *from* and *to* which the vessel is bound. These are to be expressed in the policy, and if left in uncertainty by any omission or blank, or when either appears to have been mistakenly or untruly stated, the policy is void. *Manley* v. *U. S. M. & F. Ins. Co.*, 9 Mass. 85. And it has been said, "if a ship be insured from London to ———," the risk will not attach for want of a sufficient description. Molloy, b. 2, c. 7, § 14. But Courts do not require a very minute accuracy in the description of the risk, and it is in general sufficient, if the intention of the parties in respect to the commencement and ending of the risk can be satisfactorily gathered from the policy; any accidental errors or inconsistency in immaterial circumstances will not defeat the contract. 1 Phil. on Ins. 437.

Contracts are often written hastily, and without great care, and the meaning is not always obvious, without some reference to the situation of the parties contracting. And this reference may remove the obscurity which sometimes is found to exist without it; and it may be as proper to take it into consideration as in other contracts. *Cummings* v. *Dennett*, 26 Maine, 397.

The evidence in the case shows that the outfits came from

the plaintiff's store in Bucksport; that two of the crew had left the vessel at that place; that the policy was executed on the 17th day of May, 1852, and that she sailed from Bucksport on the 18th or 20th of the same month, with a sufficient crew for sailing the vessel; but two additional men were needed to make the proper number for the purposes of fishing. By the notarial protest, it appears that the master and mate of the vessel made oath that the vessel sailed from Bucksport, bound to the Grand Banks; that the vessel at the time of her sailing was tight, strong and substantial, and well and sufficiently manned, and equipped and provided in every respect for such a vessel on such a voyage.

Chancellor Kent, in 3 Com., p. 256, (1st ed.,) says, "the risk upon a cargo is subject to much modification of the parties, but it usually commences from the loading thereof aboard the ship." No valid reason is seen for a distinction between a cargo and the outfits of a fishing voyage in this respect. And it cannot be doubted that the vessel not only sailed from Bucksport, but the outfits were put on board at that port. If there is not such an uncertainty in the risk designed to be covered by the policy, as to make it valid, it is quite certain by the plaintiffs' evidence, that Bucksport was the place at which the policy attached.

But it is contended by the plaintiffs, that the sailing from Bucksport was for a temporary purpose only, designed to proceed to Isle au Haut, which is directly in the way from Bucksport to the Banks, for the purpose of completing the *fishing* crew, in conformity to an usage which the parties to the policy must have understood and adopted, as a part of it when it was executed.

A presumption arises, that parties mean to contract and to deal according to the general usage, practice and understanding, if any such exist in relation to the subject matter. If there be a doubt as to the existence of the custom, it is proper to prove it, as a fact, by evidence. It must be proved by evidence of facts, and not by mere speculative opinion, by means of witnesses, who have had frequent experi-

ence of the custom. 2 Stark. Ev. 453. "Usage can be resorted to," says Judge Washington, "when the law is doubtful, and unsettled, and even then the question must be determined by the usage, and not by the opinion of witnesses." *Winthrop* v. *Union Ins. Co.*, 2 Wash. 7. Usage, to be binding, must be uniform and universal, and not a way of dealing at particular houses. *Wood* v. *Wood*, 1 Car. & P. 59.

An insurance of any particular voyage will imply the liberty to touch at a port, if that be the usage, though the policy contains no express provision for this purpose. But it must appear, that the course is so uniformly pursued, that it may be presumed to be known to the parties. 1 Phil. on Ins. 492, 493. "Customs acquire the form of law, because, as they must be ancient, uniform and reasonable, they must have been generally received, known and approved." *McGregor* v. *Ins. Co. of Pennsylvania*, 1 Wash. 39. *Bentaloe* v. *Pratt*, Wallace, 64, was a case where it was determined that two instances did not constitute an usage, which would affect a policy.

The evidence introduced, and relied upon to prove an usage of fishing vessels bound from Bucksport to the Banks, to touch at Isle au Haut to fill up their crews, which will bring this case within the principle established, has no tendency to produce such a result. Fishing vessels, and others, often touch at harbors, as their various wants and necessities from time to time may require, or render desirable to those having the control of them; and those sailing near the Isle au Haut may touch or rendezvous there, for such objects as witnesses have stated, as they come down the coast or from the rivers and bays in the vicinity; but this evidence carried to any extent, does not amount to the truth of the proposition, that there is an usage, uniform and universal, well established, of vessels sailing from Bucksport to the Banks, to touch at that place on their passage, so that parties to policies are presumed to know and be governed by it.

Again it is insisted, that the vessel did not "sail," in the meaning of the policy, till her final departure from the Isle au Haut, and certain cases are referred to, as decisive of this point. These cases are those in which there was a warranty on the part of the assured to "sail" on or before a specified time. In one where the vessel was insured at and from Savannah, and vessels of heavy burden dropped down to a port several miles below, to take in a part of the cargo, and the vessel insured waited at the latter port, for the recovery of the captain from sickness, it was held that the vessel did not "sail" till her departure therefrom. The other was where goods and freight were insured, at and from Pont Neuf, thirty miles above Quebec, on the St. Lawrence, with warranty to sail on or before Oct. 28. Vessels from Pont Neuf cleared at the custom house at Quebec, to which place the captain had gone to obtain his papers. The vessel dropped down with a crew suitable for river navigation, but insufficient for the voyage afterwards, on Oct. 26th, and arrived at Quebec on the 29th, took in the captain and the residue of the crew, but failing to obtain a pilot, the vessel did not leave the latter port, till the 30th. It was held, that the vessel did not "sail" on the 28th of Oct., or before.

These cases do not decide that if the vessels went from Savannah and Pont Neuf in a seaworthy condition, with intention to touch at ports below, in pursuance of an usage which all engaged in the business understood; that the underwriters would not be holden for losses which might have happened before the vessel "sailed" in the technical meaning of the term. The questions were whether the vessels had sailed according to the warranty of the assured, and as a consequence, whether the policies ever attached; not whether there had been a deviation, and the underwriters were excused from their liability under a policy which had become effectual.

If the contract of insurance was from Bucksport to the Banks, without the right to touch at Isle au Haut, under the

policy or otherwise, doing so was a deviation. The case of *Murray* v. *Col. Ins. Co.*, 4 Johns. 443, was a policy on ship and freight, on a voyage at and from Calcutta to New York, with liberty to touch at Madras for trade, and to take in a part of the cargo. The vessel took in the whole cargo at Madras, without going to Calcutta. The Court said, "It is impossible to say that a voyage from Madras to New York is the same as a voyage from Calcutta to New York. The adventure is to begin at and from Calcutta. I should not think it competent for the assured to select at pleasure any point of the *iter*, and say the voyage insured shall begin there."

The vessel went from Bucksport to the Isle au Haut, and stopped there for the purpose of making up the number of men for their fishing crew; then went to Deer Isle, a distance of eight miles, and failing to obtain men, returned to Isle au Haut, and when going out of the harbor the disaster took place. The course taken by the vessel was clearly a deviation, which, upon this ground, is an obstacle to the plaintiffs recovering in the action.

Exceptions overruled. Nonsuit confirmed.

SHEPLEY, C. J., and HOWARD, J., concurred in the result only. — HATHAWAY, J., concurred.

JORDAN *& al., in Equity, versus* WOODWARD.

On a question arising between the owners of a water privilege, as to the alleged use by one of them of a larger share than he is entitled to, and a detriment thereby to the plaintiffs, the Court will not interpose an injunction.

Unless the right supposed to be invaded, has been established by law, or been long enjoyed without interruption, or there exists an imperious necessity, such process cannot be invoked.

BILL IN EQUITY, to which was filed a general demurrer.

The substance of the bill appears in the opinion of the Court.

J. A. Peters, for defendant.

Robinson, for plaintiffs.

APPLETON, J. — The bill alleges, that the complainants are the owners and entitled to the use of four-fifths, and the respondent of one fifth of the water of the "five saw dam," so called; that within six months past, the respondent has erected a mill, and during that period drawn one-third of the water instead of the one-fifth, to which he was justly entitled; and that in consequence of such wrongful act, they have been deprived of the use of a portion of the water belonging to them. Then follows the prayer for an injunction. There has been no judicial decision establishing a violation of the rights of the complainants. The wrong, of which complaint is made, is of recent date. In *Reid* v. *Gifford*, 6 Johns. Chan. 19, the diversion of water complained of had been for more than three years, but the injunction was denied, because the right had not been first settled at law. It is not every violation of the rights of another, which may be ranked under the general head of nuisance, which will authorize the interposition of this Court by means of an injunction. It must be a case of strong and imperious necessity, or the right must have been previously established at law, or it must have been long enjoyed without interruption. *Olmsted* v. *Loomis*, 6 Barb. 153. No irreparable mischief is threatened. The courts of law afford ample remedies for all damages, which have occurred or which may occur. In *Porter* v. *Witham*, 17 Maine, 292, the principles here considered were fully examined and affirmed. According to the uniform course of the decisions, the complainants are not entitled to an injunction.

Demurrer sustained. Bill dismissed with costs for defendant.

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

WATERHOUSE *versus* FOGG.

To support a charge against the defendant for procuring a writ in the name of a third person, the plaintiff's book, with his suppletory oath, is a legal mode of proving it.

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

ASSUMPSIT on account annexed.

With other evidence the plaintiff offered his book of original entries and suppletory oath.

Among the items charged in plaintiff's account was one as follows:—

"1852, June 13,—To 1 D. C. writ, Stephen Decker *v.* James Palmer; Joshua Fogg, plaintiff in interest."

The defendant's counsel objected that the plaintiff's book, with his oath, was not sufficient to prove that charge, and requested the Judge so to instruct the jury.

But he refused and instructed them that such evidence alone was competent to prove that charge and any other of like character.

The verdict was for plaintiff and defendant excepted.

Robinson, in support of the exceptions.

Waterhouse, pro se, contra.

TENNEY, J. — The action was *indebitatus assumpsit*, on an account annexed. Among the items of charge was the following:—"1852, June 13.—To 1 D. C. writ, Stephen Decker *v.* James Palmer; Joshua Fogg, plaintiff in interest." The book of original entries, verified by the plaintiff's suppletory oath, was in the case without objection. But it was contended that this was a transaction between other parties, and that this evidence was not sufficient to prove that charge.

If the plaintiff had made the writ for and on the credit of Stephen Decker, and the defendant was the party interested as the plaintiff in the suit, and the charge had been made to the latter, the book might be insufficient evidence

in support of the claim. But the case here, as disclosed by the book is, that the defendant obtained of the plaintiff a writ against James Palmer, on a demand claimed by him, but in the name of Decker. This would not render the general principle in relation to the sufficiency of books of a party, verified by his oath, inapplicable to this case.

Exceptions overruled.

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

MACE *versus* WOODWARD.

Where a special appearance is entered for the purpose of presenting a motion to dismiss the action for want of a legal service, unless made within the time allowed for filing pleas in abatement, it cannot prevail.

But if, on inspection of the writ, no legal service appears to have been made, the Judge may, *ex officio*, dismiss the action.

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

ACTION ON THE CASE. The *ad damnum* was laid at $3,000.

The writ purported to be served by a constable.

At the return term an attorney entered his appearance for the defendant "specially," and on the third day of the term when the writ was entered, and before the new docket was called, moved that the action be dismissed for want of proper service.

It was stipulated that if the motion should have been allowed, the plaintiff is to become nonsuit; otherwise to stand for trial, as the opinion of the Court shall be as to the legal rights of the parties.

Wiswell, for defendant.

Herbert, for plaintiff.

TENNEY, J. — A special appearance was entered for the defendant, in order to present the motion to the Court to dismiss the action for want of a legal service.

Pleas in abatement must be filed within two days after the entry of the action, the day of entry being reckoned as one. Rule 17, *Regulæ Generales*, 1 Greenl. 416. Motions in the nature of pleas in abatement should be presented in the same time.

The motion in this case was too late by the rule, and could not avail, if the action could proceed, provided none had been made. But the return on the writ, in which the damage sued for is the sum of $3,000, purports to be signed by a constable, and it does not constitute a service, such as the statute requires. R. S., c. 104, § 34. A judgment in the action would be erroneous. *Hart* v. *Hutchins*, 5 Mass. 260. The Judge had the power, *ex officio*, to dismiss the action. *Lawrence* v. *Smith*, 5 Mass. 362; *Tingley* v. *Bateman*, 10 Mass. 343. An entry should be made that all further proceedings stay.

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

CARPENTER, *Petitioner for Review, versus* SELLERS.

Where the defence to an action failed because evidence of the contents of a document was admitted, the *loss* of the original not being properly established, the fact that the document was subsequently found, furnishes no sufficient reason for a review.

THIS was a petition for review of an action wherein the respondent was demandant in a writ of dower. The case is reported in vol. 33, p. 485. The defence in that suit was, that the demandant had relinquished her dower in the premises in a mortgage deed executed by her husband and herself. The loss of it was attempted to be proved, evidence of its contents was admitted, and the case referred to the full Court on report to be decided on the evidence admissible.

The Court found, that no sufficient evidence of the loss of the deed had been produced, the secondary evidence was ex-

cluded, and the tenant defaulted. Subsequently the deed was found and is the basis of this application for review.

Kent and *C. J. Abbott*, for petitioner.

J. A. Peters and *H. Williams*, for respondent.

TENNEY, J. — This is an application for the review of an action in which the respondent demanded dower of the petitioner, and was defended on the ground, that she relinquished her right to the same, in a mortgage deed given by her husband, to one Wardwell, who died testate. The case was decided by the whole Court, upon so much of the evidence reported as was deemed by it admissible. The mortgage itself was not introduced. The petitioner proved the genuineness of the signature of the one, who purported to have been the subscribing witness, and adduced evidence of the loss of the deed, and thereupon parol testimony was received of the contents of the same.

The whole Court being of the opinion that the deed was not shown to be lost, because the sources of information had not been exhausted, the petitioner was defaulted in the action. It was proved, that the mortgage, with the note described in the condition, was sold at auction by the executors of the last will and testament of the mortgagee. The persons to whom the sale was made were not called as witnesses, and the Court held, that it was reasonable to suppose, that one of them took the mortgage after the purchase.

It now appears, that the mortgage was in the hands of one of the executors at the time of the sale and for a long time afterwards, and it has been found among the papers belonging to the estate of his testator since the trial.

An examination as witnesses of those who purchased the mortgage would not of itself have shown that the deed was not lost or destroyed; but it would reasonably have directed the inquiry to the executors, with whom the mortgage was proved to have been before the sale, when the purchasers should have stated, that they did not take it, at the

time of the purchase or afterwards. One of the executors was examined at the trial, and stated, that the deed was not with him. But the other, who, as it now appears, was not examined, had the possession, and on search could have found it.

The petitioner chose to risk the issue of his suit upon the evidence which was adduced. It would not be contended, that a review could be properly granted, if the deed had not been found, for the purpose of introducing the testimony of those who purchased the mortgage; and it is not perceived, that he now stands on any better ground, than he might have stood, if he had done what he was bound to do, before parol evidence of the contents of the deed was admissible. On the failure to obtain information of the deed from the testimony of the purchasers, it might have been necessary to obtain a delay in order to procure the testimony of the executor, who had not been examined. If delay was given, proper diligence would have brought the deed to light. If delay would have been unreasonable, a review would now be equally so.

Petition dismissed with costs.

HOWARD, J., concurred in the result. — APPLETON, J., concurred.

JORDAN *versus* OTIS.

A deed of a *saw-mill*, the sills of a part of which rest upon another mill owned by same grantors, transfers to the grantee, the right to continue that connection during the existence of his mill, and while such connecting timbers last.

A deed, free from ambiguity, cannot be limited in its legal effect, by parol testimony.

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

TRESPASS.

The parties were owners of two saw-mills in Ellsworth, situated within one or two feet of each other. They de-

rived title from the same grantors, but the plaintiff's title was the elder, and by his deed was conveyed to him, "the saw-mill," &c.

It appeared in evidence, that the mills were under different roofs, and had no connection above the bed or floor of the mills. The defendant's mill was built the earliest, and the plaintiff's mill below the flooring was connected with the other by its flooring beams resting on the side timbers or streak sills of the other; and below the floor and above water was connected by being posted.

The defendant wished to repair and make an improvement in his mill, and the acts complained of were necessary to accomplish that purpose.

It appeared that he cut one of the cross sills of the plaintiff's mill partly off, so that where it rested on the streak sill, it occupied only one-half the space it did before; and that he knocked another off, which was rotten.

When the floor timbers were cut away from the *streak sills*, the bed of plaintiff's mill would settle down and fall, unless shores were placed under to sustain it.

When the defendant did the acts testified to, the bed of plaintiff's mill settled on to the shores.

It was in evidence that Jordan's mill and bed can be made substantial without the use of the *streak sills*.

The action was for cutting those sills of Jordan's.

The defendant offered Seth Tisdale as a witness, who was one of plaintiff's grantors, to show, that at the time of the conveyance to plaintiff, he informed him he could rest his timbers on the *streak sills* only as long as the owner of *that mill* would consent. The testimony was excluded.

The Judge charged the jury, that upon this evidence, the plaintiff was entitled to recover, in law;—and a verdict was returned accordingly.

The defendant excepted.

J. A. Peters, for defendant.

1. In all the decisions where the conveyance of a mill, *eo nomine*, passes any *privilege* or *appurtenance*, it results

from the fact that such *privilege* or *appurtenance* was *necessary* to the enjoyment and use of the property conveyed. *Blake* v. *Clark*, 6 Maine, 436; *Wetmore* v. *White*, 2 Caines' Cases, 87; *Archer* v. *Bennet*, 1 Lev. 131. The law should be slow to convey property by implication. *Furbush* v. *Lombard*, 13 Met. 114.

2. From the evidence, this resting of the timbers upon defendant's mill was not necessary, and according to the cases cited, no right to continue it, passed by his deed.

3. The testimony of the witness offered should have been received. *Stone* v. *Clark*, 1 Met. 378, and cases there cited; *Freeland* v. *Burt*, 1 T. R. 701; *Brown* v. *Slater*, 16 Conn. 192; *Ropps* v. *Barker*, 4 Pick. 239; 1 Greenl. Ev. § 286; *Safford* v. *Annis*, 7 Greenl. 168.

Robinson, for plaintiff.

HATHAWAY, J. — The mills of the plaintiff and the defendant were on the same dam, and, above their foundation, were one or two feet apart. The parties derived title from the same grantors; the plaintiff by deed, Dec. 1, 1846; the defendant by deed, March 6, 1847. The two mills rested on a foundation of timbers, so interlocked, that the cutting away of the floor timbers of the plaintiff's mill from the streak sill of the defendant's, would cause the plaintiff's mill to settle and fall unless otherwise supported. The mills were thus situated when the plaintiff received his deed. The foundation of the plaintiff's mill, as it was, when he purchased, was necessary for the use, and for the support of the mill, and by his deed, he acquired the right to have it remain, as it then was, during the existence of the mill, if it should endure so long, and the defendant had no right to remove or impair it to the plaintiff's injury.

If the defendant wished to alter or repair his mill he had an undoubted right to do so, but not in such manner, as to destroy or injure the foundation of the plaintiff's mill, and that too without giving him any notice.

The testimony of Seth Tisdale was properly excluded.

The authorities cited by the defendant's counsel do not sustain its admissibility. The plaintiff has the elder title and his deed is free from ambiguity.

Exceptions overruled. — Judgment on the verdict.

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

STATE OF MAINE *versus* LEACH.

On a complaint under c. 48 of the Acts of 1853, praying for a warrant to search for spirituous liquors, where the name of the person by whom the liquors are alleged to be deposited, is stated, the warrant issued thereon must require the officer to *arrest* such person, and have him *forthwith* before the justice issuing it.

If in such case the warrant only require the respondent to be *summoned*, and such is the prayer of the complaint, the proceedings are unauthorized and insufficient.

Where such complaint and warrant, by leave of the justice, were amended, and it then appeared, that the complaint was made and warrant issued on the *fifth*, commanding the officer to arrest the respondent and have him before the justice on the *eighteenth* of the same month; *held*, that the complaint and warrant were illegal and void.

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

COMPLAINT *and search warrant* under the first section of c. 48, of the Acts of 1853. The place to be searched was the dwellinghouse of Peter Leach, the defendant, who was alleged to have deposited in his house spirituous liquors intended for illegal sale.

The complaint and warrant were made on Nov. 5, 1853. The complaint concluded with a prayer, "that said Peter Leach may be summoned to appear forthwith before the said justice at the North Penobscot school-house, in said town, on the nineteenth day of November, at one o'clock, P. M., to make answer," &c.

The warrant contained a similar requirement to summon defendant to appear at that time.

At the return day the defendant appeared, and by reason

of the absence of counsel for the State, the case was continued by the justice to the 22d of the same month, when a motion was made to quash the process for defects therein.

A motion by the counsel for the State was made to amend, which was allowed; and in the complaint the words "summoned to appear" were erased, and the words "arrested and brought" inserted in their place. The warrant was also changed to correspond with the complaint, and the officer's return was also altered by striking out "summoned" and adding "arrested."

A trial was afterwards had, and the respondent convicted and the liquor found ordered to be destroyed. The defendant appealed.

In the appellate Court many objections were made to the proceedings, which were all overruled, and the case was tried and the defendant convicted. Exceptions were taken to the rulings.

Only two of the objections made need be stated.

4. The warrant, as issued, served and returned, was not in conformity to law, inasmuch as it required the officer (if he found the liquors) to summon the defendant, &c.

5. Also, as amended and in its present shape, it is not sufficient because it requires the officer to have the defendant before the magistrate at a certain time, *eleven* days distant, and then make his return, instead of "forthwith."

Hinckley, in support of the exceptions.

Evans, Attorney General, *contra*.

The defect complained of was duly amended. The defendant was not obliged to appear on being summoned, and before he pleaded, was arrested agreeably to the amended warrant, and had "forthwith" before the magistrate.

If the warrant was defective in the particular stated, and would not for that reason justify the arrest, the defendant is not without his remedy. The officer, and perhaps the magistrate, may be liable; or he might have been relieved from arrest on *habeas corpus*. But it is no answer to the

complaint. The plea was to the *complaint.* If the warrant is merely the *authority* by which the defendant is brought before the Court, however deficient it may be, when he *is* before the Court, he answers to the complaint. That, and that only, is the matter to be heard.

Would the Court discharge a prisoner brought in upon a warrant, against whom an indictment had been found, for any defect in the warrant itself? Or would they hold the prisoner to answer to the indictment?

The statute authorized the amendment made.

SHEPLEY, C. J. — Whether the process was issued by virtue of the first or eleventh section of the Act approved on March 31, 1853, the name of the person by whom the liquors were alleged to have been deposited being stated, the Act declared that "the officer shall be commanded in and by said warrant, if he find such liquors, to arrest such person or persons and have them forthwith before the judge or justice, by whom such warrant was issued."

The complaint and warrant, as issued, did not contain such a prayer or command. The warrant was issued on November 5, 1853, in conformity to the prayer of the complaint, commanding the officer to summon the person named "forthwith to appear before me, at one of the clock in the afternoon at the North Penobscot school-house, in said Penobscot, on the nineteenth of November, 1853." These precepts were clearly illegal. They were not only unauthorized, but were issued in violation of the provisions of the statute.

The accused appeared on the day last named, and there being no counsel for the State, the case was continued to the twenty-second day of the same month, when the counsel for the accused made objection to the complaint, warrant, and service; and on motion of the attorney for the State the complaint was amended by an erasure of the words "summoned to appear forthwith," and by an insertion in their place, of the words "arrested and brought," so that the

complaint then prayed, that the person named might be arrested and brought before the justice on the 19th day of November; and the warrant was so amended as to command that he should be arrested and brought before the justice on that day.

These documents, as amended, were not authorized by the provisions of the statute, which commanded the arrest to be made, and the prisoner to be forthwith brought before the magistrate. They authorized the arrest and detention of the accused in violation of the provisions of the statute, from the 5th to the 19th day of November.

An amendment of the return of the officer appears also to have been permitted and made, not in conformity to the truth.

These processes being illegal, both before and after their amendment, cannot be sustained, and it will not be necessary to consider the other matters presented.

Proceedings quashed.

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

KENT *versus* BONZEY.

In an action of slander, that a *recantation* of the slanderous charge may be admissible in evidence, in mitigation of damages; —

It should be made in public, or in a mode to qualify the slander; or it should be made known to the party falsely charged, or to those who had been apprised of it; —

A retraction in the defendant's family *merely*, would not be such a recantation as would avail him.

An *unlawful* intermeddling with the defendant, or an *unlawful* attempt to search his person, will not authorize him to suppose such person may have taken his money, or excuse him for uttering such a charge.

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

SLANDER, for accusing the plaintiff and one Redman of robbing him of three or four hundred dollars on Sept. 24,

1851. "One of them held him and the other put his hand in his pocket and took the money out."

The defamatory words were proved. In the course of the defence, the defendant offered to prove by his son-in-law, that a day or two after the defendant was discharged from the jail, he, in the presence of his own family, retracted the charge, and said he lost the money, but accused nobody of taking it.

This testimony was objected to and excluded.

The defendant's counsel put in a copy of a warrant for search for spirituous and intoxicating liquors on the premises of the defendant, dated Sept. 23, 1851, and by the return of one Redman thereon, it appeared that intoxicating liquors were there found, the defendant arrested, tried before a magistrate and convicted, on Sept. 24th, of keeping such liquors for unlawful sale.

A physician was called by the defendant, who testified, that he was called to see him in jail, Sept. 24, 1851, and found his pulse at 100 and the man in a state of excessive excitement, and that he complained of being hurt. The next morning he was better, but still much excited. He also testified, that in January, 1853, in an office in Ellsworth, in the presence of five or six, the son of defendant asked the plaintiff if Redman, (who had also sued Bonzey for slander,) should recover one thousand dollars, whether or not he, (plaintiff,) would be satisfied to take a part of it. Kent said he did'nt know, "I had the hardest of it, I held him, while Redman robbed him or searched him."

There was also testimony that $300 were paid to defendant on Sept. 23, 1851. Other evidence was in the case, not material to an understanding of the exceptions.

The Judge instructed the jury, that if the defendant had money on his person and lost it, and the plaintiff or the officer laid hands upon him and searched him, or attempted to search him, and he was thereby induced to believe, and did believe, that they, or either of them had taken his money, that the defendant would be excused for making the charge

alleged in the writ, and the plaintiff could not prevail in this action.

The defendant requested the presiding Judge to instruct the jury: —

1st. *That,* if they believe that the plaintiff or the officer with whom, and under whose authority he acted, approached the defendant in jail, and laid hands upon his person, this was an unlawful act, and was such occasion to the defendant as would excuse him for any words spoken, which would otherwise be slanderous.

2d. *That,* if they believe that Kent, or the officer Redman, or both, made an attempt to search defendant's person for the key, in jail, or if they did search him for the key, then such acts were unlawful acts, and were sufficient to cause the defendant to suppose that the plaintiff may have taken his money, and thus the speaking is excused.

These requested instructions the Judge refused to give in full, but did instruct the jury, that if the plaintiff or the officer approached the defendant and laid hands on him in anger, it was an unlawful act; and that they had no right to search his person; and to do so, or attempt to do so, would be unlawful acts. But whether or not the plaintiff, or the officer did such unlawful acts, or attempted to do them, and whether or not what they did or attempted to do, was the occasion of the defendant's making the charge alleged in the writ, or a sufficient cause for him to have believed that they, or either of them took his money, and whether he did believe so or not, were questions of fact, for the jury to determine from the evidence in the case.

A verdict was returned for plaintiff, and defendant excepted.

Knowles & Briggs, in support of exceptions.

Peters & Wiswall, contra.

HOWARD, J. — The motion for a new trial is not "upon evidence, as reported by the presiding Justice," and is unsupported upon every ground assumed. (Statute 1852, c.

246, § 8.) So much of it, as is founded upon the alleged newly discovered evidence, was withdrawn at the argument, and has not been presented for consideration.

The fact, that the defendant retracted the slanderous charge, in the presence of his own family, which he offered to prove by his son-in-law, was not of such character as to render it admissible in mitigation of damages. It was not made in public, or in a manner to qualify the slander previously published; nor does it appear that the retraction was ever communicated to the plaintiff, or to any person who had been apprized of the slander. It was not, in any just sense, a recantation or withdrawal of the calumnious charge, and the evidence offered was properly excluded. 2 Greenl. Ev. § 275; *Hotchkiss* v. *Oliphant*, 2 Hill, 516.

If the plaintiff, or the officer with him at the time, unlawfully laid hands upon the defendant, or unlawfully attempted to search his person for a key, as the requests assume, such acts would not justify a slanderous charge. Nor would they, as a matter of law, be "sufficient to cause the defendant to suppose that the plaintiff may have taken his money, and thus the speaking be excused." The requested instructions were therefore properly withheld; and those given were favorable to the defendant, and are not subject to his exceptions. *Exceptions and motion overruled.*

Judgment on the verdict.

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

COUNTY OF PISCATAQUIS.

GARDINER *& al. versus* PISCATAQUIS MUT. FIRE INS. CO.

In a case presented for decision upon facts agreed, no facts, pertinent to the issue, are presumed to exist, which do not appear in the statement.

Where the by-laws of an insurance company, being made part of their policies, require the assured, in case of an increase to the risk of the property insured, to notify the officers of the company, or the policy will be void, a neglect to give such notice renders the policy absolutely void.

On *such policy*, where the risk was increased without notice, no action can be maintained for a loss, although the loss did not happen from such *increased risk.*

A subsequent assessment for losses upon such a policy will not revive it.

ON FACTS AGREED.

ASSUMPSIT on a policy of insurance.

The plaintiffs, residing in Boston, procured a policy on their store situated on a public traveled street in Dover, on Nov. 15, 1848.

The policy was made subject to the by-laws of the corporation, a copy of which is appended to each policy issued.

The 14th Article reads thus:—"It shall be the duty of the insured, to give notice to the secretary of this corporation, of such material and manifest increase in the risk as may have happened without his agency or consent, after the reception of his policy; whereupon the officers of the company may agree with the insured, on such an increase of premium, as the said officers may deem sufficient to cover such increased risk; or they may withdraw the insurance altogether, should they deem such increased risk too great to be taken, according to the rules and regulations of the company; and in case the insured shall neglect to give notice as aforesaid, or shall refuse to comply with the decision of the officers of the company, his policy from that time shall be void."

In the spring of 1849, a blacksmith shop was erected on land adjoining the store insured, and within ten or twelve

feet of its southerly side, and was used about one third of the time by its owner.

On the night of Nov. 16, 1850, the store was consumed by fire originating in the inside, without fault of the plaintiffs, and the shop was also burned by means of the store.

The president and secretary of defendant corporation lived in Dover at the time the policy was made and at the time of the loss, and there was the place of its business.

The loss was duly and seasonably certified to the defendants.

On May 1, 1851, the defendants made an assessment on the policy in suit, for losses during its continuance and before the store was destroyed, which the plaintiffs paid in June, 1851.

If the action can be maintained, a default is to be entered for the sum insured and interest, according to the policy; otherwise a nonsuit is to be entered.

A. M. Robinson, for defendants, relied upon the fact that the plaintiffs had failed to comply with one of the vital terms of their contract and that the policy was void. *Leadbetter* v. *Insurance Co.* 13 Maine, 265; *Perrin* v. *Turner,* 1 Fairf. 185.

A. Sanborn, for plaintiffs.

1. The position taken by the defendant, that the policy was void for the neglect of plaintiffs to notify of the erection of the blacksmith's shop, to be sustained, should have been proved. No such admission is found in the facts agreed.

2. But if it is assumed that the plaintiffs must show *such notice,* I reply that it is unnecessary. The law requires no work of supererogation. The president and secretary lived in the *same locality;* the *store* and *shop* were on a public traveled street, and the Court may infer notice. The meaning of the by-law is to bring home notice to the officers of the company. Would a paper carried to the house be more potential for such a purpose, than the actual erection of the building for such business, and where they would be likely to be personally?

3. But the facts show that the defendants regarded the policy in full force after the loss, by the assessment made *under* and by *virtue* of *the policy.*

HATHAWAY, J. — The case is on facts agreed, by which it appears that, November 15, 1848, the plaintiff procured the defendants' insurance upon his store situated in Dover. By the fourteenth article of the defendants' by-laws, which are made a part of the policy, upon which the action was brought, it is provided, that "it shall be the duty of the insured to give notice to the secretary of the corporation, of such material and manifest increase of the risk, as may have happened, without his agency or consent, after the reception of his policy, whereupon the officers of the company may agree with the insured on such increase of premium as the said officers may deem sufficient to cover said increased risk; or they may withdraw the insurance altogether, should they deem such increased risk too great to be taken according to the rules and regulations of the company; and in case the insured shall neglect to give notice as aforesaid, his policy, from that time *shall be void.*"

The case states, that, in the spring of 1849, one Nathaniel Dexter, jr., erected, on his land, a small blacksmith's shop, within ten or twelve feet of the southerly side of the store, and used it as such about one third of the time till the store was burned. "The Court are to draw such inferences as a jury might." We can have no doubt that the erection and use of the blacksmith's shop was "a material and manifest increase of the risk," which, by the express provisions of the contract, between the parties, rendered the *policy void,* unless the notice were given as stipulated. The facts agreed do not show that such notice was given; and when a case is presented, to the Court, for decision upon an agreed statement, facts, which might be pertinent to the issue, and which *do not appear* in the case, are presumed not to exist.

That the store was not burned, by reason of the erection,

and use, of the shop, can make no difference. The plaintiff had the right to enter into such contract if he deemed it proper, and although it may operate severely upon him, yet, it is not competent for the Court, to relieve him from the legitimate consequences of his own voluntary contract. *Merriam* v. *Middlesex M. Ins. Co.*, 21 Pick. 162; *Carpenter* v. *Providence Washington Ins. Co.*, 16 Peters, 495.

The defendants made an assessment upon the plaintiff, "under, and by virtue of said policy," for losses which occurred October 16th and 21st, 1850, which were paid by the plaintiff in June, 1851; and the plaintiff argues, that, by making and collecting such assessments, the defendants are estopped from treating the policy as void. But the plaintiff cannot recover without a compliance with the conditions of his policy. *Leadbetter* v. *Etna Ins. Co.*, 13 Maine, 265. On the erection and use of the shop, no notice having been given, as stipulated in such case, his policy became *void*. And "a confirmation doth not strengthen a *void* estate." Inst. 295, B. When a lease is *ipso facto* void, *by the condition*, no acceptance of rent afterwards, can make it to have continuance. *Finch* v. *Throckmorton*, Cro. Eliz. 221. The making of such assessments by the defendants, for subsequent losses, would not revive the policy, nor was it inconsistent with the legal right of the company to treat it as void. *Neely* v. *Onondaga M. Ins. Co.*, 7 Hill, 49; *Smith* v. *M. F. Ins. Co.*, 3 Hill, 508; *Philbrook* v. *N. E. M. F. Ins. Co.* 37 Maine, 137.

Upon the facts agreed, the action cannot be maintained, and a nonsuit must be entered.

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

COUNTY OF PENOBSCOT.

GARMON *versus* INHABITANTS OF BANGOR.

A town is not liable for injuries to property, occasioned by defects in their highways, unless the person in charge of it, was in the exercise of ordinary care at the time of the injury.

What is "ordinary care" must be determined by the circumstances of the case presented to the jury.

That question cannot properly be ascertained by the jury, under a presentation of facts not arising out of the case on trial.

Unless they are instructed to ascertain and determine the use or want of "ordinary care," under the condition of things at the time of the accident, as disclosed by the testimony, it is good cause for setting aside the verdict.

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

CASE, for damages sustained by reason of a defect in a highway in Bangor. The defect was a small hole in a culvert, about four feet from the end of it and about one foot outside of the wheel tracks or ruts. The plaintiff's horse, being driven by his son, fell into it and broke his leg. The plaintiff knew of the defect, but the son did not.

The defence in the case was, that the teamster was not in the use of ordinary care.

The son was returning home from Bangor with a pair of three year old colts in a sleigh, and when about three miles out of the city, about dusk, one Foster overtook him and attempted to pass, but failed to do so.

When the son was going up a hill, Foster went by him, but after traveling a short distance beyond, the plaintiff's son attempted two or three times to pass Foster, but did not succeed. At the time of the accident the plaintiff's son was attempting to pass Foster on the left, and there was more room to pass on the right of Foster's sleigh than on

the left. Two teams were close to them coming down on the same side the plaintiff's son was attempting to pass.

The Judge instructed the jury, upon the question of due care and diligence in driving, that the knowledge of the plaintiff of the defect in the highway was not the knowledge of his son who was driving the team; *that*, if the plaintiff did inform his son, then it was for them to consider whether the son was in the exercise of ordinary care and prudence in driving, and if he was not, the plaintiff would be responsible for such want of ordinary care, and was not entitled to recover; *that*, if the plaintiff did not inform his son of the defect, it was for the jury to determine whether he was guilty of neglect or want of ordinary care in neglecting so to inform him, and if so he was not entitled to recover; *that*, as to the prudence with which the plaintiff's son was driving, the question was not what would have been his rights, in case a collision had taken place between him and Foster; nor whether he was driving with ordinary care in reference to passing him, but whether he was passing with ordinary care and prudence over the road; *that* he had a right to pass one side or the other, and that they would consider whether, if the road had been clear, there was any want of ordinary care and diligence in driving on the one side of the road rather than on the other, or in the manner of his so driving, and if so, the plaintiff was not entitled to recover.

The jury returned a verdict for the plaintiff.

A. Sanborn, for defendant, cited Story on Agency, § 140; *Mayhew & al.* v. *Ease & al.*, 3 Barn. & Cress. 601; *Willis & al.* v. *Bank of England*, 4 Adol. & Ell. 21 and 39.

J. A. Peters, for plaintiff, cited *Reed* v. *Northfield*, 13 Pick. 94.

The opinion of the Court, SHEPLEY, C. J., and TENNEY, WELLS, HOWARD and RICE, J. J., WELLS, J., dissenting in part, was drawn up by

SHEPLEY, C. J. — As the plaintiff had knowledge of the

defect in the highway, by which the injury was occasioned, it is insisted, that his son, who was the teamster, must in law be regarded as having the same knowledge. The knowledge of a principal, it is said, is the knowledge of his agent. This may be correct with respect to knowledge, by which the rights of others may be affected in relation to the business to be performed with them by the agent. The rule does not extend to all the occurrences that may happen to the agent, while traveling to perform it, and by which the property of his principal may be injured.

When animals composing a team are injured by a defect in a way, those obliged to keep it in repair are relieved from responsibility, if the driver did not use ordinary care; and his knowledge of defects in the way, may be of importance to be considered. The knowledge of the owner of the team could have no influence upon his conduct.

The defendants could not have been aggrieved by the instructions on this point.

Two persons appear to have been passing in the same direction with a horse and sleigh, while the driver of the plaintiff's team was attempting to pass them, and he was about to meet other teams traveling on the same side of the way in an opposite direction, at the time of the injury.

The jury were instructed "that he had a right to pass one side or the other, and that they would consider, whether, if the road was clear, there was any want of ordinary care and diligence, in driving on the one side of the road rather than the other, or in the manner of his driving, if so, the plaintiff was not entitled to recover."

The question to be determined was, whether the teamster was in the use of ordinary care, under the circumstances and in the condition of the way, when others were traveling upon it.

Ordinary care, "if the road had been clear," might be very different from that care, when much of the way at that place was properly used by other persons. The words, "or in the manner of his driving," must have been understood

as having reference to that teamster's mode of driving, or to his mode of driving when the road was clear; not to his mode of conducting his team under the circumstances in which he was placed.

There appear to have been instructions applicable to other conditions, in which the jury might have considered the teamster as placed, but none distinctly presenting the question, whether he was in the use of ordinary care under the circumstances, in which he was actually placed.

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

WELLS, J., dissenting.—I concur in the opinion on the first point. It was for the jury to judge, whether the omission of the father to inform his son of the defect was a want of ordinary care. There might be cases, where it would be very clearly the duty of the owner of the team, to communicate to the driver known defects in the highway. The decision of the question fell within the province of the jury.

In relation to the other portion of the opinion, it appears to me, that its conclusion is wrong. The defendants had mingled the conduct of the driver, as a traveler upon the road, with his actions in reference to Foster. Now he may not have conducted with propriety in reference to Foster, while he has so done as a traveler in relation to the road. It was necessary for the Judge to separate those ideas. He did so by saying in substance, that the jury should regard the driver's mode of traveling irrespective of Foster or the treatment of him. It had been previously stated that the son must exercise ordinary care and prudence.

The driver's conduct towards Foster, whether good or bad, cannot determine his rights in regard to the town. The meaning of the Judge appears to be, that the jury are to look at the mode of traveling upon the road, as if the road were clear, not how the driver treated Foster. The whole of the last instruction is intended to illustrate the same idea, and is to be taken together to ascertain its meaning.

PURRINGTON *versus* PIERCE.

A deed of land and bond for a re-conveyance, on conditions, executed at the same time, constitute a mortgage.

Of the improvements made by the husband as mortgager, his widow is dowable.

But to make the bond operative as a mortgage, as against subsequent purchasers, it must be recorded.

Still, if unrecorded, and a subsequent purchaser is chargeable with notice of its existence, such notice, as to him, is equivalent to a registration of the bond.

Whether the provision in the R. S., requiring *actual notice* in the case of unrecorded deeds, will not exclude all modes of constructive notice, *quere*.

If, in the trial of a case, the Judge omits to give instructions upon the *effect* of testimony, on points to which his attention is not called, such omission is no ground for exceptions.

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

ACTION OF DOWER, against the tenant of the freehold.

The question was, whether the demandant should have dower in the store built by her husband.

The land described in the writ and part of the buildings were conveyed by demandant's husband, in 1834, to Amos M. Roberts & als. After that conveyance, the demandant's husband remained in possession and built a store thereon in 1835. At the time of that conveyance, a bond was taken for a re-conveyance of the property on the payment of a sum of money in two years.

The Court instructed the jury, *that*, although demandant's husband might have a right to redeem said premises at the time the store was built, by virtue of the bond, unless the bond was recorded or defendant had notice of it when he purchased, she could not recover dower in the store, and that the jury in estimating damages would exclude the store. To which ruling the demandant excepted.

Ingersoll, for demandant.

1. The store having been built after the conveyance to Roberts and others, and while the bond was in force, was subject to dower. This was a mortgage.

2. The time of the alienation was not until there was a foreclosure or forfeiture of the bond, and the improvements made by demandant's husband are subject to dower. 4 Kent's Com. 66, (5th ed.)

3. The bond in this case, though unrecorded, was good against the defendant, who is chargeable with notice. The case is like *McLaughlin* v. *Shepherd*, 32 Maine, 143, and *McKecknie* v. *Hoskins*, 23 Maine, 233.

4. But a rule founded in equity, and said by Kent to be "the better and more reasonable American doctrine," is, to give the widow her dower according to the value at the time of assignment, deducting all improvements by the purchaser. 4 Kent's Com. 66, 67 and 68; 3 Mason, 375; 5 Sargeant & Rawle, 289.

A. W. Paine, and *J. H. Hilliard*, for tenant, cited 32 Maine, 143; *Thomaston* v. *Warren*, 28 Maine, 298; *Brewer* v. *Machias*, 27 Maine, 489; *Harpswell* v. *Phipsburg*, 29 Maine, 313; *Stowell* v. *Goodenow*, 31 Maine, 539; *State* v. *Shaw*, 33 Maine, 556; *Curtis* v. *Kennedy*, 3 Met. 405; *Emerson* v. *Hains*, 6 Met. 475.

RICE, J. — Was the bond on which the demandant relies executed, if at all, under such circumstances as to constitute it a defeasance? To give it that operation against subsequent purchasers, it must not only have been executed at the time the deed was given, but, under the provisions of c. 36, § 3 of stat. of 1821, and of c. 91, § 27, R. S., it should have been duly recorded. The object of the Legislature, in requiring such instruments to be recorded, undoubtedly was, that all persons interested might know the true condition of the title. Such being the manifest object of the Legislature, our Courts, acting upon the principle of this provision, have held, that in all cases where subsequent purchasers had notice of the condition of the title, they should be entitled to the same rights in relation thereto, that they would have been, had the instrument of defeasance been recorded, and nothing more. This Court has also

decided that the open, continued and exclusive possession and occupancy of a house and lot, by a man who had conveyed the premises, and held a bond from his grantee for a reconveyance, were facts from which notice might be inferred that he was in possession by right, and under the title which he actually had. *McLaughlin* v. *Spofford*, 32 Maine, 143. This case seems to have been decided under the provisions of the statute of 1821, the demandant claiming title under an attachment made before the R. S. went into operation.

Whether the provision in the R. S. requiring *actual notice* in the case of unrecorded deeds, will not necessarily require a corresponding modification of the rule, applied to instruments of defeasance, it is not necessary now to determine. Strict legal analogy would seem to indicate such a result.

The jury in the case at bar, if they found the existence of the bond, were required also to find whether the tenant had notice of that fact when he purchased the estate.

Upon this point they were instructed, that unless the bond was recorded, or the defendant had notice of it when he purchased, she could not recover dower in the store.

It is not contended that the instruction, as a general proposition, is not correct. But complaint is made that it is too general in its character. That it does not point out what facts would be sufficient to authorize the jury to find notice; or in other words, the complaint is, that the Court did not instruct the jury that the facts in the case were such, as in law, necessarily implied notice.

The answer is twofold. First, the case does not find that the facts assumed by the counsel for the demandant were *proved*. Evidence, the competency of which is not now material, *tending* to prove these facts, was introduced. How the jury found, does not appear. Again, if the instructions were deemed too general in their terms, and were for that reason unsatisfactory, it was the duty of counsel to call for those of a more specific character. If a Judge omits to give instructions upon the effect of testimony, on points to

which his attention is not called, such omission is not cause for exceptions. *Exceptions overruled.*

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

HARDY *versus* WATERS.

An infant promisee of a negotiable note may transfer the same by indorsement, and the act of transfer is voidable only by himself, his heir, or personal representative.

And *such promisee* may by parol, authorize another to transfer such note by indorsement for him, and the transfer, so made, is valid, until avoided.

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

ASSUMPSIT, on a promissory note, payable to a *minor*, who was under guardianship. The note was indorsed to the plaintiff, by a brother of the payee, also a minor, being authorized by the payee to write his name thereon. Since this suit was commenced, the guardian had approved of the transfer to plaintiff.

The defence was, that the note had not been legally negotiated, and therefore the plaintiff could not maintain this action. The Court ruled otherwise, and the plaintiff recovered the amount of the note. Defendant excepted.

Cutting, for defendant.

It is not contended that an infant payee may not indorse and transfer a note payable to him or his order, as was decided in *Nightingale* v. *Withington*, 15 Mass. 272. Or make a ratification after becoming of age, as in *Whitney* v. *Dutch*, 14 Mass. 457.

But it is denied that an infant under guardianship has such authority; or having such authority, can delegate to another; or if to another, an infant.

It is settled beyond controversy that an infant cannot delegate authority to an agent or attorney, to transact business or appear in his behalf.

An infant is also incapable of assuming any power as an agent or attorney. More especially if the infant delegating such power be under guardianship. If a decision adverse to these propositions be pronounced by this Court, it would overturn all the elementary law on this subject.

"The assignment of a promissory note by an attorney in fact of an infant obligor is void, though the infant be present at the assignment." *Semple* v. *Morrison*, 7 Monroe, (Kentucky,) 298, cited in 2 Sup. U. S. Dig. 159.

The consent of the guardian, since the commencement of the suit, cannot affect the rights of the parties as they existed when the suit was instituted. *Ford* v. *Phillips*, 1 Pick. 202; *Thing* v. *Libbey*, 16 Maine, 55.

Peters, for plaintiff, cited 15 Mass. before cited; 22 Pick. 540; *Nightingale* v. *Withington*, 15 Mass. 272; 2 Kent's Com. 235; 1 N. H. 73; 10 Peters, 71; 7 Cowen, 179; 1 Met. 559; *Whitney* v. *Dutch & al.* 14 Mass. 457.

SHEPLEY, C. J. — It is admitted, that an infant may transfer a promissory note payable to himself by indorsement. It is denied, that he can confer upon another the power to do it for him, the reason is, that an indorsement by an infant is voidable; while his act conferring power upon another to do it for him is void.

If the act of transfer in this case be voidable only, it is to be regarded as valid until avoided; and it can be avoided only by the infant or his heir or personal representative. If the power to indorse by another was void, it could not be ratified, and the plaintiff could acquire no legal interest in the note; and the approval of the guardian since the commencement of the suit cannot aid him.

In the case of *Whitney* v. *Dutch*, 14 Mass. 457, the right of an infant to empower another, otherwise than by an instrument under seal, to do an act for him, which he might lawfully perform himself, was fully considered. It was admitted, if the Court were confined to the letter of the

authorities, it must conclude, that the act could not be performed by delegated power.

Considering, that the object of the law was to protect infants from injury, and that this would be fully effected by regarding contracts so entered into as voidable and not void, the Court came to the conclusion, that there could be no difference, upon principle, between the ratification of a contract made by an infant and one made through the intervention of another person acting under parol authority from him.

Changes in the law respecting negotiable paper are undesirable, and should not be made without strong reasons for them. The decision in that State was made, and the rule of law established, while this State composed a part of it. It should not, after it has been so long received as the law, be abrogated merely because other highly respectable Courts have come to a different conclusion, especially when it is not perceived, that it has been, or is likely to be productive of any injustice or mischief. *Exceptions overruled.*

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

CUSHING *& al. versus* BABCOCK.

The defendant, by an agreement in writing with the plaintiff in interest, as to the final disposition of a suit against him in Court, thereby waives any technical objections that may exist to the maintenance of the action.

It is competent for parties, to invest arbitrators by them chosen to settle their disputes, with powers sufficient to effectuate their intention, provided they do not violate any rule of law.

The awards of such tribunals are binding, when made within the scope of their powers, and will only be set aside for gross partiality and corruption.

Where the amount of damages in a suit pending, with other matters between the parties, is submitted to the determination of arbitrators, their award of the amount for which the defendant shall be defaulted is admissible in evidence upon the trial, and by that award the parties are bound.

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

ASSUMPSIT, to recover balance of an account. The writ

was dated Aug. 21, 1845, and also contained a count for money paid, &c. No items were sued for which accrued after 1841. Copies of the decree of bankruptcy of plaintiffs and of the appointment of G. G. Cushman as their assignee in Feb'y, 1843, were put into the case, and evidence of the sale of the claim sued for, by the assignee in bankruptcy, to one of the plaintiffs.

On June 9, 1847, Henry E. Prentiss purchased all the rights of plaintiffs in this suit, and took an assignment of the same.

On June 26, 1847, the defendant, in writing, in consideration that Prentiss had agreed to advance the plaintiffs $300, and take an assignment of this suit, agreed to pay Prentiss $375, in one year, or be defaulted in said action after one year for $1000, or show him property on which to levy the execution, but after Prentiss had received the $375, and costs and interest in the suit, the balance was to be applied to other demands he might have against the defendant.

Prentiss was connected in buying real estate with defendant, and on Dec. 27, 1851, they submitted all their matters, by a writing under seal, to arbitrators mutually agreed upon, and clothed them with special and extraordinary powers, on equitable principles, to adjust and settle all the matters between them. Among the items submitted to them was the "Cushing action agreement $375."

On Feb. 4, 1852, the arbitrators made their award, and that part of it in relation to this suit, was in these words: "The obligation or agreement for $375, relating to the Cushing action is to be retained by said Prentiss and filed in the clerk's office, but to be considered as paid by judgment in said action or suit, and we award and decide and direct, that said suit shall be defaulted for $500, debt or damage, and no more. Should said Babcock redeem said suit according to said last named bond, then said agreement is to be given up to said Babcock, and said Prentiss shall transfer the assignment of said action, which he received from Cushing, to said Babcock."

Prentiss appeared as assignee in this suit, and indorsed the writ, as ordered on motion of defendant, and moved, that the action be defaulted and judgment be entered for $500.

The motion was resisted, and the evidence of the facts recapitulated produced, subject to objections, which it is unnecessary more directly to notice.

It was stipulated, that upon so much of the evidence as may be legally admissible, the Court might decide the case by nonsuit or default, as the rights of the parties may demand and assess the damages.

H. E. Prentiss, pro se.

1. The alleged bankruptcy of nominal plaintiffs cannot affect this action, for there is no sufficient proof of it, in the first place, and if there was, a bankrupt who has bought back the demand, is the proper person to sue as decided by this Court. *Sawtelle* v. *Rollins*, 23 Maine, 196.

2. The agreement by the defendant under his own hand to be defaulted, takes away all power from him to contest this suit.

3. The award of the referees absolutely renders all defences by him to the action unavailable. This being an accord at common law, is not examinable, except on the ground of corruption, gross partiality, or evident excess of power. *North Yarmouth* v. *Cumberland*, 6 Maine, 21.

Rowe and *W. C. Crosby*, for defendant.

1. This action being assumpsit on a contract entered into prior to 1842, and plaintiffs having been decreed bankrupts in 1843, is not maintainable in their name.

2. The paper marked A, merely sets forth the terms on which Prentiss agreed to settle the suit for Babcock, and contains no admission of indebtedness.

3. That contract is usurious. Its enforcement in this suit would deprive the defendant of the relief against the usury which the statute has secured to him in an action on the agreement.

4. The award is not evidence.

Whether any thing, and if any thing, how much, is due from defendant to plaintiffs, in this case, was not determined by the referees, nor even submitted to them.

An arbitrator has no authority to direct a verdict to be entered, unless specially authorized so to do. And where, without authority, he directs a receipt for a particular sum to be entered, and does not, in terms, find that sum to be due, the award, it seems, is bad *in toto*. *Jackson* v. *Clark*, 13 Pick. 208; *Dunbar* v. *Brett*, 2 Adol. & Ellis, 128; *Hayward* v. *Phillips*, 6 Adol. & Ellis, 344.

5. By the agreement, the excess recovered over the amount due to Prentiss was to be appropriated towards other claims of Prentiss. Those claims are all adjusted; what then is he to do with the excess?

RICE, J. — The demand of Cushing & al. against the defendant was purchased, and the assignment procured, by Prentiss, at the instance and request of the defendant himself, under an agreement which stipulated the manner in which that action should be finally disposed of in Court. He thereby waived all technical objections to maintaining that action by the assignee, if any existed.

It was competent for the parties to submit matters in dispute between them to arbitrators, and to confer on these arbitrators such powers as they might deem proper, provided they did not violate any rule of law.

The matters in dispute between the parties in interest were much complicated. Trust and confidence had been reposed by each in the other, and both seemed to desire a settlement based upon the broadest principles of equity, without regard to strict technical rules of law. To accomplish this object the arbitrators were clothed with uncommon powers, being authorized not only to determine what acts each party should perform in the premises, but also the manner of carrying the same into effect.

Arbitration is a mode of adjusting disputes favored by the

law, and is peculiarly appropriate in controversies like the one existing between these parties.

Arbitrators are judges chosen by the parties themselves, and, at common law, their awards are not examinable, except on the ground of corruption, gross partiality, or evident excess of power.

It is competent for parties to liquidate, by agreement, or arbitration, the amount for which judgment shall be entered up in actions pending in Court.

The Cushing action was specifically referred, as appears by schedule "C" annexed to the award.

It is not perceived that the arbitrators acted upon any matter not submitted to them, and there is no suggestion that they acted corruptly or with partiality. In determining the amount for which judgment should be rendered, they undoubtedly had reference to the relation which the parties sustained to each other, in all the transactions between them, and to existing equitable rights.

The award was properly admitted in evidence. The defendant is to be defaulted and judgment entered up for five hundred dollars according to the award.

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

HANSON *versus* KELLEY.

It is no ground of exceptions, when the Court excludes questions to a witness, the answers to which, could not aid the party propounding them.

Secondary evidence of the contents of a paper, alleged to be lost, is not admissible, upon the testimony of a witness, that he was clerk of the party and had the oversight and filing of his papers, and had made thorough search with the party among them for the paper, but could not find it, and believed it to be lost.

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

ASSUMPSIT, on a note of hand signed "A. P. Kelley, by W. B. Kelley."

The note was payable to one Knowles, and by him endorsed to plaintiff, before its maturity.

The defendant denied the authority of W. B. Kelley to give the note, and introduced him as a witness, and he testified that he had no authority to sign the note, or any note.

Defendant then interrogated the witness as to the reason of his signing the note as agent, and asked what was said at the time, and under what circumstances he was induced to sign the note. *This evidence was objected to and excluded.*

The witness testified that he had authority to accept orders drawn for labor by men whom he was supplying; and that he was supplying one Page, for whom the oxen were alleged to be purchased, for which the note in suit was given, and that Knowles brought a letter or paper from Page, which was in part the inducement for his signing the note. He then testified that he was defendant's clerk, and had the oversight of his papers, and filing of them; that he had made thorough search with defendant, among defendant's papers to find the paper, but could not find it, and believed it lost. Thereupon the defendant offered to prove the contents of the paper but the Court excluded the evidence.

The jury rendered a verdict for plaintiff, and defendant excepted to the rulings of the Court.

A. W. Paine, for defendant.

The evidence rejected was a part of the *res gestæ*. The rule in such cases is expressed by HOSMER, C. J., in *Enos* v. *Tuttle,* 3 Conn. 250, and explained in 3 Phil. Ev. 207; 1 Greenl. on Ev. § 108, note 2.

The act of signing the name was but a part of the transaction. The will, the motive for signing was as essential and even more so, than the act itself of writing the name. *Allen* v. *Duncan,* 11 Pick. 308.

The parol proof of the contents of the letter was admissible. 1 Greenl. on Ev. § 558; *Sellers* v. *Carpenter,* 33 Maine, 485; 1 Stark. Ev. 336, Met. ed.

Knowles & Briggs, for plaintiff.

TENNEY, J. — The note purports upon its face to have been signed by the defendant, acting through W. B. Kelley. The defendant denied the authority of W. B. Kelley to sign the note in his behalf, and introduced him as a witness. He testified, that he had no authority to sign the note in suit, or any note. On the witness being interrogated by the defendant, as to the reason of his signing the note, as agent, and touching the conversation at the time, and under what circumstances he was induced to sign, objections were interposed by the plaintiff; and the witness was not allowed to answer the inquiries made.

To entitle the plaintiff to recover in the action, it was necessary to show in some mode, that W. B. Kelley had the right to affix the defendant's name to the note, and make him liable. Without some proof, no presumption of such authority would arise. It might be desirable, that the witness should be exculpated from any design to do wrong, in using the name of the defendant improperly; but after having in the fullest manner denied the right to sign the note as he did, it is not perceived, that a detail of the circumstances would make that denial in any respect stronger than it was when first expressed. The defendant could not have been injured by the ruling of the Court.

The exceptions taken to the exclusion of the secondary evidence of the contents of a paper referred to, in the trial has no legal foundation. A witness testified, that he was the defendant's clerk, and had the oversight of his papers and of the filing of them; that he had made thorough search with the defendant among the papers of the latter, for the purpose of finding the paper, but was unsuccessful, and he believed it to be lost.

"It seems in general, that the party is expected to show, that he has in good faith, exhausted in a reasonable degree, all the sources of information, and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him," and "the affidavit of a party is admissible to show the loss, after other evi-

dence, that it once existed, is introduced." Greenl. Ev. § 558. The evidence produced, that the paper was lost, was not inconsistent with the hypothesis, that it was in existence, and that the defendant had a knowledge of the place, where it could be found. Notwithstanding the oversight of the papers of the defendant was with the witness, it does not appear, that their custody was not with the owner, and if he had made thorough search and was unable to find it, he could have made affidavit of that fact.

Exceptions overruled.

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

SMITH *& al. versus* DAVIS.

Rule 18 of the Court, requires pleas in abatement to be filed, within the first two days after entry of the action.

Motions, for causes which might be presented by pleas in abatement, are restricted to the same limitation.

Where a petition for review is entered before the service, a motion to quash for want of an indorser, must be made within the first two days of the term next after notice to the respondent, or such an objection will be considered as waived.

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

PETITION FOR REVIEW.

The petitioners were not inhabitants of this State, and the petition was not indorsed before entry, which was at October term, 1851, order of notice granted October term, 1852, served November 24, 1852, and proved on the 6th day of the January term, 1853.

On the 48th day of the term, a motion in writing was filed to quash the proceedings for want of an indorser, as required by statute applicable to this case. The motion was overruled, and prayer of the petition granted; and the respondent excepted.

Cutting, for respondent.

Rowe & Bartlett, for petitioners.

1. Rule 18, page 25, requires pleas in abatement to be filed within the first two days of the return term.

2. A motion to quash a writ must be made, generally, within the time limited for filing pleas in abatement. *Maine Bank* v. *Hervey*, 21 Maine, 38; *Trafton* v. *Rogers*, 13 Maine, 315.

Defect arising from want of indorser, is considered to be cured, if not taken advantage of within that time. *Clapp* v. *Balch*, 3 Maine, 216.

3. It is only where it is apparent on the record, that the Court has not jurisdiction, that the writ or process will abate on motion. *Upham* v. *Bradley*, 17 Maine, 423.

SHEPLEY, C. J. — The statute requires, that petitions for review should be indorsed. c. 114 § 16. The eighteenth rule of the court requires that pleas in abatement should be filed within two days after entry of the action. Motions for causes presentable by plea in abatement, have been considered as subject to the same rule, the Court having regard to the substance rather than the form, in which the objection is presented. *Clapp* v. *Balch*, 3 Greenl. 216; *Trafton* v. *Rogers*, 13 Maine, 315; *Maine Bank* v. *Hervey*, 21 Maine, 38.

Such a motion would seem to be considered in Massachusetts as made in season, if made during the first term. *Carpenter* v. *Aldrich*, 3 Met. 58. It does not appear that any rule of that court required that it should be made at an earlier time.

When a petition for review is entered before service, the respondent must be entitled to the same opportunity after he is required to appear, as he would have in case of a precept served before entry, but he cannot be entitled to greater indulgence. There is a difference between the present and the former statute respecting the time when an indorsement should be made; but that affords no cause for a change or disregard of the rule respecting the time when advantage should be taken of the omission. The party is considered

as having waived the privilege secured to him by the statute. *Exceptions overruled.*

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

HILL *versus* MASON.

Section 87 of c. 14, R. S., is still in force, excepting as modified by c. 123, of Acts of 1844.

To work a forfeiture of lands owned by non-residents, for non-payment of taxes, it must appear, that the collector *certified* to the treasurer the delinquencies of the payment of taxes upon such real estate, and that they were advertised within three months thereafter.

And the party claiming *such forfeiture*, must show that a copy of the delinquencies was lodged with the clerk of the town in which the lands are situated.

ON FACTS AGREED.

COVENANT BROKEN.

The defendant, on July 1, 1851, conveyed to plaintiff the east part of lot No. 14, Herrick's plan, situate in Clifton, by deed, with the covenants of warranty.

The incumbrance complained of is certain taxes, alleged to have been due, for assessments upon the land, at the time the deed was executed.

In 1824, Herrick made a survey and plan of a portion of the town of Clifton, and laid the same off into lots, 58 in number, designating them on the plan by numbers only.

The first town tax upon those lands was assessed in 1849. The land of non-residents in that assessment was not described by lots, but was all included in one gross number of acres and the tax assessed in one sum, except two half lots, part of the fifty-eight lots, one of which was that conveyed by defendant to the plaintiff which was assessed thus:—

"J. Mason, or unknown	90 acres.	Value, $75,00	Money tax, ,97.	Highway tax, $2,17.

The remainder of said lots, excepting part of lot No. 19, assessed to D. L. Stevens, non-resident, was assessed to "Hill & Mason, or unknown."

In 1850 the assessment was similar. Mason owned no interest in the lands so taxed, except in the ninety acres, and Hill owned no interest in the ninety acres, or that taxed to Stevens.

In 1851, the assessors put down the value of each of these lots, but carried out no separate assessment, and at the bottom of the list carried out one whole sum as the assessment upon all the lots including the Mason and Stevens half lots, all of which were assessed to John Mason and John B. Hill, (the parties to this suit,) or unknown.

A school district tax was assessed in the same manner.

These taxes, with a deficiency of highway taxes for the year 1850, not assessed upon any particular lots, were committed to the collector with a warrant signed by two of the assessors, but the lists of taxes so committed were not signed by the assessors.

The taxes not having been paid were returned by the collector to the treasurer, about May 3, 1852. After they were returned, the assessors, or some of them, carried out a separate assessment of each lot and half lot, but it was not afterwards committed to the collector.

The treasurer proceeded to advertise the same on June 14, 1852, giving the No. of lot, range, acres, value, and tax against each; and at the bottom of the advertisement, added, "deficiency in highway tax in the above described lots, for the year 1850. — Total, $57,18."

It was agreed, that if upon this state of facts the taxes were legally assessed, the Court were to assess the damages, but if they were not a charge upon the land, a nonsuit should be entered.

J. B. Hill, pro se.

Peters, for defendant.

TENNEY, J. — The covenant of warranty against incumbrances, contained in the deed to the plaintiff from the defendant, dated July 1, 1851, of the east part of No. 14, on Herrick's plan, in the town of Clifton, it is insisted has

been broken, by reason of the non-payment of taxes assessed thereon, which has been followed by a forfeiture of title to the town.

If it should appear, that no forfeiture has taken effect or can take effect by means of the taxes, shown by the agreed statement, to have been assessed upon the land described in the deed, the suit cannot be maintained.

By R. S., c. 14, § 76, when no person shall appear to discharge the taxes duly assessed upon real estate, within six months from the date of the assessment, the collector shall make a true copy of so much of the assessment, as relates to the taxes due on such real estate, and certify the same to the treasurer of the town. By § 77, the treasurer is required to record the same, &c., and advertise in the newspaper, &c. By § 82, if any taxes on lands shall remain unpaid, &c., the treasurer shall publish notice of the same, &c., therein stating the amount of tax, which have remained due for the space, &c., and the date of the assessment thereof, &c. By § 87, in any trial, &c., involving the validity of the title of the town, to any land forfeited for the non-payment of taxes, it shall be sufficient for the town to produce the assessment signed by the assessors, and prove that notice of such assessment was advertised by the treasurer, as provided in sections 87 and 82.

By statute of 1844, c. 123, sections 2 and 3, the former statute was modified, the treasurer being required to cause advertisements to be published three weeks successively, within three months from the time the collector shall have certified to him, the delinquencies, &c., and shall also lodge with the clerk of the town, &c., where said lands lie, a copy of said advertisement; and by § 21, of the same statute, all Acts and parts of Acts inconsistent therewith are repealed.

Section 87 of c. 14 of R. S. not being inconsistent with any part of the provision of the statute of 1844, excepting so far as the latter is a modification of the former, must be regarded as in force; and proof of proceedings, not

dispensed with in the statute of 1844, essential to the validity of a title in the town, is required. The statement of facts fails to show certain things, which are indispensable to work a forfeiture of the land in the former owner, which are applicable to all the taxes referred to in the statement. It does not appear, that the collector ever certified to the treasurer, delinquencies of payment of taxes upon real estate in the town of Clifton; consequently the proof is wanting, that advertisements were published within three months thereof. There is nothing showing that a copy of the delinquencies was lodged with the town clerk, as is required by the statute.

Other errors in the assessment of the taxes upon the land conveyed by the defendant, and subsequent proceedings, are relied upon in defence of the action. These may perhaps avail, but their consideration is not required for a decision of the case. By the facts presented, no absolute title adverse to that of the plaintiff, and nothing which can ripen into such title, or become an incumbrance upon the land, is shown. By the agreement of the parties, the plaintiff must become *Nonsuit.*

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

DWINELL *versus* LARRABEE.

The 35th rule of this Court, requiring previous notice to be given to the adverse party, to produce written evidence in his possession, in order to let in secondary evidence of its contents, is dispensed with, by the voluntary offer of the party to produce it.

And if on searching, the written evidence cannot be found, and no request is made for further time, secondary evidence is then admissible.

In an action by one tenant in common against the other, for selling stumpage from the common land without authority, it is no defence that the plaintiff, previously, had wrongfully sold stumpage from the same land.

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

TRESPASS, for treble damages, under the statute, for cutting timber on land owned by the parties in common.

The facts proved on the trial, appear in the opinion of the Court. By one witness introduced by plaintiff, it appeared that in the winter previous to the cutting complained of in this suit, the plaintiff had given permission to the witness to cut on the same land. It also appeared that he had paid the defendant his proportion of that stumpage.

On this part of the case, the presiding Judge instructed the jury, "that so far as the evidence related to authority to cut having been given the year before, and the money having been received therefor by plaintiff, it at most only disclosed an unauthorized interference by plaintiff, for which he might be liable to defendant, but that it constituted no defence to this suit."

A verdict was returned for plaintiff, and the defendant excepted to the above instruction, and also to other rulings which appear in the opinion.

Cutting, for defendant.

1. The admission of evidence as to the contents of the letter to defendant was wrong. No previous notice had been given to produce it, and the hasty search during a few moments could not be sufficient evidence of its loss. The defendant was not obliged to search during the progress of the trial. 35th Rule of this Court.

2. The conversation between Ranney and Coombs should have been excluded, for there is no evidence that it related to the premises embraced in this suit.

3. The effect of the fact put into the case that the plaintiff had the year previous *permitted* this land, should have been left to the jury. But they were not allowed to consider it. Under a statute so penal, an inference might properly have been drawn of a mutual understanding, that either party might *permit*.

Rowe & Bartlett, for plaintiff, as to the construction of the Act under which this action is brought, cited 15 Maine, 198; and whether the cutting was by plaintiff, was a question for the jury; that it was their province to find not only

the words and acts of defendant, but the meaning of them, and cited *Copeland* v. *Hall*, 29 Maine, 93.

TENNEY, J. — The action is brought by virtue of R. S., c. 129, § 7. The parties were tenants in common of the land, on which the timber spoken of by witnesses as having been cut in the winter of 1850–51, was previously standing. Evidence was introduced by the plaintiff, that certain timber was cut upon the lands, owned in common by him and the defendant, by permission of the latter, who received payment for the same.

Samuel W. Coombs testified, that in the winter of 1851, the defendant informed him in Bangor, that one Ranney had said something to him about going on to No. 4 town; and requested him to say to Ranney, that he had no objection; and he requested the witness to scale the timber, which Ranney should cut. Ranney testified, that he wrote to the defendant a letter, saying, if that was to be permitted, he should like to have it. He received no reply to the letter, but Coombs told him, he had word from the defendant, that he was willing the witness should go on to that part, he designated. The conversation between Ranney and Coombs was objected to.

The defendant objected to the contents of Ranney's letter to him being shown by parol. The defendant then offered to produce the letter; but being unable to find it, the evidence was received, and the objection overruled.

It appeared in evidence, that Ranney had lumbered on the gore in the same township, the previous winter, and cut 72 tuns of juniper timber. One Oakes, who attended to the plaintiff's business, gave the permit, and the witness paid the stumpage to the plaintiff. It was admitted, that the latter paid the defendant, the proportion of the stumpage, which belonged to him.

By the thirty-fifth rule of this Court, which is that "where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless *previous no-*

tice, to produce it on trial, has been given," the secondary evidence of Ranney's letter to the defendant was inadmissible, no notice for its production having been given. When, however, the defendant made the voluntary offer to produce the letter, the matter then stood as it would have done, if a previous notice had been given; the want of notice was at that stage of the proceedings in Court waived. But on failing to find the letter, on a search, no suggestion was made, that he should be able to find it, by having further time allowed therefor, and the objection does not appear by the case to have been renewed after the offer. The basis for the introduction of the contents of the letter by parol, seems to have been laid.

According to the evidence, by Ranney's letter, or in some other manner, the defendant had information of Ranney's wish for permission to cut timber on the land in which he was interested. A message was communicated through Coombs from the defendant to Ranney. The message thus sent, if delivered correctly, is to be treated as a direct statement made to him, and was admissible. Whether the message was sent or not; and if it were sent, whether communicated as it was sent or not; and whether the request of Ranney, and the permission of the defendant, had reference to the same land, were questions for the jury to settle.

It is insisted that the Judge erred in his instructions on the subject of the cutting by Ranney on the gore the previous winter; the jury having been informed that this constituted no defence to the present suit; that at most, it disclosed an unauthorized interference by the plaintiff. The authority given to Ranney by the agent of the plaintiff, to cut the previous winter, and the payment by the plaintiff to the defendant of the proportion belonging to the latter, have no legitimate tendency to prove the right of the defendant to give a similar permission the succeeding year. It does not appear that the cutting under the plaintiff's permission was not wrongful. No evidence is adduced to show it otherwise. The receipt of his proportion of the stump-

age by the defendant, has no tendency to show that the cutting was by his permission. From an act which is apparently wrongful in the plaintiff, no authority to do a similar act by the defendant can be inferred.

There was evidence on the part of the plaintiff, which had a tendency to show, that the defendant was liable in this action; and it was of such a character that the mind might be satisfied that it was sufficient. It was not so feeble or inconclusive as to justify the Court in setting the verdict aside. *Exceptions and motion overruled.*

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

SMITH *versus* MORGAN.

In a suit upon a negotiable note, which came into the possession of plaintiff after its maturity, the payee is a competent witness to show its payment while in his hands, by the maker.

A party, who in the progress of the trial, makes use of a deposition, cannot afterwards corroborate or strengthen it, by the *disclosure* of the same witness, made and sworn to before two justices of the peace and quorum.

To invalidate the evidence of a witness, regarding a note he had testified about, the defendant showed, that he "manifested surprise at finding such a note in his papers, but could not recollect what he said"; — *held*, that this testimony was too indefinite and uncertain to be admissible.

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

ASSUMPSIT, on a promissory note, dated May 9, 1833, payable to Joseph G. Bakeman or order, in two years from its date, for $124, witnessed and indorsed in blank by the payee. It was again indorsed by Lucius Hyde, on May 21, 1849.

It was proved, that it was turned out to the plaintiff by Hyde, on a disclosure under the Act in relation to poor debtors, and appraised at $100.

The defence was, that the note had been paid about the time it was due, and Bakeman testified, though objected to, that he received his pay and gave it up to defendant with his indorsement upon it.

The plaintiff introduced the deposition of Hyde, to the effect that he received the note of Bakeman for a valuable consideration.

The testimony of a witness, against the objection of the plaintiff, was received, that "he was present at the disclosure of Hyde, and that he manifested surprise at finding such a note in his papers, but could not recollect what he said."

The plaintiff then offered the disclosure of Hyde, sworn to before the parties, to prove what and all he said about the note, which was rejected.

The plaintiff excepted to the rulings at the trial.

G. W. Ingersoll, for plaintiff.

The defendant was allowed to prove mental feelings, without giving the words spoken to express them, or even a fact from which they might be inferred.

The rule of evidence is, that when bodily or mental feelings are material to be proved, the usual expressions of such feelings made at the time are evidence. But in this case there was no cause for allowing such feelings to be proved, and if there was, it was violated, no expressions or words of Hyde having been proved. 1 Greenl. Ev. § 102.

After the admission of such testimony, the disclosure should have been admitted to prove what Hyde did say. It was taken down at the time, and the offer was to prove what expressions were used, and all he said at the time.

J. H. Hilliard and *A. W. Paine,* for defendant.

1. The indorser was rightly admitted to testify. *Davis* v. *Sawtelle,* 30 Maine, 389; *Freeman's Bank* v. *Pratt,* 31 Maine, 501.

2. Whatever was said and done at the time of the disclosure, when the note was turned out to plaintiff by the payee, was a part of the *res gestæ,* and of course admissible. The fact that he "manifested surprise," was therefore, as a fact, admissible.

Again. It seems plaintiff was present at the disclosure,

and the *note was turned out to him.* What was said and done *in his presence* is of course admissible, as binding him in the purchase of the note. So that whether the fact of "manifesting surprise," be one of *acts* or *declarations*, it matters not, as in both contingencies the plaintiff is bound thereby.

Still further. The fact is admissible as contradicting the witness Hyde, whose deposition had before been read to the jury.

3. The disclosure was altogether *res inter alios*, and of course not admissible. Hyde was plaintiff's own witness, and the disclosure could only be offered to support or confirm his testimony.

TENNEY, J. — The note in suit was turned out, indorsed by one Hyde, to the plaintiff, on a disclosure which he made at the time he took the poor debtor's oath, and appraised at the sum of one hundred dollars. Bakeman, the payee of the note, testified for the defendant, the plaintiff objecting, that at or about the time that the note became payable, it was fully paid by the maker, and given up, with the indorsement of Bakeman upon it. Hyde, on the other hand, testified to facts, tending to show, that he received the note for a valuable consideration of the payee. A witness for the defendant, against the objection of the plaintiff, was allowed to testify, that being present at the disclosure, "Hyde, the debtor, manifested surprise at finding such a note in his papers, but could not recollect what he said."

Bakeman was competent to testify that the note was paid and taken up by the maker. *Davis* v. *Sawtelle*, 30 Maine, 389.

No evidence being reported in the case, that the note came to the hands of Hyde before its maturity, it was a material question, whether it was or was not paid by the maker to the payee, who at the time was the holder thereof. According to the finding of the case, the evidence of Hyde's surprise was too indefinite and uncertain to be admissible. It

was suited to mislead the jury. It should have been excluded on the ground that it did not sufficiently appear that it was competent. The witness does not say that he saw Hyde examine his papers when he found the note; but that he was at the disclosure, and Hyde manifested surprise at finding the note in his papers. The surprise spoken of may have been manifested at the disclosure, in a statement of Hyde, that such was the case, although the papers may have been previously examined and the note found. Again, it does not appear, that the surprise was indicated by verbal expressions, which the witness had forgotten, or by appearance and acts; if the surprise was made known to the witness by the former, it is proper that the Court should have known what they were; and also, in order to ascertain, whether they were a part of the *res gestæ*, it should be proved, that they were made, when Hyde first found the note in his papers; at any other time, they would have been inadmissible, there being no act, which such expressions were suited to explain. If surprise was manifested by appearance and acts of Hyde, it is very difficult to perceive, how surprise shown in that mode, especially if it were not at the time when the note was found, could be attributed with any degree of certainty to the cause assigned by the witness.

Hyde having said nothing in his deposition on the subject of his surprise at finding the note, the testimony of the witness on this subject, has no tendency to contradict his statements therein.

The disclosure of Hyde was offered by the plaintiff, to prove what Hyde did say concerning the note, at the time of the disclosure, and all he said about it, but it was held inadmissible. The only effect, which this disclosure could have had, so far as we can perceive, was to corroborate the testimony of Hyde given in his deposition. The only corroboration which it would afford was, that on a former occasion he made statements, not inconsistent with those made in his

deposition and by the plaintiff in this case. On no principle is such evidence for such a purpose admissible.

Exceptions sustained.

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

INHABITANTS OF HOLDEN *versus* INHABITANTS OF BREWER.

Where an Act, for the division of a town and incorporation of a new one, authorized the Commissioners of the County to appoint a committee to determine the value of certain property named, and any other property of the town not provided for, with power to settle any differences regarding the town property, and also "to determine all privileges and burdens, that justice may be done between said towns;" it was *held*, that the committee had no power to decide respecting the support or settlement of paupers.

By c. 32, § 46 of R. S., towns are required to relieve and support persons who are in need, residing therein, and having no settlement in this State.

When *such persons* remove into another town and fall into distress, no further obligation is imposed upon the town who first furnished the necessary relief.

And when a town is divided by an Act of the Legislature, a pauper residing therein, without any settlement in this State, must be supported by that town in which his residence may be established at the time of the division.

ON FACTS AGREED.

ASSUMPSIT, for supplies furnished to Rhoda White, a pauper.

Of the notice and answer no question is raised.

The pauper was born in Massachusetts in 1798, and came to her father's in 1831. He moved into Brewer from Massachusetts, in 1829, and has ever since resided there. The pauper has ever since lived with her father, in that part of Brewer now composing the town of Holden.

In the year of 1834, she became idiotic or insane, and so remains. She became a pauper in August of 1834, and has ever since been supported by the town of Brewer, at her father's house.

The town of Brewer was divided in April, 1852, and the easterly part thereof incorporated into a new town by the name of Holden.

In the Act of incorporation was a provision for the appointment of a committee by the Commissioners of Penobscot county, to hear and determine upon the matters therein enumerated, which related to the property of the town of Brewer, "said committee having full power to settle any differences regarding the town property in Brewer, which shall belong in proper proportion to the town of Holden, the amount of money to be paid, and the time when it shall be paid, *and also determine all privileges and burdens, that justice may be done between said towns.*"

That committee heard and determined the matters submitted to them, and in relation to the paupers belonging to the old town of Brewer determined "that the said new town of Holden shall assume all such as acquired an absolute settlement on the territory now within the incorporated boundaries of said Holden, excepting Rhoda White, whom, together with all other paupers for the support of whom said old town of Brewer were legally liable, the said new town of Brewer are to assume."

The inhabitants of Brewer, contended, that the committee had no such power and refused to support the pauper.

If, under this statement of facts, the support of said pauper legally devolves upon the town of Holden, the plaintiffs are to become nonsuit, otherwise a default is to be entered.

A. W. Paine, for plaintiffs.

That the support of the pauper was a "burden" imposed upon the town, as much so as the payment of money for any other purposes, is indisputable. The *literal* interpretation of the Act unquestionably gives to the committee the power which they have exercised.

Why should not this be held the *legal* interpretation of the Act? The only reason for the negative, that has been given, is, that the case of paupers' settlement, in division of towns, is provided for in the general pauper law, and it was not the intention of the Legislature to change the general law by this special Act.

To this view of the case, which in fact is the only question of the case, it is answered —

1. That if the case is provided for by the general law, yet there is nothing to prevent the operation of a special law on the same subject changing the operation of the general law.

The insertion of a special provision for the support of paupers, in case of division of towns is very common and indeed most usual, yet the Court have never hesitated to give full effect to such special provision, however much it may be in derogation or opposition to the general enactment. *Norton* v. *Mansfield,* 16 Mass. 48; *Bloomfield* v. *Skowhegan,* 16 Maine, 58; *Belgrade* v. *Dearborn,* 21 Maine, 334; *Winthrop* v. *Auburn,* 31 Maine, 465.

2. The case is not provided for in the general law. It is claimed to be embraced in the provisions of c. 32 of the R. S., § 1, clause "fourth." It is very clear, however, that the provisions of the enactment do not embrace this case.

Here the pauper never "*had a legal settlement*" in Brewer; nor was she "absent at the time of the division," therefore she does not come within the first paragraph. *Mt. Desert* v. *Swanville,* 20 Maine, 343.

Neither does she come within the description of paupers provided for in the last paragraph, inasmuch as she never was "*legally settled*" in Brewer, nor had she "begun to acquire a settlement therein" inasmuch as she had been a pauper ever since the time of her first falling in want up to the time of the new incorporation. 20 Maine, 341. And besides, the provision in such case is not, that such person shall have a settlement in the new town, but only "the same rights in the new town, in relation to settlement, whether incipient or absolute, as he would otherwise have had in the old town where he dwelt."

The case then falls clearly without the provisions of the section and cannot be affected by them. For no person, under those provisions, could gain a settlement in the new town, unless he *then had a settlement* in the old town. *New*

Portland v. *Rumford*, 13 Maine, 299; *New Portland* v. *New Vineyard*, 16 Maine, 69; *Sutton* v. *Dana*, 4 Pick. 117.

This case not being provided for in the general law, affords a strong argument in favor of the position assumed as to the authority of the committee.

3. But if we are in error in this assumption, what is the effect? The pauper follows the general law.

But by the general law, where a new town is incorporated from an old town, as is the case here, the old town retains all the property and effects and is chargeable with the debts and burdens belonging to it. No part of these pass to the new town, except so far as they are made to do so by the Act of incorporation. *Windham* v. *Portland*, 4 Mass. 384–9.

The only exceptions are those falling within the "fourth" clause already cited, and the burden of the support of the pauper is upon Brewer. *Smithfield* v. *Belgrade*, 19 Maine, 390.

Peters, for defendants.

The committee were unauthorized to throw upon Brewer the support of the pauper, who belonged to the town of Holden. The laws as to the support of paupers existed, and they had no authority to change them.

The "burdens" in the Act of incorporation, do not imply any future liability, but only liabilities and indebtedness already existing. They referred to the town debts and contracts then existing.

If the committee had any authority on the subject of future support of paupers, it certainly extended to any contingency under that head; and they could have gone on and decided that Brewer shall support all persons now having residence in the territory of the two towns, whoever of them shall ever become a pauper. If burdens could cover what was not in existence, the committee could have gone on legislating *ad infinitum*.

If the pauper has no settlement, she belonged to neither town, and Holden must take her territory with all its inci-

dents, its fields, its woods, minerals, and whatever else they find upon it; and finding this Rhoda upon her lands, what will they do with her? They say she has no settlement with them. But they cannot call on Brewer, because neither has she a settlement with us. It is their misfortune, and they must take care of her. R. S., c. 32, § 46.

SHEPLEY, C. J. — The pauper does not appear to have had any legal settlement in this State. She had been supported by the town of Brewer since 1834, not because she had a legal settlement therein, but in obedience to the provisions of statutes. Act of March 21, 1821, § 18; R. S., c. 32, § 46. She might have been removed from the State to the place where she had a legal settlement. If her father had removed from the town of Brewer, to any other town in this State, and taken her with him as a member of his family, the town of Brewer would have been relieved from any obligation to provide for her support. When she ceased to be in that town, by a division of it, all obligation on its part to support her terminated. There remained upon it no burden on account of her former residence. The town of Holden finding her within its limits, became liable to provide for her while she should remain in that town and need relief. It can have no right to call upon Brewer to pay for her support, unless by virtue of a decision of the committee appointed under the Act passed to divide the town of Brewer.

That committee was authorized by the Act to determine the value of certain property named, and of any other property of the town of Brewer, not provided for in the Act; and they had "full power to settle any differences regarding the town property in Brewer;" "and also determine all privileges and burdens, that justice may be done between said towns."

Such general language finds its interpretation and limitation by reference to the subject matter contained in the Act. If a matter so important as the support of the poor was to be submitted to a determination by the committee in prefer-

ence to leaving it to be regulated by the existing laws, it is reasonable to expect that it would have been enumerated as one of the subjects to be determined by them, especially as subjects of less importance were named.

There were subjects named in the Act, out of which burdens and privileges might be expected to arise, and for which it might be necessary to make provision; and the language appears to have been well suited for that purpose. The fifth section of the Act provides, that "the inhabitants of said town shall continue to hold and enjoy in common, all the rights and privileges belonging to the inhabitants of Brewer, in any and all public landings, cemeteries, gravel pits, flats and fisheries of every kind." Some or all of these must be cared for, preserved, regulated, and fenced, and out of them would arise burdens and privileges, from which differences and difficulties might be justly anticipated, unless the burdens and privileges of each town were declared and determined. And here is found the explanation and appropriate use of those terms.

If the committee had been authorized to determine contrary to existing laws, that a particular pauper should be supported by either town, they might have so determined respecting them all; and have decided that all of them should be supported by either town.

They do appear, if their decision be valid, to have imposed burdens upon the town of Holden, respecting other persons than Rhoda White, to which it was not liable by the existing laws. This is done by their decision, that it "shall assume all such as acquired an absolute settlement on the territory now within the incorporated boundaries of said Holden, except Rhoda White." According to this decision, that town would be liable hereafter to support persons who gained a settlement in Brewer while residing on the territory now composing the town of Holden, and who, at the time of the division were residing in the present town of Brewer, while by law such persons would have their legal settlement in Brewer.

If the town of Holden may be unable to recover any thing for the support of Rhoda White, it may be relieved from liability to future burdens more than equivalent.

The conclusion is, that the committee were not authorized to decide respecting the support or settlement of paupers.

Plaintiffs nonsuit.

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

LUCE *versus* DOANE.

The rule of law, allowing a party to a suit, to prove items of account by his book of original entries and suppletory oath, does not embrace a book, in which the entries were made by his wife by his direction, and where the party could not write.

A wife, who thus keeps her husband's book, is incompetent to sustain the charges therein, by her suppletory oath.

Testimony, as to the habits of the party, in having his accounts thus kept by his wife, after his return home from his work, is inadmissible.

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

ASSUMPSIT, on an account annexed. The defendant filed an account in set-off. He relied on his set-off, and offered his book of entries with his suppletory oath. It appeared that he could not write, and that the book had been kept regularly every day by his wife, by his direction.

The evidence was objected to and excluded.

The defendant then offered said book, with the suppletory oath of his wife, which was excluded.

The defendant then offered to prove by his daughter, that during the time of the account between the parties, he was accustomed on returning home from his work to direct his wife to set down upon said book the charges therein contained, who did so accordingly; and that the charges therein against the plaintiff were made in this manner.

This evidence was rejected. A verdict was returned for plaintiff, and defendant excepted to the rulings.

Knowles & Briggs, for defendant.

The book and suppletory oath of the plaintiff ought to have been admitted as evidence.

1. Because it was the best evidence that could be had; he could not write, and some one must write for him. It was kept by another but only as his instrument; it was in effect kept by himself.

2. Because, though there are some *dicta* which seem to exclude the testimony here offered, yet its admissibility would not conflict with the *principles* on which rests the admissibility of book accounts, in any case. In the cases from Massachusetts, and our own Reports, where this matter has come up, it seems taken for granted that the book must be in the handwriting of the party, but this point has never been discussed, and no reasons given.

No form has been considered necessary of keeping his book, and the handwriting has been allowed to degenerate to pencil and chalk marks made upon a board or shingle. Why would it not be safer and better to rely upon a daily memorandum made by one who is able to do it well?

What is there in the nature of the testimony to require, that the party should actually use the pen in setting down his daily accounts? It is the oath of the party which is the testimony relied on after all, and not the "book." In *Cogswell* v. *Doliver*, SEDGWICK, J., says, that "where a book is offered in evidence, it ought to appear suited to *aid* the *oath* of the party which it is brought to fortify and confirm." And this proposition is confirmed by the decision in the case of *Dwinel* v. *Pottle*, where a new trial was granted because "the party did not swear to a delivery of the articles charged by him." If then the book is but to "confirm and fortify" the oath of the party, and if he must swear to a delivery of the articles, or the labor done, it is after all the oath of the party under certain sanctions, which is to satisfy the Court.

Now what can the difference be between his swearing "the book is in my handwriting" "and the book was kept

daily by my wife at my direction." Would not a jury hold the book as much corroborative of his oath in the one case as the other.

J. E. Godfrey, for plaintiffs, cited *Prince* v. *Smith*, 4 Mass. 455; *Witherell* v. *Swan*, 32 Maine, 247.

SHEPLEY, C. J. — The rule of law permitting a party to a suit to testify that his book of accounts produced, contains the original entries, that they were made on or about the time, and that the articles were delivered, or the labor performed, as charged, has, it is believed, never been extended to permit him to testify respecting entries made upon his books by another person, unless it be to entries made by his wife. If his wife were admitted to testify for her husband to entries made by her in his books, unless present when the goods were sold, or the service performed, she could only testify that she made the entries as the husband desired or directed. To prove his account, he also must be admitted as a witness, and if the entries by the wife were not made under his own eye, he could only state that he made sale of certain articles or performed certain services, and that he directed his wife to charge them.

Whether the charges were correctly made or not, must depend wholly upon his recollection, it may be many years afterward, without any aid to be derived from any written memorandum made by him at the time, or known to him to have been correctly made at the time by another. If the entries had been made by direction of the husband by his clerk or other person competent to testify, who could only state, that he made the entries as directed without any knowledge that the articles were sold or the services performed, such testimony, even if the party could also be permitted to testify, would be insufficient proof. There would be no identification of the sales or services with the entries, but such as must rest upon the accuracy of the memory of the party, it may be after the lapse of many years; and if the items were numerous, it is quite obvious, that no reli-

ance could be safely reposed upon it. To admit the wife to testify, and her testimony to be sufficient to make a *prima facie* case, would be to give greater effect to her testimony than to the testimony of any other competent witness, who had made the entries under the like circumstances. There would be no more safety in permitting the wife to testify to entries made by her, unless they were made in the presence of the husband, so that it could be certain, that they were correctly made, as he directed, than there would be to admit a party to testify to his account, without the production of any book whatever. For in both cases identity must rest upon the mere recollection of the party.

In the case of *Carr* v. *Cornell*, 4 Verm. 116, testimony of the wife for the husband was excluded.

In the case of *Littlefield* v. *Rice*, 10 Met. 287, it was admitted, it appearing that "the entries were made by his wife in his presence and by his direction."

The offer in this case was, that the "book had been kept regularly every day by the wife of the defendant by his direction." When proof is thus offered, it must be presumed to be presented under all the circumstances most favorable for its admission; and the Court must determine upon its admissibility upon the precise terms of the offer. No testimony subsequently introduced can have any effect upon the decision.

The entries on the book not having been made in the handwriting of the daughter, her testimony respecting them could not be legally received.

If the defendant may in this case suffer loss by reason of his inability to write, he may also in the transaction of other business, on account of his lack of a common education.

While our common schools afford means for a competent education of all for the correct performance of the ordinary business of life, one who has neglected, or been deprived of those means, must be expected to suffer loss thereby, but

he cannot reasonably claim to have the rules of law changed to relieve him. *Exceptions overruled.*

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

LABAREE *versus* BROWN.

By c. 128, § § 1 and 2, R. S., any justice of the peace and of the quorum in the county where he resides shall have jurisdiction in all cases of forcible entry and detainer, except those arising within a city or town therein, in which a municipal or police court is or may be established; and on complaint made to him, in writing and on oath, &c., he shall issue his warrant, &c.

Under this chapter, a magistrate has no authority to issue a warrant, unless he receives the complaint on oath.

Where the judge of a police court issued a warrant, under this chapter, upon a complaint directed to him, but sworn to before a justice of the peace and of the quorum of another county, the proceedings before him were unauthorized and void.

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

COMPLAINT, for forcible entry and detainer, brought to recover possession of the New England House and lot in Bangor.

The complaint was directed to the judge of the police court of Bangor, and sworn to before a justice of the peace and quorum for the county of Lincoln in which the complainant resided.

The judge of the police court of Bangor, upon that complaint, issued his warrant, and at the return day the defendant appeared and pleaded in abatement to the process, which plea being overruled, he filed his plea of not guilty. Judgment of guilty was entered against him, from which he appealed.

The other facts in the case become unnecessary by reason of the grounds of the opinion.

Knowles, for the defendant.

The justice in Lincoln county had no jurisdiction of the

subject matter, and his act was void. *State* v. *McGrath*, 31 Maine, 469.

The complaint and warrant were parts of one process, and were to be made in the county where the land lies. The statute did not contemplate a divided jurisdiction between the two magistrates, and such a proceeding was wholly unauthorized; c. 128, § § 1 and 2; *State* v. *Coombs*, 32 Maine, 526.

Fessenden, for complainant.

The complaint was sworn to before a proper magistrate, and this is all the statute requires. It was directed to the judge, who issued the warrant. The complaint is in writing and on oath. R. S., c. 128, § 2.

This is a civil action. Its object is to ascertain in whom is the right of possession of real estate. But the complaint must be made under oath, and that too of the party, and cannot be done by attorney.

This complaint must be made to some magistrate in the county where the land lies. But the complainant may live in a remote part of the State, or may be unable from infirmity to travel, and shall not such a citizen have redress? Must he submit to the unlawful occupation of his property by another?

There may be reason, in a prosecution in behalf of the State, and where the prosecutor is not bound to pay costs if the complaint should prove groundless, that he should be subjected to some examination by the justice, prior to issuing the warrant, regarding the circumstances of the case. But where the prosecutor, as in this case, is in fact the plaintiff in a civil action, subject to costs if his claim is unfounded, the warrant should issue, as of course, if the plaintiff is ready to make oath to a complaint drawn in proper form, and the justice would act with gross disregard of the plaintiff's rights, if he should refuse under such circumstances, to issue the warrant. Any cross-examination of the plaintiff by the justice would be useless at least. He would not and should not be allowed to prejudge the plaintiff's rights

before the trial. One justice, then, may as properly administer the oath as another.

TENNEY, J. — The Revised Statutes, c. 128, §§ 1 and 2, provide, that any justice of the peace and of the quorum, in the county in which he resides, shall have jurisdiction in all cases of forcible entry and detainer, except those arising within a city or town therein, in which a municipal or police court is or may be established. On complaint made to him, in writing and on oath, &c., he shall issue his warrant, &c. No other statute now in force contains any other provision, touching the jurisdiction of justices of the peace and of the quorum, or judges of municipal or police courts.

The obvious construction of the sections of the statute referred to, is, that the magistrate, who has authority to issue his warrant, is required to receive the complaint on oath. It is believed, that in all cases where complaints have been made to a justice of the peace, that the warrant has been issued by him and by no other, unless where the statute has expressly otherwise provided.

In the case at bar, the warrant having been issued by the judge of the police court in the city of Bangor, in the county of Penobscot, upon a complaint sworn to before a justice of the peace and of the quorum of the county of Lincoln, the proceedings are unauthorized, and the judge of the police court has no jurisdiction. *Complaint dismissed.*

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

SHAW *versus* EMERY.

The wife, as such, has no authority to put her husband's name to a contract.

But where a promissory note, against the defendant, was canceled and given up to his wife, for which she gave another similar note, changing the word *order* to *bearer*, and signed the defendant's name thereto, which doings of the wife, the defendant subsequently ratified; such note is sufficient to establish a *prima facie* case in an action by the party lawfully holding it.

Shaw *v.* Emery.

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

ASSUMPSIT, upon a note of the following tenor:—

"St. Albans, 9th October, 1846.

"For value received I promise to pay Charles B. Ellis or bearer thirty dollars, in one year from date, with interest.

"Attest, Amasa B. Lothrop." "Seth Emery."

The plaintiff introduced the subscribing witness, by whose testimony it appeared, that one William H. Snell came into the defendant's house, who was then absent, and asked his wife to substitute the word "bearer" for "order" in a note, which he then presented, against her husband, as he wished to dispose of it and the payee lived some miles off. Mrs. Emery finally gave the note in suit, and he witnessed it. The old one was left with Mrs. Emery.

He also introduced said Snell, after being released by the plaintiff, by whom it appeared, that he was the general agent of the payee of the note, that he witnessed the first note given by Emery; that it was of the same tenor of the note in suit, excepting that the word "bearer" was substituted for the word "order;" that he was authorized to dispose of it by Ellis, and wished Mrs. Emery to make the change. She made this note and signed her husband's name and he gave up to her the old one. On the same day he sold and transferred this note in suit to the plaintiff, for a full consideration, which was authorized by Ellis. Some week or ten days after this he met the defendant and told him what he had done. Mr. Emery asked for what reason Mr. Shaw wanted "bearer" inserted instead of "order," and he told him because Mr. Ellis was not there to negotiate it. Emery said, "it was all right, he should have done it if he had been at home."

On this evidence, the presiding Judge, on motion of the defendant, ordered a nonsuit, to which the plaintiff excepted.

Peters, for plaintiff.

The Court probably ordered the nonsuit upon the strength of the case *Wood* v. *Goodridge*, 6 Cush. 117. That case

does not apply to this in the point decided, in the principle it discusses, nor in the reasons given in the opinion of the Court.

The point pressed into this case was in that a mere *dictum* of Judge FLETCHER, it being sometimes a weakness of new Judges, to discuss points which do not relate to the decision of the case.

In that case, no power was given; in this, the power was given, or what was the same thing, was subsequently acknowledged. The ratification extends to every thing that was done. Whatever was done by defendant's wife, was rightfully done, because the defendant knowing it, has agreed to it.

That was in relation to an instrument under seal; this is a simple contract. This distinction is recognized in 5 Wheat. 326; *Haven* v. *Hobbs*, 1 Ver. 238; *Moore* v. *Green*, 13 N. H. 32.

A person may execute a deed or other instrument by the "hand of another person." *Frost* v. *Deering*, 21 Maine, 156; and the same is shown by a review of authorities in 11 Pick. 400.

There can be no question about ratification here. It was ratified by keeping the old note, by acknowledgment, and by contract; and a new assent is sufficiently proved by any conversation which is evidence of the fact. It applies to cases of this kind. *Skinner* v. *Dayton*, 19 Johns. 513; *Cady* v. *Shepherd*, 11 Pick. 400; *Bryan* v. *Moore*, 26 Maine, 84; Minot's Digest, p. 22, title "Ratification and Adoption."

D. D. Stewart, for defendant.

1. The note on its face purports to have been signed by the defendant personally. In fact, it was written by another person. Such a note is void. The agency of the person making the contract must appear upon the face of the contract, or its execution is a nullity. This question has recently been before the Supreme Court of Massachusetts, and their decision is directly against the validity of such a note.

Wood v. *Goodridge & al.*, 6 Cush. 117; Story on Promissory Notes, § 11.

The plaintiff attempts to escape the force of this decision on the ground of a subsequent ratification in this case. According to all the authorities *a subsequent ratification* is equivalent *simply* to a *previous authority*. Neither more nor less. Story on Agency, p. 297, note, (§ 251 and note.)

The difficulty is, that the mode of execution is void, *ipso facto*, and being void, no ratification can make the mode of execution valid. The note in suit not only purports to have been signed by the defendant *personally*, but even has an *attesting witness* to it. Nothing could be better calculated to deceive the public. No ratification could make such *attestation* true, or the mode of executing the note valid.

2. It is denied, that the defendant ratified the making of the note. The language should show a distinct and unambiguous promise to pay the note. *McLellan* v. *Crofton*, 6 Greenl. 348.

3. It may deserve consideration whether the note would not be void under the statute of frauds. R. S., c. 136, § 4.

4. There is another and decisive objection against the maintenance of this action. The note was made without the defendant's knowledge, and on the same day sold to the plaintiff. At the time of the sale there is no pretence it was valid against the defendant, it was then merely void, and no ratification has since been made to the plaintiff or to any person authorized by the plaintiff to act for him.

This difficulty is insuperable; it goes to the very essence of the action which is professedly upon contract, and a contract requires the assent of two minds, there must be mutuality or there can be no contract, and there can be no mutuality except between the actual parties to the contract or their lawfully authorized agents. Now whether the old note was payable to Ellis alone, or to his order, is immaterial, for nothing can be clearer than that this plaintiff Shaw cannot maintain any action upon it, it never having been negotiated. Nor is any such claim made in the present suit; but

this suit is brought by the plaintiff upon an alleged contract which clearly had no existence or validity against the defendant at the time when the plaintiff became possessed of the note now in suit. It has acquired no validity since, unless by the agreement of the defendant. And that agreement must have been made with the plaintiff, he having ever since remained the holder of the note.

"An original promise must be made to the party, or some one authorized to receive it." Per PARKER, C. J., in *Whitney* v. *Bigelow*, 4 Pick. 113.

This doctrine is as old as the law of contracts. It is of the very essence of the contract. S. P. in *Stewart* v. *Kennet*, 2 Campbell, 177; *Mountstephen* v. *Brook*, 2 Barn. & Ald. 141; S. P. in *Stanton & al.* v. *Blossom & al.*, 14 Mass. 116, 120; Story on Agency, § 247.

CUTTING, J. — The plaintiff introduced in evidence a note purporting to have been signed by the defendant, and made payable to one Charles B. Ellis or bearer. And called William H. Snell, who testified, *that* in October, 1846, as the general agent of Ellis, he went to the defendant's house, in his absence, and presented to his wife a note of a similar date and tenor, with the exception of the word "order", instead of "bearer"; *that* he called for the purpose of procuring the latter word to be substituted by the defendant for the former, for certain reasons then disclosed; *that* the wife declined to make that alteration, but did then sign her husband's name to the note in suit and delivered it to the witness, who surrendered to her the original note; *that* in a week or ten days afterwards, he met the defendant and informed him "what he had done," who replied "it was all right, he should have done it, if he had been at home," and *that* the note in suit was duly transferred to the plaintiff. Upon this evidence the Judge presiding ordered a nonsuit, to which the plaintiff excepts.

The evidence wholly fails to establish any authority in the wife to place her husband's signature to the note, either

with or without the sanction of her own as his agent. And this admission exhausts the authorities cited by defendant's counsel, on that point.

But it further appears, that the original note had been canceled and delivered up to the wife, and the presumption is, that it had gone into the possession of the husband and constituted a valid consideration for the renewal; that the defendant, with a knowledge of the facts, ratified and confirmed the whole proceedings, and thereby established a *prima facie* case for the plaintiff. *Bryant* v. *Moore*, 26 Maine, 84.

Exceptions sustained—
and nonsuit to be taken off.

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

NASH *versus* PARKER.

The legal owner of a vessel, not in his possession or under his management, is not responsible for repairs, procured by one having the entire control thereof.

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

ASSUMPSIT, for painting, &c., on schooner St. Leon.

The work done on the vessel was proved, and the plaintiff introduced the records from the Custom House, showing, that the defendant was the owner at the time.

It also appeared from the plaintiff's testimony, that the work was done at the request of one Alden Parker, and that defendant was not known in the transaction.

The defendant proved, that Alden Parker bought the schooner, and that he helped Alden to make his cash payments, and also indorsed the notes he gave for it; and for his security and other indebtedness the bill of sale was made to him instead of to Alden. These notes were all paid by Alden, and the title of the vessel remained in defendant through negligence. The defendant never had pos-

session or control of the schooner, or any thing to do with her, but she had always been in the possession of Alden Parker, and under his sole management and he had received all her earnings.

The case was submitted for decision to the full Court.

A. Sanborn, for defendant.

1. Parol testimony was admissible to show, that the defendant held the schooner merely as collateral security for the debt of Alden Parker. Abbott on Shipping, 47, 48, and note 1, and cases there cited; *Reed* v. *Jewett*, 5 Maine, 96.

2. The enrollment of the vessel and the oath recorded, that defendant was the owner, will not exclude the testimony put in, showing that it was done as collateral security. Abbott on Shipping, 83, note 2; *Weston* v. *Penniman*, 1 Mason, 306; *Cutler* v. *Thurlo*, 20 Maine, 213; *Lord* v. *Ferguson*, 9 N. H. 380; *Brooks* v. *Bondsey*, 17 Pick. 441; *Pierce* v. *Norton*, 10 Maine, 252.

3. The defendant never had any thing to do with the vessel, but it was in the possession and under the entire control of Alden Parker, who ordered the repairs. The defendant cannot therefore be liable. Abbott on Shipping, 48, note 1; *Winslow* v. *Tarbox*, 18 Maine, 132; Kent's Com. 3, 98, and notes, and cases before cited.

There has been some conflict in the authorities in England and this country touching the point raised in this case, but the weight of them is clearly with the defendant.

A. W. Paine, for plaintiff.

I admit, that charterers, thus owners *pro hac vice*, are held to be owners, so far as to be held chargeable for supplies to the exclusion of the general owner's liability.

But in such case even, the general owner is still liable for *repairs*. It is only from the charge of *supplies* furnished the charterer, that the general owner is exempt by the principle now admitted.

Repairs done on the vessel charge the owner of the vessel just as the *supplies* furnished the special owner are a charge on him.

The principle contended for is the only one which can safely be adopted and at the same time can operate no wrong to any one. While the defendant holds the title he is abundantly secure, and if he is obliged to pay when, as here, another reaps the benefit, he has no cause for complaint, as he has voluntarily assumed the charge and allowed himself to be held out to the world as the man to be charged for all such expenses.

The case at bar is precisely like that of *Tucker* v. *Buffington*, 15 Mass. 477, where the position now advanced was fully supported. See also *Brooks* v. *Bondsey*, 17 Pick. 441.

The case of *Cutler* v. *Thurlo*, 20 Maine, 213, was an action for *supplies*, which differs from *repairs*. That case is based on 15 Johns. 298, which supports the plaintiff's views.

TENNEY, J. — Alden Parker purchased the schooner St. Leon, of one Dealing, and paid therefor in notes given by him and the defendant as his surety, and cash, a part of which he borrowed of the defendant, to whom he was also otherwise indebted.

For the security of this liability and indebtedness, he caused the bill of sale of the schooner to be made from Dealing to the defendant. But the latter never had possession or control of the schooner, or had any thing to do with her; but she had always, after the purchase, been under the sole management of Alden Parker, who had received for himself the entire earnings thereof, and who called upon the plaintiff for the work, which is the alleged cause of action in this case, and employed him to do it, and the defendant was not known in the transaction.

The authorities on the question of the liability of those who are legal owners of vessels which are not in their possession or management, for repairs procured by those who have the entire control thereof, are not entirely uniform. But it is believed, that for a long time the decisions have been in greater harmony. It may be regarded as settled, that "ships and vessels, in this respect are now placed upon

the footing of other chattels." *Cutler* v. *Thurlo*, 20 Maine, 213. Numerous decisions sustain the doctrine, that the owner *pro hac vice*, is alone liable for repairs made for his benefit, and by his procurement. "Mere legal ownership does not make any person liable for the ship's debts." *Briggs* v. *Wilkinson*, 7 Barn. & Cres. 30. "The party for whose profit the ship is in reality employed at the time, has the benefit of the work done on board, and is liable to the tradesman who does it." *Reeve* v. *Davis*, 1 Adol. & Ellis, 312; *Leonard* v. *Huntington*, 15 Johns. 298; *Brooks* v. *Bondsey*, 17 Pick. 441; *Colson* v. *Bonzey*, 6 Greenl. 474.

Plaintiff nonsuit.

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

WARE, *petitioner for certiorari, versus* COUNTY COMMISSIONERS OF PENOBSCOT COUNTY.

By c. 196, § 1 of laws of 1841, before a road is located across lands not situated within an organized plantation or incorporated town, notice must be given of the pendency of the petition, and of the *time and place* appointed to consider the same and adjudicate thereon.

An omission to give *such notice* is sufficient cause for granting the writ of *certiorari* against the County Commissioners.

It is essential to the validity of the proceedings of County Commissioners in laying out a highway across a township, that they determine at whose expense the way is to be made.

PETITION for writ of *certiorari*.

A petition was presented to the Commissioners of Penobscot County at their August term, 1851, for the location of a county road, commencing in township No. three, in the fifth range of townships, on the Aroostook road, near the school-house in district No. one; thence westerly across township No. three, in the sixth range, and township No. three, in the seventh range, to the east branch of Penobscot river, near the house of W. H. Hunt, jr.

On this petition a hearing was ordered, and that the Com-

missioners "meet at Patterson's tavern, in No. 3, Aroostook road, on Wednesday the 28th of January next, at 10 o'clock, A. M., and thence proceed to view the route mentioned in said petition, immediately after which view, a hearing of the parties and witnesses will be had at some convenient place in the vicinity, and such further measures taken in the premises as the Commissioners shall judge proper, and that notice of the time, place and purposes of the Commissioners' meeting aforesaid, be given to all persons and corporations interested, by copies, &c. on the chairman of the County Commissioners of Aroostook county, and by publishing the petition and order in one of the papers printed in Bangor, the first publication thirty days before the time appointed, and by publication in the Age, six weeks successively, the last publication thirty days before said view, that all persons," &c.

The Commissioners of the two counties met, and agreed to lay out the road prayed for.

Afterwards the Commissioners of Penobscot surveyed and marked the road in Penobscot county, and adjudged "that township No. 3, in the sixth range, and No. 3, in the seventh range will be enhanced in value, each of them, by the laying out and establishing the road prayed for, to the full amount of the cost and expense of opening and making said road in each of said townships, and said Commissioners adjudge, (the owners being to them unknown,) that the proprietors of said township No. 3, in the sixth range, shall pay the whole amount of the cost of opening and making said road in said township, being in the judgment of the Commissioners, proportionate to the value and benefit likely to result to said township."

The copies of the records exhibited did not show at whose expense the road across township No. 3, in the seventh range, was to be built.

The petitioner, at the time of said application was, and still is, the owner of one half of the latter township. The

Commissioners were about assessing taxes upon the same for the building of the road.

Several errors in the proceedings were alleged, among which were:—

1st. That the Commissioners did not cause notice of the time and place of the view to be posted up in three public places in the towns through which said route passed, or to be served on the clerks of said towns.

3d. That no notice was ordered or given of any place at which parties and witnesses might be heard in opposition to said petition and road; nor was any such place appointed by the Commissioners; nor does it appear by the record, at what place the hearing was had.

7th. That as appears by the records, the Commissioners of Penobscot county adjudged that the proprietors of township No. 3, range 7, shall pay the whole amount of the cost of opening and making said road in said township, being an uncertain amount, and not a fixed sum as the law requires.

Rowe & Bartlett, for petitioner, cited c. 196, § 1, of laws of 1841; *Pingree* v. *County Commissioners,* 30 Maine, 351.

Hilliard & Flagg, contra, cited c. 25, § 23, and c. 196, § 1, (1841,) and contended that the required notice had been given. They also cited 4 Mass. 565; 11 Mass. 417; 1 Met. 122; 19 Maine, 338; 23 Maine, 9; 24 Maine, 406.

HOWARD, J. — The petitioner, as part owner and tenant in common of *Township numbered three, seventh range,* in the county of Penobscot, applies for a writ of *certiorari,* to bring up the record of the proceedings of the County Commissioners, in locating a highway across that, and the adjoining township *numbered three, in the sixth range,* in the same county.

The original petition was for the location of a public highway across lands not situated within the limits of any organized plantation or incorporated town. In such cases the statute of 1841, c. 11, p. 196, § 1, requires that the

County Commissioners, "upon being satisfied that the petitioners ought to be heard touching the matter set forth in their petition, shall, before having any further proceedings thereon, order the petitioners to give notice of the pendency of their petition, and of the *time and place appointed to consider the same, and adjudicate thereon,*" in the manner therein prescribed. But in the case presented by the petitioner, no such order was made and the notice required by law was not given. The proceedings, therefore, were defective, *in limine.*

The notice to be given on petitions for the location of highways leading from town to town, is prescribed in the Revised Statutes, c. 25, § § 2, 3, and differs from that required on applications for locating such ways through unorganized places. It was held in *Orono* v. *County Commissioners,* 30 Maine 302, that in the former case, when giving notice of the time and place appointed for a meeting to view the route, the County Commissioners are not bound to fix the time and place for hearing the parties; but in the latter it is required by the express terms of the statute of 1841, before cited.

It appears on inspection of the copies of the record before us, that the County Commissioners did not decide at whose expense that part of the highway located across township *numbered three, in the seventh range,* was to be made. On that account, and to that extent at least, their proceedings cannot be sustained. *Pingree* v. *County Commissioners,* 30 Maine, 351. *Writ granted.*

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

MOORE *& als., in Equity, versus* WARE.

Where one or more notes are given, secured by a mortgage of the maker, the mortgagee holds the estate in trust for the mortgager, charged with the mortgage debt.

So the assignee of a mortgage with *one* of the notes only, holds the estate in trust for the payment of *all* the notes it was made to secure.

And the mortgage is in itself notice to the assignee of the trust chargeable upon it, notwithstanding he may not know to whom the other notes may have been assigned.

BILL IN EQUITY, to which the respondent filed a general demurrer.

The bill alleged, that on the 10th day of April, 1835, Luther Dwinel, Albert Tibbetts and Jefferson Sinclair, gave to one M. P. Norton, their six notes of hand for $10359,38, payable in one, two and three years, with annual interest; and to secure the payment thereof mortgaged to him one-half of Township No. three, in the seventh range from the easterly line of the state in the county of Penobscot.

It further alleged, that two of said notes were paid by the makers as they became due, and that Norton, a short time after their date, and before they became due, indorsed and negotiated three of the six notes to certain persons, and the judgments recovered thereon were assigned to plaintiffs.

The bill further alleged, that Norton, on the 16th day of March, 1837, by deed, assigned to the defendant, all his right and interest in and to the said mortgage, and the land therein described, and as the plaintiffs believed and were informed, negotiated to him one of the "six notes" therein described, being for $1531,71.

Another allegation was, that defendant forthwith entered into possession of the mortgaged premises, and has so remained ever since, cutting large quantities of timber thereon, and receiving large rents and profits from the same, and in the months of July and August, 1839, foreclosed the same by advertising in a public newspaper, and has ever since claimed the same as sole owner.

The plaintiffs further alleged, that two of the makers of

the notes had become insolvent, and had been declared bankrupts under the United States Bankrupt Act, and the other died many years since in California, insolvent, and that they had no remedy for their debts, except upon the premises mortgaged to secure the payment.

The defendant was notified to account and arrange the whole prior to the commencement of the bill.

The bill concluded with a prayer that defendant might show cause why relief should not be granted — that a decree might be passed that he holds the mortgaged premises in trust for himself and these complainants, according to the several sums due — that he might account for the rents and profits, and convey to the complainants their just share of the estate.

A. Sanborn, in support of the demurrer, maintained —

1. Defendant was the purchaser of the estate without notice of the trust, and courts of equity will protect him against it. 2 Story on Equity, § 976, and cases cited in note 1, § 977, and note 1.

2. A purchaser without notice, and for a valuable consideration, is protected from such trusts by R. S., c. 91, § 32. The notes alone, nor the mortgage alone, do not constitute the trust, but both together.

3. No notice of the trust is alleged in the bill, or that defendant knew of the existence of the other notes.

W. C. Crosby, in support of the bill, cited *Johnson* v. *Candage & al.,* 31 Maine, 28; *Buck* v. *Swasey,* 35 Maine, 41.

TENNEY, J. — It is the well established doctrine in equity, that the debt is the principal, and the mortgage is the accessory. "If it should be assigned the assignee must hold the interest at the will and disposal of the creditor who holds the bond. *Accessorium non ducit, sed sequitur principale.*" "The control over the mortgaged premises must essentially reside in him who holds the debt." *Jackson* v. *Willard,* 4 Johns. 41; 2 Story's Equity, § 1016.

"The mortgagee in possession holds the estate strictly as a trustee, with the duties and obligations of a trustee." "He can make no gain nor profit out of the estate which he holds merely for his indemnity." 4 Kent's Com., Lecture, 58, p. 167 *et seq.* (4th ed.); *Holdridge* v. *Gillespie*, 2 Johns. Ch. 33. "He is treated so entirely as a trustee that he cannot exercise any right over the property mortgaged for his own benefit; but all acts done, and all profits made, are deemed to be for the benefit of the party who is entitled to the estate." 1 Story's Equity, § 1016; *Crane* v. *March*, 4 Pick. 131.

In courts of equity it is held, that the mortgagee holds the estate for the mortgager in trust, and when the debt is assigned he becomes a trustee for the benefit of the person having the interest in the debt. *Parsons* v. *Wells & al.* 17 Mass. 425.

By the foreclosure of a mortgage given for the security of two notes which have been separated by distinct negotiations, and the mortgage assigned to the indorsee of one, if the property mortgaged is equal in value to the amount of the two notes, the whole debt is paid. *Haynes* v. *Wellington*, 25 Maine, 458.

It follows from these principles, that where several notes are given, secured by a mortgage of the maker, the mortgagee holds the estate in trust, for the mortgager, charged with the mortgage debt. If the mortgagee negotiates one of the notes, he holds the mortgage in trust also for the indorsee. If he simply assigns the mortgage to secure the note transferred, with no agreement that the assignee shall hold it exclusively for the security of the note transferred, the assignor still holding the other notes, the assignee becomes trustee, and the mortgager as before, and the assignor, become *cestuis que trust.* The negotiation of the personal security makes the transfer thereof absolute with or without a liability of the indorser, as in other cases of indorsed notes. But the mortgage remains the security for all who are interested in the debt. Those to whom notes secured by the mortgage

are negotiated in such case, will take the place of the payee who indorses them.

The defendant invokes for his protection a well established principle in equity, that if a trustee disposes of the trust estate to a *bona fide* purchaser, for a valuable consideration, without notice of the trust, he will bar the interest of the *cestui que trust.* 2 Story's Equity, § 977. This principle the Legislature of this State have incorporated into the R. S., c. 91, § 32.

Again, it is insisted that if the mortgage and the notes constituted a trust estate, the complainants cannot be treated as the *cestuis que trust,* because at the time that the defendant took the assignment he had no notice that the three notes which have since passed into judgments, and are now claimed as their property, had been negotiated.

The two notes secured by the mortgage, which were made payable in one year, were paid by the makers at maturity. The mortgage was assigned to the defendant, with one of the other four notes before it became payable; and the estate has become absolute by foreclosure. The three remaining notes, according to the allegations in the bill, were negotiated soon after they were given, and before their maturity, but whether before or after the assignment of the mortgage does not distinctly appear, and it is not deemed material for the decision of the case as now presented.

The bill contains no allegation in terms, that the defendant was notified of the trust. This is unnecessary, when from other statements therein he must have had such notice.

A trust estate was created in pursuance of a provision of the statute, and declared such by the mortgager in the deed executed, and the note signed by him.

By the assignment of the mortgage the defendant was notified of every thing which appears therein. He was informed by that mortgage that it was given for the security of six notes, two of which were overdue if outstanding, and of the other four he purchased one, which, with the three remaining, had not then become payable. And the presump-

tion was, that the three last named were unpaid. He therefore could not be treated as a purchaser without notice.

The trust having been created and declared by the mortgage and the notes of which the defendant had notice, by the assignment, he became the trustee, and was bound to execute the trust, notwithstanding he might not have known with absolute certainty what persons were the *cestuis que trust* at the time he so became trustee. If the mortgagee had negotiated one of the notes, retaining in his own hands the mortgage, he would have held the relation of trustee of the one to whom he had transferred it, and when he assigned his interest in the mortgage to the defendant, the latter took the place of the mortgagee, and would not be discharged of his obligation to execute the trust by the want of knowledge to whom the note had been negotiated.

Demurrer overruled.

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

MERCANTILE BANK *versus* COX *& al.*

Although two persons are partners doing business under the name of *one* of them only, a bill of exchange drawn on *him* and accepted, is presumed by law to belong to the *individual* to pay, and not to the partners. — *Per* APPLETON, J.

Of a promise to accept a bill of exchange.

G. W. C. & Co. were building a barque which was mortgaged to F. C. & W. B. V., and drew their bill of exchange on F. C., which was discounted by plaintiffs and most of the money was paid out for work done on the barque. F. C. refused to accept. On the return of the bill to plaintiffs, W. B. V. promised, that F. C. should accept and pay it. — *Held*, that plaintiffs could maintain no action on the bill against F. C. & W. B. V. *jointly*, nor *severally* against either.

Nor, under the *money counts*, could a recovery be had against either, as the loan was made to others.

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

ASSUMPSIT on a draft of the following tenor:—

"$1200. Franklin, Nov. 24, 1847.

"Thirty days after date, for value received, pay to the order of Geo. W. Cutter, twelve hundred dollars and charge the same to account of owners of barque Cleona.

"Yours respectfully, Geo. W. Cutter & Co.

"To Francis Cox, Esq., Merchant, 66 Commercial Street, Boston." Indorsed, "Geo. W. Cutter."

This draft was discounted by plaintiffs and protested for non-acceptance. This suit is against Francis Cox & Wm. B. Vincent, as partners, under the name of Francis Cox. The writ also contained the usual money counts.

Most of the money received on this draft by the drawers was paid out for labor on the barque Cleona.

The drawers were engaged in building vessels and lumbering, and in June, 1847, obtained a loan of $6000, of defendants, by a note signed by Cox and indorsed by Vincent. To secure this loan a mortgage was taken by the defendants upon the two vessels then building, one of which was called "Cleona." Subsequently, in September, a second mortgage was taken by defendants, on the Cleona, who made further advances to fit her for sea.

After this loan the builders had not funds sufficient to finish the vessel, and a draft of $500, similar to the one in suit, and about a month before, was accepted and paid by Cox. The witness stated he should not have drawn this draft without authority, but would not state, that Cox gave him specific authority, but presumed he did. The money was obtained to relieve the *Cleona* from the claims against her.

When the draft was returned protested, Vincent went into the plaintiffs' place of business, with Cutter, one of the drawers, and said, that Cox expected him to draw instead of Cutter; he should have been there in season to have done so, had he not been detained on the road; the draft was correct and he had received most of the money from Cutter; that Cox would accept it on the receipt of a letter he had already written from Ellsworth; that the draft

should be accepted and paid, and it was unnecessary to do any thing more about it.

No evidence was introduced showing any other connection of defendants in business than that concerning these two vessels of Cutter & Co.

After the Cleona was launched she was attached for mechanics' liens to the amount of $1841,97, which was paid by defendants.

The account between defendants, with their names in full, and the owners of the barque was put into the case, consisting of a great variety of items, among which was one for commissions on the sums by them advanced.

There was evidence tending to show, that Vincent merely assisted Cutter & Co., in paying out the avails of this draft to the workmen on the Cleona, and that it was done for the benefit of Cutter & Co., and also tending to show there was no partnership between the defendants.

The Court were authorized to find the facts, and render a legal judgment thereon.

J. A. Peters, for defendants.

1. The discounting of this draft was in violation of law and no action can be maintained thereon. 17 Mass. 258; 26 Maine, 464; 22 Maine, 488.

2. But if maintainable we were not partners. Story on Partnership; 30 Maine, 387; 6 Greenl. 76; 6 Pick. 120.

3. But if partners the draft was upon an individual alone, and cannot bind the partners. The individual on whom it was drawn refused to accept.

4. Vincent could not bind himself on the paper, it was the debt of another.

5. Nor can the count for money had and received avail. The money was for the use of Cutter & Co.

Cutting, for plaintiffs.

APPLETON, J. — From the evidence it appears, that the firm of George W. Cutter & Co. were, in the year 1847, extensively engaged in shipbuilding and in lumbering, at

Franklin in this State; that Vincent, one of the defendants, then was and for years previous had been employed as a book-keeper; that Cox, the other defendant, was a merchant transacting business on his own account; that the defendants were not then and never had been associated as general partners, nor had they ever been jointly interested or connected in any business, except in the particular transaction out of which the present claim originated.

In June, 1847, the firm of Cutter & Co. being in need of funds, to complete the vessel they were then building, it is in proof that George W. Cutter applied to the defendant Cox, to assist him with funds for that purpose; that Cox replied, "that if he could get any one to assist him, he would do as much as any one else, and go on equal risk with him," and was willing to aid him to the extent of half which might be required. An arrangement was ultimately made, by which Cox made his note for the amount of seven thousand dollars, payable to the order of Vincent, who indorsed the same, and on this paper the money necessary for George W. Cutter & Co. was raised. At the same time a note was given by George W. Cutter & Co. for the same amount, to William B. Vincent and Francis Cox or order, payable in four months, and a mortgage was made of the brig called Cornelia and the barque Cleona which they were then building, to secure the payment of the note then given at its maturity. At the same time, and as a part of the same mortgage, it was agreed on the part of the mortgagers, that the mortgagees might sell at public or private sale one or both of the vessels mortgaged, as might be required to pay whatever might be due on the note, if not paid at its maturity.

It thus appears, that on June 17, 1847, the defendants were joint mortgagees of certain property to secure a note given to them in their own names, and payable to their order, the consideration of which was the several note of Cox payable to Vincent, and by him indorsed, and of which by the agreement between them, each was to pay his half.

But no partnership is here created. If nothing more had ever been done, it could not have been alleged, that a co-partnership had been created. The defendants were joint mortgagees, but as joint mortgagees they were not co-partners. The mortgage could not be transferred by one without the consent of the other. The relation of the defendants was like that of the joint owners of a horse or any other chattel. Each controlled his own interest. Neither controlled or could rightfully transfer or control the interest of his co-mortgagee.

The position of these parties remained unchanged until September 17, following, when George W. Cutter & Co., anticipating need of further aid to complete the vessel, executed a mortgage of the barque Cleona to the same mortgagees to secure them against any further advances they might make in completing her for sea. The mortgagees having thus obtained a second mortgage made further advances to a large amount.

It does not appear that any of these advances were made by defendants as partners, or that any act was done by them indicating the existence of that relation. There is nothing in the evidence to negative the idea that they were made by each furnishing his share from his individual funds. The mortgage is from Cutter & Co., describing them as co-partners, to William B. Vincent and Francis Cox. The account current between the parties describes them in the same way. Upon that account, as settled, is minuted, "Balance $5328,87, Feb. 18, 1848. Due William B. Vincent and Francis Cox, one half each, viz., W. B. Vincent $2664,43½, and Francis Cox 2664,43½." There is not the slightest pretence that any written agreement of co-partnership was ever entered into between them. So far as any inference can be drawn from the papers as exhibited, it is against the existence of that relation.

The part owners or builders of ships are not from that fact, to be regarded as partners. Neither are the co-mortgagees of ships, owning a less interest, to be any more

treated or held as partners from holding security upon a part than if they owned the whole.

When the last mortgage was given the mortgagees were under no legal obligation to make advances; they had made no agreement, so far as the evidence discloses, by which they were to furnish any sum whatever, or by which they had brought or agreed to bring their several funds together for a common purpose. Either was at liberty to decline advancing. Neither had authority to pledge the credit of the other to any amount of advances. Nothing indicates that either had any authority to sign any contract or to pledge in any mode the credit of the other without his consent. They were in the common condition of men who, having aided an insolvent firm to a large amount, might, from the necessity of their position, be obliged for self-protection to make still larger advances. But of that necessity and of the extent of such advances each was to judge for himself. Each advance was a completed transaction. Whether the advances were by each paying half at the time, or by giving their joint and several note, is entirely immaterial, as when made, the relation of the parties was still that of co-mortgagees. Neither could compel future action or control their common interest.

The defendants, then, have in no way entered, as between themselves, into the relation of partnership with its corresponding rights, duties and obligations.

The defendants have not, by word or by act, held themselves out to the world as partners, and cannot therefore be held liable as such upon that ground.

2. But assuming there was a partnership, the plaintiffs have even then failed to show any right to recover.

The draft in suit is drawn by George W. Cutter & Co. upon Francis Cox, Esq., Merchant, 66 Com. street, Boston. The plaintiffs declare against the defendents "as co-partners in the name and style of Francis Cox."

The draft purports to be drawn upon an individual, and if it had been accepted, would have bound only the party so

accepting. Such is the presumption of law. A firm may be constituted doing business in the name and style of one of its members, and the co-partnership will be bound by the signature of such name, when relating to the business of the firm. But in such case the presumption would be, that the signature of the individual was binding on him alone. A draft upon, or an acceptance, would primarily bind only the person accepting.

But in this case there is an entire failure of proof that there was any co-partnership between these defendants, under the name of Cox. If the draft had been upon Vincent rather than Cox, the proof would equally well have sustained the suit against the defendants, as co-partners, under the name and style of W. B. Vincent.

If there was any firm, its name and style was "William B. Vincent and Francis Cox," for the mortgage of the firm of Cutter, & Co., was made to them in that name, and they are so described in the accounts between the parties and adjusted by them.

The evidence then fails to show a partnership in the name and style of Francis Cox, or that any draft has been drawn upon the defendants as partners.

3. The draft having been drawn upon Cox and by him not accepted, the inquiry arises whether he has made himself personally liable. The evidence shows that Cutter & Co. had drawn a previous draft on the defendant which he accepted and paid. But the acceptance and payment of one draft is no proof of a general authority to draw and a general promise to accept. Whatever may have been said or done by Cox was *before the draft was drawn.* The witness Cutter says, "he did not recollect of saying to Cox, that he should want more than $500; that he should not have drawn said draft unless he had been authorized; that he never drew a draft without authority; that he would not state that Cox gave him specific authority to draw the $1200 draft or not, but he presumed he did; that he presumed he had a conversation and understanding with Cox at the time he drew, that

he should accept, and that he informed him at that time of his drawing; that he was not aware of ever drawing a draft without giving information to the person upon whom the draft was drawn; that he had as much authority to draw the $1200 draft as he had the $500 draft." But no authority, even verbal, is here shown to bind the defendants. The witness, at most, says he presumes he had authority, but discloses no facts to justify his presumption. He will not state that Cox ever gave him specific authority to draw. He discloses no fact showing such authority, but only his conclusions and presumptions from facts withheld, if they existed, but at any rate not made known.

But, as between the drawer and drawee, a promise or agreement to accept a bill which should afterwards be drawn, has never been deemed an acceptance. Story on Bills, § 249. But, as between the drawee and a third person who has taken a bill upon the faith of a promise to accept, it has been held to be an acceptance; but in such case, when the promise is in writing, it should describe the bill to be drawn in terms not to be mistaken, so as to identify and distinguish it from all others; and that it should be received by the person taking it upon the faith of such promised acceptance. Story, § 249, and cases cited. These elements are entirely wanting. *Howland* v. *Carson*, 3 Har. 453; Chitty on Bills, 285.

In the cases just referred to the promise was in writing, but in the case at bar the agreement, such as it was, is verbal. It seems that a parol promise to accept a non-existing bill, will not support an acceptance. *Edson* v. *Fuller*, 2 Foster, 183. *Strohecker* v. *Cohen*, 1 Speers, 349; *Kennedy* v. *Geddes*, 8 Porter, 263.

It is obvious that Cox was not bound by any thing said or done, before the drawing of the bill, to accept the same; and if he had so promised, there is no proof, that the plaintiffs took the draft relying on such promise.

There is no evidence that Vincent was the agent of Cox, or in any way authorized to bind him by any promise he

might make for or on his account. The declarations or statements of Vincent, whatever may be their effect as to himself, can upon no principle affect the rights of Cox.

4. Nor has Vincent bound himself personally. He said that Cox would accept the draft; that the draft should be accepted and paid, but declined drawing a new draft or in any way becoming a party to the one drawn. The draft was not drawn on him. All this was after the money had been loaned to Cutter & Co. It is difficult to perceive how this can bind Vincent in this suit as jointly liable with Cox. He did not promise to pay. If he had expressly promised to pay, there would be no consideration for such promise. It would be to pay for the debt of another, that is, of Cutter & Co., and would be void by the statute of frauds. He can no more be held on the draft, than could any other individual who had expressed strong convictions, or had promised that the drawee would accept and pay a draft of which he had refused acceptance.

If the statements, as reported by Cutter, are taken most strongly against him, they are only binding on him, and in no way, either directly or by implication, purport to bind the alleged firm. No joint promise can by the most forced construction be gathered from the evidence.

The action cannot be maintained against the defendants upon the draft, either jointly or severally; not as against both, for they have never accepted or promised to accept; not against Cox, for he has refused to accept; nor against Vincent, for it is not drawn on him, nor has he ever accepted or promised to pay it.

5. But it is insisted that the plaintiffs can recover of the defendants upon the money counts.

But the position of the plaintiffs is not perceived to be such as to entitle them to recover. The draft was by Cutter & Co. upon Cox, and the money was loaned upon that paper. The loan was to Cutter & Co., and upon their credit, and when they received it, it ceased to be the money of the bank. The bank had no *more* right to control its

disposition in this than in any other case of a loan to insolvent creditors. If it was lost, the loss was that of Cutter & Co. They had the same right to it that any borrower has to money loaned him.

Because portions of the money went to discharge liens upon property upon which the defendants had a mortgage, does not alter the case. Part went to pay lien debts, part was paid in Bangor and elsewhere on other debts of Cutter & Co. It would be impossible to distinguish what amount went for one purpose and what for another.

The fact, that part of it may have relieved the property of the defendants from superincumbent liens, confers no rights of recovery on the plaintiffs, because when thus paid, the funds with which the payment was made were no longer theirs. They held the paper of Cutter & Co. as the consideration of the loan. If they could follow this in the hands of the defendants, they would be equally entitled to follow it into the hands of any individual, who may have received it in payment of his claims.

The result is, that the plaintiff must become nonsuit.

RICE and HATHAWAY, J. J., concurred in the result only.
TENNEY, J., non-concurred.

DWINEL *versus* PERLEY.

In equity proceedings under the Act of April 9, 1852, no questions of law, not arising out of the facts found by the Judge at *Nisi Prius*, can be raised or entertained by the court of law.

When the respondent is attempting to enforce the rights of an owner of the land in controversy, he may be required to release all his claims thereto, although he may have previously conveyed the same to a third person.

In cases under this Act, the *facts* found by the presiding Judge are conclusive and cannot afterwards be changed by a report of the evidence from which they are drawn.

If the *conclusions* of the presiding Judge upon the cause before him, are to be controverted in the court of law, it can only be done by reporting the *facts*, not the testimony tending to prove them.

BILL IN EQUITY against Joseph Perley. The material parts of the bill are recited in the opinion of the Court. The prayer of the bill was for a conveyance of the premises, and also for an injunction against respondent's further prosecuting a suit for one portion of the premises, and a writ of possession for another portion.

The injunction was granted at the filing of the bill in Dec. 1846, and thus remained till the final hearing before HATHAWAY, J., April term, 1854.

At that hearing, the presiding Judge decided, that the fraud alleged was proved, that the property in controversy belonged to the plaintiff, and adjudged that the prayer of the bill should be granted.

The objections made to this decision will also be found in the opinion. With the objections was filed a report of the evidence.

J. Hilliard, for respondent.

Rowe & Bartlett, for plaintiff.

SHEPLEY, C. J.—It appears from recitals contained in the bill, that the plaintiff claims to be the owner of a brick store and of one-half of a wharf in the city of Bangor, and to have acquired a title thereto by purchase from the assignee in bankruptcy of L. J. Perley.

That the defendant claimed to be the owner of the same estates; that L. J. Perley held two notes against the plaintiff and another person; that a suit was commenced upon them in the name of the defendant, judgment recovered, and an execution issued thereon was satisfied by a levy upon these estates on January 6, 1843. The bill alleges, that although the judgment was recovered in the name of the defendant, he was not the owner of the notes; that L. J. Perley was the owner of them, and that all property in them passed to his assignee in bankruptcy.

The report states, that the other facts alleged in the bill were admitted or proved without controversy, and the con-

test was confined to the ownership of the notes and the validity of the proceedings in bankruptcy to vest title in the plaintiff.

The presiding Judge decided, that the judgment and all rights to the store and wharf, acquired by the levy, were the property of L. J. Perley; that they passed to his assignee, and from that assignee to the plaintiff.

Several objections are made to his decision and decree:—

1. That the defendant resides out of the State, and that this Court has no jurisdiction.

No such question appears to have been raised before the presiding Judge; and his report contains no facts out of which such a question could arise.

By the Act approved on April 9, 1852, all causes in equity are to be heard and determined at a term held for the trial of causes by a jury; and the 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." The party dissatisfied may remove the same by exceptions or report. When so removed, if the testimony be all reported, the court of law is not authorized to revise the decision of the presiding Judge upon the effect of that testimony, and to find the facts to be different. Nor to act upon any supposed state of facts not found and reported by him. Nor upon any question of law not arising out of the facts so found. The decree may be reversed or varied, or any other order or decree may be made, which may be required by the facts so found.

The first objection cannot therefore be entertained.

2. That the defendant had conveyed the premises to a third person, and that a decree to convey them to the plaintiff would be useless.

The report states, that the defendant on Nov. 1, 1845, conveyed the premises, without consideration, to Nathaniel Pickard, in secret trust; and that Pickard has conveyed them to the plaintiff. It also appears from allegations in

the bill, stated to have been admitted or proved, that the defendant had recovered a judgment against a tenant of the plaintiff occupying the wharf, and had commenced a suit against other tenants occupying the store, and had attempted to enforce them. The conveyances might not prevent the defendant from enforcing the judgment already obtained, or prevent his obtaining judgment in the other suit; for it might be too late to enter a plea, that he had conveyed to a third person. While the defendant is found attempting to enforce the rights of an owner, it may be proper to require him to release all his claims, that all contests about the estates may cease.

3. The third objection is in substance, that the Judge erred in finding the transfer of the notes from L. J. Perley to the defendant, as alleged in the answer, to have been fraudulent.

As already stated, the facts found by the Judge are conclusive; and from those facts, the alleged fraud is a just inference.

4. The fourth is in substance, that if there was fraud in the transfer of the notes, it was completed during the year 1838; that such transfer was valid between the parties, and that the assignee in bankruptcy would acquire no title to them. This might have been so, if the facts were as the position assumes.

The report of the Judge finds, that the defendant, as late as the year 1844, stated, that he "never owned the notes;" that he never knew, that a suit had been commenced upon them in his name, until after the levy was made. The Judge, therefore, found, that the judgment was the property of L. J. Perley, when he filed his petition to become a bankrupt.

5. That the sale by the assignee was illegal.

The report states, that "by this sale, which appears to have been duly licensed and conducted, and by subsequent conveyances," "the judgment and all rights to the store and wharf created by the extent" "passed to the plaintiff."

The report does not state any facts, from which this Court can come to a different conclusion. If counsel would have the accuracy of that conclusion, as matter of law, examined here, he should have had the facts reported, not the testimony tending to prove them. This Court cannot proceed to examine the testimony to ascertain the facts proved by it. *Exceptions overruled.*

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

KITTREDGE, *in Equity, versus* MCLAUGHLIN.

Upon proceedings in equity to redeem a mortgage to secure notes on *annual* interest, in estimating the amount due, *compound* interest cannot be reckoned. — HATHAWAY, J., *dissenting.*

Under the provision of c. 125, § 16, when the respondent renders an account of the money due and of the rents and profits in a reasonable time after demand, the *complainant* can recover no costs.

And although the *respondent* has complied with the demand in rendering the account, yet if he denies the right of the complainant to redeem when he is entitled to, *he* can recover no costs.

ON EXCEPTIONS to the rulings, APPLETON, J., January term, 1853.

BILL IN EQUITY.

This case was before the Court in 33 Maine, 327, when a master was appointed to find the sum due on the mortgage.

The sum tendered by complainant on July 18, 1849, was $525. By the master's report, after deducting the rents and profits, and reckoning *simple* interest on the notes, which specified interest *annually*, five hundred dollars only was due on the mortgage at that time; and since, the rents and profits have been about equal to the taxes paid.

The presiding Judge, *pro forma*, accepted the report and decreed $500, to be paid, and costs for complainant.

The respondent excepted because annual or compound interest was not allowed; and that the sum tendered was not given; and because interest was not allowed on the sum

due on July 18, 1849; and because complainant was allowed costs, when costs should have been given to respondent.

Peters, in support of the exceptions, cited to the first point — 1 N. H. 179; 3 N. H. 40; 10 Maine, 315; 23 Pick. 168, 169.

To the second point, 33 Maine, 216.

To the third point, 10 Maine, 161; *Osgood* v. *Jones,* 23 Maine, 312.

To the fourth point, 29 Maine, 302; R. S., c. 125, § 16.

Rowe & Bartlett, for complainant, in answer to the first exception, cited *Doe* v. *Warren,* 7 Maine, 48; *Howe* v. *Bradley,* 19 Maine, 31; *Reed* v. *Reed,* 10 Pick. 400.

In answer to the second, *Tucker* v. *Buffum,* 16 Pick. 50.

In answer to the third, 16 Pick. 50; R. S., c. 125, § 17.

In answer to the last, R. S., c. 115, § 56; *Saunders* v. *Frost,* 5 Pick. 271; *Clark* v. *Reed,* 11 Pick. 449.

The opinion of a majority of the Court, HATHAWAY, J., *dissenting,* was drawn up by

SHEPLEY, C. J. — The question was fully considered, whether compound interest could be allowed either at law or in equity in the case of *Doe* v. *Warren,* 7 Greenl. 48. That decision has been uniformly regarded as exhibiting the rule by which the rights of parties have been regulated since that time.

It is admitted, that compound interest is not recoverable at law; and when under a process in equity to redeem an estate mortgaged, the duty arises to ascertain what is "due on a mortgage," the Court cannot properly allow what is not legally due.

The exception to the master's report, in this respect, is overruled.

The plaintiff does not appear to be entitled to costs under the provisions of the statute, c. 125, § 16.

By the provisions of the same section the defendant would be entitled to costs, if he had not prevented the plaintiff from performing or tendering performance of the condi-

tion before the commencement of the suit. In this case, he has denied the existence of any right to redeem, and he cannot be entitled to costs, for the plaintiff could not be restored to the enjoyment of his full rights without a suit.

Exceptions to master's report overruled, except what relates to costs. — No costs allowed to either party.

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

The following *dissenting* opinion was delivered by

HATHAWAY, J. — A bill in equity to redeem land mortgaged to secure the payment of two notes, each for one hundred and twenty-nine dollars, dated April 17, 1835, payable on time, with interest annually. It appears by the original papers, referred to in the case, that the interest for the first two years, was paid and indorsed, when it became due, and that there were no subsequent indorsements.

The first question presented, on exceptions to the master's report, is, what interest should be allowed on the notes?

According to the law, as decided in this State and Massachusetts, if a promissory note be made payable in annual installments, with interest annually, and the interest be not paid at the end of each year, in an action on the note, the holder cannot recover interest upon the unpaid interest, which became due, at the stipulated annual periods of payment; and the reason assigned by the Courts is, substantially, that the holder of the note might have collected the interest at the end of each year, and not having done so, he shall suffer the loss of interest on such amount due, as a penalty for his neglect to enforce its payment.

In an action for rent unpaid when due, the lessor is entitled to recover interest. *Clark* v. *Barlow*, 4 Johns. 183. A note for money lent, made payable in a year, including the year's interest on the sum loaned, bears interest, *proprio vigore*, after its maturity, if it remain unpaid; but if the note be made for the sum loaned, payable in one year with interest, although, at its maturity, the interest is due as truly as the principal, and is as perfectly certain in its

amount, yet if it remain unpaid, the holder cannot, in an action at law, recover interest for it; he neglected to collect it, or rather, his debtor neglected to pay it, as he promised, when it became due, and the collection of interest upon it is prohibited, by what the Courts have decided to be the law. It is difficult, if not impossible, to perceive any sensible reason why the creditor should incur a penalty for neglect in one case and not in the others; why it should attach to the interest and not to the principal, and to the rent, which is for the use of land, as interest is for the use of money; or why, if a sum of money be lawfully due to a person, and the debtor neglect to pay it, when it is due, and when he promised to pay it, he should be held liable to pay interest upon part of the sum due and not upon the whole, when both parts were equally due, and with equal justice, merely because the different parts were due for different considerations, equally lawful; yet such have been the decisions of the Courts at common law, in this State and generally. The question has been decided otherwise in New Hampshire. *Pierce & al.* v. *Brown*, 1 N. H. 179.

The common law is founded in reason, and has been said to be "the perfection of reason." Inst. 97, B. And its symmetry and all its analogies seem to require, that whenever an ascertained sum is to be paid at an ascertained time, it should bear interest from the stipulated time of payment, if not paid when due.

A consideration of the decisions upon this question, where it has been presented, in suits, by creditors, at common law, is important only, so far as it may aid the Court, in determining whether or not the principles of those decisions are so founded in reason as to justify an extension of their application to cases, in which the Court is not constrained, by authoritative precedents, to apply them. *Doe* v. *Warren*, 7 Greenl. 48, a leading case, was assumpsit, by the creditor, and the *point decided* was, that in an action at law, the plaintiff could not recover interest upon interest. The case at bar presents a very different question. The defendant, the

holder of the notes, is not seeking to collect them, but the plaintiff is seeking to redeem his land, and his process is in equity.

In an action at law, according to the decisions, the defendant could not recover interest upon interest. Nor can the holder of a note, barred by the statute of limitations, recover any thing upon it, but if he hold a mortgage of land to secure his payment, he can hold the land, and the mortgager can redeem it only by paying, or proving that he has paid the note. *Thayer* v. *Mann*, 19 Pick. 535; *Joy* v. *Adams*, 26 Maine, 330. The mortgager, or the person holding his right, cannot be equitably entitled to redeem without performing the condition of the mortgage. If by reason of the lapse of time and neglect on his part, he cannot do it, literally, it surely is not for him to complain that he should be required to do it substantially as he agreed. He should not be permitted to redeem upon terms easier for himself, and less beneficial to the mortgagee, than were stipulated in the condition of his deed. To allow him to do so would be manifestly inequitable and unjust. To permit the mortgager in this case, to redeem by paying the principal and merely simple interest thereon, would be allowing him a reward for violating his contract. It would be presenting an inducement to mortgagers to take the benefit of the three years statute right of redemption in all cases, as matter of economy, in regard to the interest, which in a large mortgage would be an important consideration. As was said by Lord MANSFIELD, in *Robinson* v. *Bland*, 2 Burr. 1088, "where the sum is large, the debtor may gain by protracting the cause in the most expensive and vexatious manner, and the more the creditor is injured the less he is relieved."

"He who demands equity must give equity." And the plaintiff is not equitably entitled to redeem without paying the notes due, with interest to be reckoned precisely according to their tenor, and as was stipulated in the condition of his deed. The decisions upon this question have

been numerous, and they are confused and contradictory. A difference of opinion as to the law, as deduced from decided cases, not unfrequently occurs from the different circumstances, under which a question is presented; and in the application of legal principles to this question of the computation of interest, in the various modes and times in which it has been presented to the Courts, it would not be remarkable, that crude and ill considered decisions should have been, sometimes, regarded with too much veneration as precedents.

In *Waring* v. *Cunliffe*, 1 Vesey, jr., 99, the Chancellor said, "my opinion is in favor of interest upon interest, because I do not see any reason, if a man do not pay interest when he ought, why he should not pay interest for that also; but I have found the Court in the constant habit of thinking the contrary, and I must overturn all the proceedings of the Court if I give it;" and he did not give it. If the decisions of the Court had been wrong, a better logic would have deduced the conclusion, that they should have been overruled and the error corrected and prevented for the future.

The fact that a wrong habit has been formed, is no better reason for its continuance in law or equity than in morals. If wrong decisions have been made, there is less evil in overruling them, than in following them as precedents. It is better to adhere to opinions sanctioned by principle and authority, than to yield our assent to those sustained by authorities alone against reason.

"A mortgagee of mortgage forfeited shall have interest for his interest." 2 Fonbl. b. 5, c. 1, § 4. Compound interest was allowed in *Barrell* v. *Joy*, 16 Mass. 227, in which case, PARKER, C. J., said "in suits for debts at common law, this mode of computation is rejected, because it is in some measure the fault of the creditor to suffer his debt to lie over, beyond the time of payment; the case of a trustee obliged to advance money upon property pledged for the security of his debt is different, and the Court of Chancery, in England, has allowed or disallowed compound

interest, according to the justice of each particular case." The true rule, applicable to the case at bar, was correctly stated in *Kennon* v. *Dickens*, Cam. & Har. 357, in which it was held, that in general, interest upon interest is not allowable, but when the sum is ascertained, and the annual payment forms a part of the contract, where it is so specific, that an action of debt may be sustained, and interest recovered by way of damages for the detention, and particularly, when the payment of the principal is postponed to a very distant period, upon the faith of a regular discharge of the interest, it ought to be allowed.

The case finds that the defendant was called on to render an account of the sum due, &c., and that he did so, accompanied by a written statement that he recognized no right in the plaintiff to redeem, but claimed that the right of redeeming belonged to himself alone, and on the same day the plaintiff tendered the sum of five hundred and twenty-five dollars, which was not received. The defendant rendered the account as requested. The tender was insufficient, being less than the sum due, as appears by the notes. The defendant, therefore, is not liable for costs. R. S., c. 125, § 16. The defendant claims costs, and would by the general rule in equity be entitled to them, if he had not in any manner presented impediments to a redemption. *Vroom* v. *Ditmas*, 4 Paige, 427; *Bourne* v. *Littlefield*, 29 Maine, 402. But he did present impediments by denying and resisting the plaintiff's right of redemption; hence he is not entitled to costs. The result is, that, in my opinion, the exceptions should be sustained; the master's report should be amended, by allowing compound, instead of simple interest on the notes, to be reckoned up to the time of payment, and that a decree should be entered accordingly, with no costs for either party.

See *Farwell* v. *Sturdivant*, vol. 37, p. 308.

HILL, *Adm'x, versus* FISKE.

An agreement in writing to procure for the plaintiff a good and sufficient deed of a certain tract of land, the title of which is not in the respondent, and that was known to the plaintiff, lays no foundation for a court of equity to decree a specific performance of the contract.

Nor in *such a case* will the court of equity retain *jurisdiction* to give compensation in *damages* for a breach of the contract.

BILL IN EQUITY, for a specific performance of a written contract.

THE FACTS WERE AGREED.

The plaintiff's intestate and James B. Fiske, the defendant, entered into a written contract with each other, under seal, on April 14, 1849, in which the defendant agreed to procure a good and sufficient deed for plaintiff of a piece of land described therein, on the payment of certain notes by him given for $455.

Of this sum $200 was payable in June following, and the balance in two equal yearly payments from the date of the contract.

The first payment was made. The intestate died on April 16, 1850, without making the second payment.

On August 14, 1851, S. H. Blake, as attorney, tendered defendant $300 and demanded the deed, which was refused, and soon after this process was instituted by the administratrix.

A part of the agreement between respondent and the intestate, was in these words, "he, the said Fiske, being allowed a reasonable time, after said request, in which to make, execute and deliver a deed, shall make, execute and deliver to the said Hill, his heirs or assigns, a good and sufficient warrantee deed of the tract of land afore-described; which deed shall be signed and sealed by the wife of the said H. S. Fiske, (as the deed will come from him.")

A. Sanborn, for defendant.

S. H. Blake, for plaintiff.

APPLETON, J. — It appears that on April 14, 1849, the defendant entered into a contract with Abraham Hill, the plaintiff's intestate, "*to procure a good and sufficient deed*" of a certain tract of land particularly described therein. The title at that time was in Henry S. Fiske, and by the terms of the agreement, the deed was to come from him. There is nothing in the contract indicating that the defendant was in any event to make or execute the conveyance.

This bill is to compel a conveyance from the defendant of the premises, to which the above contract related. There is no allegation, that at the time when this process was instituted, he had the title or the means of compelling its conveyance. It is not in proof that he has since acquired the means of doing either. Not having the title no decree for a conveyance will be made against him. In *Hatch* v. *Cobb*, 4 Johns. Ch. 560, the Chancellor says, "a specific performance cannot be decreed. The defendant had fairly disabled himself before the suit was brought, and this was known to the plaintiff." In *Kempshall* v. *Stone*, 5 Johns. Ch. 193, the Chancellor says, "that where the defendant has disabled himself before filing the bill, and that the plaintiff knew that fact before he commenced his bill, it is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal and not of equitable jurisdiction." The same doctrine has been held to apply where the party contracting to convey never had any title to the premises contracted to be conveyed. *Morse* v. *Elmendorf*, 11 Paige, 279. It is obvious, where the party contracting has no title to the land agreed to be conveyed, that there is nothing upon which a decree for a specific performance can operate. *Woodark* v. *Bennet*, 1 Cow. 711.

The defendant never having had the title, and that fact being known to the plaintiff, even if the case as proved were one where a specific performance would have been decreed, still as no such decree can be made, this Court will not retain jurisdiction for the purpose of giving compensa-

tion in damages. "The cases of compensation in equity, I consider," says Lord Ch. Baron ALEXANDER, in *Newham* v. *May*, 13 Price, 752, "to have grown out of the jurisdiction of courts of equity, as exercised in respect to contracts for the purchase of real property, when it is often ancillary as incidentally necessary to effectuate decrees of specific performance." It is well settled, that where the vendee never had title to the land contracted to be sold, or where he has conveyed the same subsequent to the making the contract, so that he has not the power specifically to perform the same, and that fact is known to the vendee, the latter cannot file a bill in equity for the mere purpose of obtaining compensation in damages, for the non-performance of the contract by the vendor; but he must resort to his remedy at law for that purpose.

The plaintiff, it will be perceived, has no case entitling him to a conveyance, for the defendant never agreed to convey him a title, and if he had so agreed, it is apparent that it is not in his power so to do. The bill not being maintainable for the purpose of obtaining a decree for a specific performance, and that being known to the plaintiff, it will not now be retained for the purpose of affording compensation in damages.

The rights of the plaintiff have already been presented for adjudication. In *Hill, Adm'x,* v. *Fiske,* 34 Maine, 143, it was held that the plaintiff having failed to show a performance of the contract on her part, or on that of Abraham Hill, was not entitled to recover. As she would not be entitled to damages at law, so she must fail to recover them in equity. *Bill dismissed. — Costs for defendant.*

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

PAGE *& als. versus* CUSHING *& als.*

Evidence that damages have been suffered by a *malicious* prosecution by defendants, commenced without *probable cause*, is sufficient to support an action for a conspiracy in instituting such prosecution.

Unlawful acts *willfully* done, are malicious as to those who are injured thereby.

Probable cause cannot be predicated for a prosecution to accomplish a purpose, known by the prosecutor to be unlawful.

In an action for the *abuse of legal process*, it is unnecessary to allege or prove, that it was sued out *maliciously* or without *probable cause*, or that it had terminated.

ON EXCEPTIONS, HATHAWAY, J.

TRESPASS ON THE CASE for a conspiracy in commencing a prosecution and abuse of legal process.

Defendants severally pleaded the general issue.

Plaintiffs were owners of the steamer Boston, running between Bangor and Boston and touching at the intermediate ports.

On the third day of Dec. 1851, the Penobscot river being closed with ice, the boat was expected to stop at Frankfort, where defendants lived.

All but one of defendants made complaint to that one, and obtained a warrant under c. 211 of Acts of 1851, to search said steamboat.

Evidence was introduced by plaintiffs tending to show, that the complaint and warrant were made before she arrived, and for the purpose of seizing the liquors she had on freight, when she arrived.

The Judge instructed the jury, that to maintain the action, plaintiffs must prove, that the prosecution to search the boat was instituted by the defendants maliciously and without probable cause, and that plaintiffs sustained damage thereby; *that* the defendants had no lawful right to seize the liquors on board the boat, which were there merely on freight, and any combination or conspiracy to do so, would be for an unlawful purpose; and *that* if the defendants, who made the complaint, made it to defendant Jones, (the magistrate,) before the steamboat arrived at Frankfort, and if

the defendants all knew that the steamboat was not at Frankfort when the complaint was made and sworn to and the warrant made, there could not have been probable cause for the complaint at that time, and *that* malice might be inferred by the jury from want of probable cause; *that* it was not necessary, to maintain the action, that defendants should have had any corrupt design, or that there should have been any moral turpitude in the act complained of; *that* defendants might have acted from good motives, and probably did, but if they intended to take liquors from the boat, which they knew were there merely on freight, and combined and confederated for that purpose, they were not justified, and that if by such combination, for such unlawful purpose and the acts done by them in effecting such purpose, they occasioned damage to the plaintiffs, they would be liable to pay such damage.

The defendants requested the following instructions:—

1. That plaintiffs must show, that the complainants knowing and having good reason to believe the facts stated in their complaint to be false, notwithstanding maliciously made the complaint.

2. To sustain this action of conspiracy, so far as based on the abuse of legal process, the plaintiffs are bound to show, that the respondent in the prosecution has been acquitted of the charge in the complaint.

The first was refused except as contained in the instructions, the Court deeming it unnecessary to add to them, and the second was wholly refused.

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

A. W. Paine, in support of the exceptions, argued that the principles which governed this action and that for a malicious prosecution were alike. The first clause of the instructions was wrong, because it makes a party criminally responsible for the correctness of his opinion in matters of law. Probable cause does not depend upon the actual state of the case, but upon the honest and reasonable be-

lief of the party prosecuting. 2 Greenl. Ev. § 455; 4 Cush. 238; 11 Ad. & El. 483; *Payson* v. *Caswell,* 22 Maine, 226; *Stone* v. *Crocker,* 24 Pick. 86; *Willis* v. *Noyes,* 12 Pick. 326; 33 Maine, 332.

As to the instruction regarding malice, there is no such absurdity recognized by law, that a *good* motive may be a *malicious* one. Where malice has been inferred, there has been a want of *bona fides.* 8 C. & P. 11; 34 C. L. 276; 3 M. & P. 12; 1 Am. Lead. Cases, 226; 1 Mason, 104; 6 Bing. 183; 2 Greenl. Ev., note to p. 368.

Again, the Judge took from the jury the question of malice, which cannot be sustained. The Court drew the inference of *malice* from the want of probable cause. The language of the books is, that it *may be inferred,* not *must* or *shall be inferred.* 2 Greenl. Ev. § 453. The law on this question is settled in *Sutton* v. *Johnson,* 1 T. R. 493, and appears to be against the instruction.

It is for the jury to infer malice from the want of probable cause. *Mitchel* v. *Jenkins,* 5 Ad. 588.

The only justification for the instruction is found in *Adams* v. *Paige,* 7 Pick. 542, which has been virtually overruled by same Court in 11 Pick. 527; 3 Cush. 145, and by our Court in 27 Maine, 427.

The requested instruction, that an acquittal must be shown to sustain the action for malicious prosecution is settled in 4 Cush. 217; 2 Greenl. Ev. § 452; 1 Salk. 21; 2 Salk. 452. The same doctrine is applicable to actions of conspiracy. 1 Am. Lead. Cases, 228; 1 Jones, 93; 10 Mod. 214; 2 Mass. 172.

That the first request should have been given, see 1 Am. Lead. Cases, 216; 4 Pick. 393; 3 Mason, 102; 3 Steph. N. P. 2275.

Rowe & Bartlett, contra, cited 13 Maine, 459; 12 Pick. 324; 15 Pick. 340; 24 Pick. 87; 12 Conn. 225.

HOWARD, J. — The plaintiffs claim damages for conspiracy, in the malicious institution of a prosecution, and abuse of

legal process. Under the instructions given, they were required to prove affirmatively, in order to maintain their action, that they had sustained damages by the prosecution instituted by the defendants maliciously, and without probable cause. To these instructions, in the letter and spirit of the law, on the subject of malicious prosecutions, the defendants have no legal grounds of complaint. Nor were they injured by the directions given in reference to a conspiracy to do an unlawful act, knowing it to be unlawful at the time, as repelling the existence of probable cause. For there can be no such thing as probable cause for a prosecution to accomplish a purpose, known to the prosecutor to be unlawful.

Whether the facts and circumstances appearing in a given case amount to probable cause, is for the Court to decide, as a matter of law; and the question of malice is to be determined by the jury. But in a legal sense, malice has a meaning different from its popular signification. Acts willfully and designedly done, which are unlawful, are malicious in respect to those to whom they are injurious. One may prosecute a laudable purpose with an honest intention, but in such a manner, and in such disregard of the rights of others, as to render his acts unlawful. Prosecutions may be instituted and pursued with pure motives, to suppress crimes, but so regardless of established forms of law, and of judicial proceedings, as to render the transactions illegal and malicious. The general motive may be upright and commendable, while the particular acts in reference to others, may be malicious, in the legal acceptation of the term. So that an act may be malicious in a legal sense, which is not prompted or characterized by malevolence or corrupt design.

The instructions on the subject of malice, were therefore correct, although seemingly paradoxical, when the distinction between malice in a popular and in a legal sense, is overlooked.

The remarks of the presiding Justice, substantially, that

if the defendants conspired and confederated to accomplish a purpose which they knew to be unlawful, and by their acts done in effecting such unlawful purpose, they occasioned damage to the plaintiffs, they would be liable for such damage, as embracing a general proposition, would be correct; and taken in connection with previous instructions, would be unobjectionable.

The first request for instructions was properly refused, on the ground, that sufficient directions had been previously given upon the point presented in the request. It was within the discretion of the Judge whether or not to repeat his instructions.

In an action for abuse of legal process it is not necessary to aver or prove, that the process is at an end, or that it was sued out maliciously, or without probable cause. For a prosecution which is not malicious may be improperly employed, and an action will lie for damages occasioned by its abuse, whether or not it be terminated. *Grainger* v. *Hill*, 4 Bing. N. C. 212; 2 Greenl. Ev. 452. This would furnish sufficient reason for refusing to comply with the second request. But there are other reasons why the instructions asked for in that request could not have been granted. It does not appear, that Sandford, the supposed "respondent" in the prosecution, was ever arrested, or arraigned for trial, or that he was directly charged with an offence; the plaintiffs could not, therefore, show, or be required to show, in the language of this request, that he had been "acquitted of the charge made in the complaint."

In an action for a malicious criminal prosecution, the plaintiff may show that the prosecution has terminated without proving an acquittal; as that it has been abandoned by the prosecutor, and the government, before his arraignment, or before he has been required to plead, as was alleged, and not contradicted, in the case at bar. The reason for averring and proving how the original prosecution was determined, before maintaining an action for malicious prosecution, is given, that otherwise, the plaintiff might recover damages,

when by a subsequent disposal of the prosecution, it might appear, that it was not malicious and without probable cause, and thus the results would be inconsistent. *Parker* v. *Langley*, 10 Mod. 209; *Fisher* v. *Bristow*, Doug. 215. But the burden of proof is upon the plaintiff, to establish malice and the want of probable cause, on the part of the prosecutor, which may be done upon his own admissions by plea or parol; and when they can be proved, there is no reason why the suit for damages should be postponed until the prosecution, shown to be false and hopeless, should be more formally terminated. The bare possibility of inconsistent verdicts should not exempt or relieve a party from responsibility for damages for admitted wrongs. It has been held, that a return of *ignoramus* upon a bill, by the grand jury, is sufficient to show the termination of the prosecution. *Morgan* v. *Hughes*, 2 T. R. 225. A nonsuit would have a like effect upon an action alleged to be malicious, to show that it was at an end, although another suit might be brought for the same cause. 10 Mod. 209, before cited.

Exceptions overruled. —
Judgment on the verdict.

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

TOWLE *versus* BLAKE.

It is provided by § 10, c. 205, of the Acts of 1846, that no action can be maintained upon any claim, whether it be by note or account, in whole or in part for spirituous or mixed liquors, sold in violation of that Act.

In a suit upon an *account*, some of the items of which are for spirituous liquors sold in violation of that Act, the plaintiff may, at the trial of the action, amend his bill of particulars, by striking out the items for liquor, and recover on the *account* as thus amended.

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

ASSUMPSIT, to recover a general balance of account.

A bill of particulars was filed, commencing December, 1848, and ending in September, 1849. Among the items were several charges for spirituous liquor.

An account in set-off was duly filed.

The accounts on both sides were admitted to be correct, and that a part of the spirituous liquor was of home manufacture, and that plaintiffs were not licensed to sell such articles.

When the cause came on for trial, plaintiff asked leave to amend his bill of particulars by striking out the items for liquors, which was objected to by defendant.

The plaintiff offered to release all claim he might have for the liquors.

The cause was then taken from the jury by consent and submitted to the full Court, to render judgment by nonsuit or default according to law.

Rowe & Bartlett, for defendant, objected to the amendment, as the request was too late, and cited in defence c. 205, § 10, of Acts of 1846.

Hilliard & Flagg, for plaintiff, that the amendment should be allowed, cited *Wyman* v. *Dorr,* 3 Maine, 103; *Clapp* v. *Balch,* 3 Maine, 219; *Mandeville* v. *Wilson,* 5 Cranch, 15; *Beard* v. *Young,* 2 Overton, 54; *Plummer* v. *Walker,* 24 Maine, 14; *Pullen* v. *Hutchinson,* 25 Maine, 249; *Ball* v. *Clapham,* 5 Pick. 303, and same, 446.

As to the construction of the statute, relied upon in defence, they cited 4 Mass. 471; 15 Mass. 205; 9 Pick. 412; 3 Met. 273; 1 Met. 547.

SHEPLEY, C. J. — This suit was commenced to recover for the value of certain goods sold, among which were spirituous liquors. A bill of particulars, including such liquors, had been filed, and the plaintiff's counsel at the trial asked leave to amend by striking out all the items of charge for such liquors.

The question presented is, whether he may do so and then have judgment for the remaining portion of the account admitted to have been correct.

A bill of particulars is amendable.

The provision contained in the Act of August 7, 1846, c.

205, § 10, that no action shall be maintained upon any claim or demand, including an account, in whole or in part for spirituous liquors, was intended to prevent a recovery for the value of any such liquors; and when so combined with any other matters, that no separation could be legally made, that the action should not be maintained for a recovery of any part of the claim. If the amendment be allowed, the action will not be maintained upon an account part of which is for spirituous liquors, and there will be no violation of any provision of the statute. Its design will be fully accomplished by preventing a recovery for any such liquors.

The plaintiff may amend his bill of particulars by striking out all the items of charge for spirituous liquors, and deducting the amount of the account filed in set-off, take judgment for the balance due with interest thereon from the commencement of his suit. *Defendant defaulted.*

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

TYLER *versus* ALFORD.

A justice of the peace, for any act done in his *judicial* capacity, is not liable in a civil action; but if he act *corruptly* in his *ministerial* duties, he is liable to the party injured.

An arrest on an execution issued upon a judgment lawfully rendered by a magistrate, will not support an action for assault and battery and false imprisonment, against the magistrate, by evidence that he refused to allow an *appeal* claimed from *such judgment*, when sufficient sureties were offered and his fees paid.

ON REPORT, HATHAWAY, J., presiding.

TRESPASS. Plea, general issue.

The declaration contained one count only, and alleged an assault and battery and imprisonment for one day, and by means of the false imprisonment defendant compelled the plaintiff to pay $20.

It appeared, that defendant was a justice of the peace, and four actions were tried by him on one day against the

plaintiff, in which judgment was rendered against him. From these judgments he claimed an appeal and offered satisfactory surety and paid the magistrate eighty cents, but defendant refused to allow the appeals without a payment of $1,50, each, for copies, claimed under c. 205, of the Acts of 1846.

Upon one of these judgments, execution has issued, and defendant arrested and committed to prison.

This was the evidence in support of the action, and on motion of defendant a nonsuit was ordered; and it was agreed, that if, upon this evidence, the action was maintainable, the nonsuit should be taken off and the action stand for trial, otherwise to be confirmed.

Knowles & Briggs, for plaintiff, cited *Briggs* v. *Wardwell*, 10 Mass. 356; *Pratt* v. *Gardiner*, 2 Cush. 63, and a case from North Carolina, Cam. & Nor. 494.

Wilson, for defendant, cited *Tompkins* v. *Sands*, 8 Wend. 462.

HOWARD, J. — The plaintiff alleges in his declaration, that the defendant assaulted him on June 6, 1850, and then and there, with force and arms, "beat, bruised, wounded and imprisoned" him, and "detained him in prison for the space of one day," against his will, and compelled him "by means of said false imprisonment to pay a large sum of money, amounting to the sum of twenty dollars." For that, and that only, stated in a single count, this action is brought. But the evidence offered tended to show, that the defendant refused to allow an appeal from a judgment rendered by him, as a justice of the peace, on March 2, 1850, in a suit in which the plaintiff was the defendant, and claimed an appeal. The gravamen would seem, from the evidence and the argument, to have been the refusal of the magistrate to allow an appeal from his judgment, and the issuing an execution upon which the plaintiff has been arrested and imprisoned.

In rendering the judgment, the justice acted in a judicial character, and within his jurisdiction, and is not responsible

for errors of judgment; nor is he liable, in a civil suit, for any act done by him in his judicial capacity. This doctrine of the protection of judicial officers in their official acts, was maintained by KENT, then Chief Justice, in *Yates* v. *Lansing*, 5 Johns. 287, and supported by an undisturbed current of decisions in the *English* Courts. "*Juvat accedere fontes atque haurire.*" *Yates, in error,* v. *Lansing*, S. C. 9 Johns. 395; *Pratt* v. *Gardner*, 2 Cush. 63; *Tompkins* v. *Sands*, 8 Wend. 462.

But in determining upon the supposed appeal, as well as in issuing the execution, the justice acted ministerially, in a matter demanding the exercise of his discretion. In such cases he may be amenable to a party injured, if he act corruptly. In the case at bar, however, it is not averred that he conducted either corruptly, willfully or erroneously, or that he acted officially. Indeed the case stated in the declaration, and the case intended to be proved, if the evidence offered be regarded as proof, are widely different; so different that a judgment in the one, would be no bar to a suit and judgment in the other. But neither is supported by the evidence. *Nonsuit confirmed.*

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

LAWRENCE *versus* GULLIFER *& al.*

Where the plaintiff hired out by the month at stipulated wages, and before his time expired, was rightfully discharged on account of his bad conduct, he is entitled to recover the value of his services, not exceeding the contract price.

And in such a case, he will not be liable for any damages the other party may suffer by employing another.

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

ASSUMPSIT, for labor.

The defendant offered testimony tending to show, that

the conduct of plaintiff was so bad, that he was obliged to discharge him.

Defendant requested the instruction, that if plaintiff hired by the month for a term, and his conduct was so bad while in his employ, that defendant was justified in discharging him before the time was out, that the plaintiff could recover his wages at the contract price, deducting what damage his leaving before the time was out, would cause the defendant.

This request was refused, and the jury were instructed, that in such case the plaintiff would recover what his labor was worth, for the actual value of his services while he labored; not to exceed in any event the contract price.

To this refusal and instruction defendants excepted.

J. A. Peters, in support of the exceptions, cited *Miller* v. *Goddard,* 34 Maine, 102; *Frazier* v. *Cushman,* 12 Mass. 277.

Knowles & Briggs, contra, cited *Abbott* v. *Hermon,* 7 Maine, 118.

SHEPLEY, C. J. — When one person contracts to labor for another for a stipulated time, he impliedly engages to conduct properly and to labor faithfully. This he may fail to do, by performing his duties imperfectly. His employer is not obliged to receive such imperfect service. He may discharge the laborer. This should not subject the laborer to the payment of damages occasioned to the employer, by his being obliged to employ another at higher wages to perform the duties for the remainder of the time. For the imperfection, which authorized the discharge, may have occurred without any willful intention to violate the contract. It may have been the consequence of ignorance or of infirmity of temper. In this respect it would differ from a voluntary refusal on the part of the laborer to perform his contract, by which he would forfeit his wages, and he should not be subjected to such a forfeiture. His employer in such case cannot reasonably claim to recover damages for a violation

of the contract, by his not continuing to labor for the whole agreed time, for he has chosen to prevent it.

It is alleged in argument, that the laborer compelled him to make that choice. He may have compelled him to decide, whether he would receive an imperfect service, or bear with an infirmity of temper, or refuse to do so and employ another. Still the choice is made by the employer, and he should not make it and then claim to recover damages, because the laborer did not continue to perform his contract. When he is required to pay the laborer not the full contract price, but only for the actual value of his services, he can have no just cause of complaint, unless the laborer has intentionally and willfully conducted in such a manner as to render it necessary, that he should be discharged. It is only, when he does this, that he is required to pay other damages, than the loss of his agreed compensation. And when he does this, he may justly be required, as in other cases of a voluntary and willful violation of his contract, to make compensation for the injury occasioned by his not continuing to labor for the whole stipulated time, although he may have been discharged by his employer.

Exceptions overruled.

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

FISHER *versus* TRUE.

Where a sale of property is alleged to have been fraudulent, the vendee cannot give in evidence the declarations of the vendor in previously offering to sell the same to other persons.

Nor can he show that he was *advised* to purchase it.

But one having a right to impeach the sale, may give in evidence the declarations of the vendor tending to show a fraudulent intent, made *before* the sale.

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

TROVER.

The defendant justified the taking of the goods declar-

ed for, as an officer on a writ in favor of one Lincoln *v.* H. G. O. Weston, and that they were the property of Weston.

The plaintiff introduced three bills of sale from Weston to himself, dated respectively the 10th, 12th and 18th of April, 1848. The note declared on, in writ Lincoln *v.* Weston, was dated April 20, 1847, and was payable in one year from date. It was contended by the defendant, that the sale of Weston to plaintiff was *fraudulent.* Weston was not called as a witness, but the plaintiff, to rebut the fraudulent intent of Weston, proved by one Allen, that prior to the sale Weston had offered to sell the goods to him more than once; and by one Shaw, that he had offered to sell the same goods to him. To the introduction of this testimony the defendant objected, but it was received by the Court. To negative fraud on the part of Fisher, the plaintiff also called Allen to testify, that prior to said Fisher's purchase he had advised him to purchase. The defendant objected to the admissibility of this testimony, but it was received.

The defendant offered to prove the declarations of Weston, made while in the store which contained these goods, and while selling them, a week before the note became due, tending to show, that the sale on his part was fraudulent, but it was excluded by the Court.

The defendant offered to prove the declarations of Weston, made in his store at the time of the attachment of these goods, tending to show the sale fraudulent, but they were excluded by the Court.

The defendant offered to show, that some time before the note became due Weston told Jones, the then holder of the note, that he had sold out in order to prevent an attachment, which was excluded by the Court.

To these rulings the defendant excepted.

Knowles, in support of the exceptions, cited *Corinna* v. *Exeter*, 13 Maine, 321; *Baker* v. *Briggs*, 8 Pick. 122; *Greene* v. *Harriman*, 14 Maine, 32; *Flagg* v. *Wellington*,

6 Maine, 386; *Howe* v. *Reed*, 12 Maine, 515; *Bridge* v. *Eggleston*, 14 Mass. 245; *Parker* v. *Marston*, 34 Maine, 386.

Waterhouse, for plaintiff, cited *Bridge* v. *Eggleston*, 14 Mass. 245.

The opinion of the Court, concurred in by HOWARD, HATHAWAY and CUTTING, J. J., was drawn up by

SHEPLEY, C. J. — The trial took place in October, 1851. The exceptions are first presented for consideration in July, 1854.

The plaintiff claimed to be the owner of certain goods by purchase from H. G. O. Weston, during the month of April, 1848. The defendant, as sheriff, caused them to be attached as the property of Weston, on a writ against him in favor of Lincoln, and alleged, that the sale from Weston to the plaintiff was fraudulent.

The plaintiff was permitted to introduce the testimony of Allen and Shaw, to prove that Weston, before he sold the goods to the plaintiff, offered to sell the same goods to them.

The general rule is, that the declarations of one, who may be a competent witness, cannot be received in evidence. To admit them would be to allow that person to affect the rights of others without assuming the obligations imposed by an oath, and would deprive the party of a right to have him state all facts under that sanction.

The declarations of Weston made to Allen and Shaw, were not suited to prove any fact necessary to be established; and they did not constitute a part of the *res gestæ* of any transaction. They were erroneously admitted.

The declarations of Weston made before, not after the sale, and tending to prove the sale on his part to the plaintiff to have been fraudulent, should for that purpose have been received in evidence. *Howe* v. *Reed*, 3 Fairf. 515. The reason for this exception to the general rule is, that one fact to be established by the defence was his fraudulent

intention in making that sale, which might be inferred from his declarations respecting it or respecting other sales made by him about the same time. His declarations made to Jones while holder of the note by virtue of which the attachment was made, respecting the sale of the same goods to another person to prevent an attachment of them, were admissible. His declarations made subsequent to the sale, and having a tendency to impeach it, were correctly excluded.

The testimony of Allen, that he advised the plaintiff to purchase the goods, should not have been received. It only recited a conversation between others than the parties to the sale and purchase. It could have no legitimate tendency to prove what was the true character of the sale subsequently made. *Exceptions sustained, verdict set aside, and new trial granted.*

PARSONS, *Petitioner for Partition, versus* COPELAND *& als.*

Where one of the commissioners in a warrant for partition, after it issued, declined to act, the appointment of another by the Court, with the certificate of the clerk, on *such* warrant, will authorize the *substitute* to act in the premises.

The *interlocutory* judgment, in petitions for partition, affects only the *common* property, as it existed when the petition was filed.

Buildings *rightfully* erected upon the common property, by one of the tenants in possession, for his own use, after a co-tenant has filed his petition for a division, cannot be *appraised* by the commissioners in estimating the value of the entire property, and thereby give to the petitioner a *share* of their value.

The appraisal of *such buildings*, although no part of *them* is assigned to the petitioner, will make the proceedings of the commissioners erroneous.

Things personal in their nature, such as belts, looms, carding machines, pickers, jacks, spoolers and dressers, suited and designed for a woolen factory, and placed therein by the owners, although they may be taken away without detriment to the freehold, are, nevertheless, fixtures which appertain to the realty, and in a partition ordered among tenants in common, may be divided as real estate.

On Report, Hathaway, J., presiding.

Petition for Partition.

This case was before the Court, (33 Maine, 371,) when partition was ordered and commissioners appointed. Their report was subsequently offered for acceptance, when Calvin Copeland, one of the respondents, filed objections: —

1. Because Lysander Cutler, Caleb B. Curtis and Jonas Wheeler were appointed commissioners and commissioned in due form of law, and at a subsequent term Paschal Abbott was appointed by said Court instead of said Cutler, but no commission under the seal and attestation of said Court ever issued, directed to said Paschal Abbott.

2. Because the said commissioners set off and assigned to said Parsons, property of which Calvin Copeland was sole seized in fee, and in which the petitioner had no seizin nor possessory right.

3. Because the commissioners set off as real estate personal property belonging to said Copeland, to wit, machinery connected with a woolen factory, consisting of looms for weaving, carding machines, bands, water-wheel, fulling stocks and boilers, together with other personal property generally found in a woolen factory.

The petition for partition was entered at the October term, 1849, and described the entire premises of the tenants in common, containing five acres, and all the privileges and appurtenances to the mill or factory privilege, and claimed, that the petitioner was owner in fee of twenty-three six hundred and twenty-fifth parts of the premises, and that the same might be set off in severalty.

At the October term, 1852, an interlocutory judgment was entered, the commissioners were appointed and their warrant issued, but one of them having declined, Paschal Abbott was appointed in his place, and the same was certified on the warrant by the clerk.

The return of the commissioners set forth particularly their doings in complying with their warrant.

Evidence was introduced showing, that Calvin Copeland

in 1850, built a dye house near the factory without a cellar. In it was a copper kettle, iron kettle, washers, fulling stocks, press and shafting. A dry house also was built by him, at the same time, standing on blocks, and the year following a wood house.

In estimating the value of the entire property the commissioners included the preceding, but none of it was set off to plaintiff. In the part set off was a portion of the machinery, consisting of looms, carding machines, belts and wheels by which the woolen factory was operated.

All the papers used in the former trial were presented, and the Court were authorized to render judgment according to the legal rights of the parties upon the evidence admissible, the parol evidence being objected to.

Hilliard & Flagg, for respondents, cited 12 N. H. 205; 4 Pick. 311; 9 Conn. 63; 14 Mass. 352; 4 Metc. 306; 17 Johns. 116; 20 Wend. 636, and the case of *Seaff* v. *Hewitt & al.* Ohio R. Jan. term, 1853, and particularly the *comments* of the Ohio Court upon the case of *Farrar* v. *Stackpole*, 6 Greenl. 154. He cited also 2 Watts & Serg. 116.

J. Crosby, for petitioner.

1. There was no error in the commission, and if so it was amendable. 3 Greenl. 29; 10 Maine, 278; 26 Maine, 411; 23 Maine, 251.

2. The store house and land was common property.

3. The property set off was real estate. All the machinery and buildings have become a part of the realty by *accession*. The property to be divided was settled by the *interlocutory judgment*. The construction given to the language of the warrant by the commissioners has been well settled in this State. *Farrar* v. *Stackpole*, 6 Greenl. 154; *Trull* v. *Fuller*, 28 Maine, 545; *Corliss* v. *McLaughlin*, 29 Maine, 115.

The same principles of construction apply to a levy as to a deed. *Waterhouse* v. *Gibson*, 4 Greenl. 230; 2 Kent, 346.

In Massachusetts the law is the same. *Winslow* v. *Mer.*

Ins. Co., 4 Metc. 314; *Butler* v. *Page*, 7 Metc. 40; 8 Metc. 26; 19 Pick. 314. The same view is taken in Pennsylvania. *Voorhis* v. *Freeman*, 2 Watts & Serg. 116; *Gray* v. *Holdship*, 17 S. & R. 415. In New Hampshire such is the law. *Despatch line of Packets* v. *Bellamy*, 12 N. H. 205; *Powell* v. *Monson*, 3 Mason, 466.

TENNEY, J.—1. The commission issued upon the judgment for partition under the seal of the Court. One of the persons appointed to make the division declined to act, and the Court designated another. This appears by the commission and the official certificate of the clerk thereon, and was in all respects sufficient authority to those appointed, in the discharge of the duties prescribed. The substitution of one commissioner for another did not annul the commission in other respects or impair its legal effect. After the substitution, the seal upon the commission was adopted, and applied equally to the person substituted, and to those who were previously appointed, and accepted the trust.

2. Another ground of objection to the acceptance of the report is, that the commissioners set off and assigned to the petitioner, property of which Calvin Copeland, the respondent, was sole seized in fee, and in which the said petitioner had no seizin in or possessory right.

The petitioner obtained twenty-three, of six hundred and twenty-five parts of the premises, under the levy of an execution in his favor against Calvin Copeland, on Nov. 18, 1847. The petition for partition was presented to this Court and entered therein at October term, 1849, in the county of Penobscot; and judgment for partition thereon was rendered at the October term, 1852, of the same Court, and commissioners were appointed to make partition, who made their return and report on Feb. 16, 1853, signed by them.

The case discloses, that after the levy of the execution and the filing of the petition for partition in Court, and before the interlocutory judgment, a dye house and a dry house,

with kettles and other articles therein, together with a wood house, were erected on the premises by Calvin Copeland, for the purpose of carrying on the factory with greater facility and profit. It does not appear that the petitioner aided in the erection of these buildings, or that he consented or objected to their erection. These were taken into the estimation of the value of the premises by the commissioners, and the division made accordingly, though no part thereof were set off and assigned to the petitioner, and the party, who caused their erection, is not deprived of them. But as they constituted a part of the appraised value of the whole, the value of the share set off to the petitioner was proportionably greater than it would have been, if they had not been taken into the account.

If these buildings had been upon the land at the time the petition was filed, and no question had been presented in the proceedings, whether they were a part of the common property or not, the interlocutory judgment would have established the title in the petitioner to twenty-three parts of the six hundred and twenty-five, including the buildings in question. The commissioners would have had no authority to exclude any part of these buildings, upon the land; and would not have been empowered to inquire whether they were erected exclusively by one tenant in common or not, with the view to disregard them in the division, if it should be found, that they were erected by one party alone, before the filing of the petition. Under the commission they would have been bound to make division of the premises, as they found them.

But the judgment for partition must be based upon the petition, and the estate therein described. It cannot include property, not embraced in the petition, or which has not been added under such circumstances as to make it a part of the premises to be partitioned.

After a petition for partition has been filed in Court, and all the tenants in common of the land referred to therein, have had due notice of its pendency, if one should erect a

temporary building thereon, for his own exclusive use, by the consent of his co-tenants, such building would belong to the party alone, who erected it, in the same manner, that it would, if placed upon the land of a stranger, under similar permission.

It cannot be assumed, from the evidence, that Calvin Copeland, being in possession of the premises, as a tenant in common with the petitioner, who owned a small part only of the premises, erected the buildings in question wrongfully, so that they became a part of the common property. But from the description of the buildings and the mode in which they were attached to the ground, and the use for which they were apparently designed, according to the testimony, and the entire want of evidence, that they were placed there against the consent of the petitioner, it may well be inferred that they were erected rightfully, and never became the property of the tenants in common. Consequently it would seem to comport with the justice of the case, and with the equitable rights of all the owners of the premises, that the partition should be based upon an estimation of their value exclusive of those buildings, if it should be found by the commissioners, that they were legally erected by Calvin Copeland for his own use and benefit, subsequent to the filing of the petition for partition.

For these reasons, the report is recommitted.

3. Another ground relied upon against the acceptance of the report is, that the commissioners set off and assigned to the petitioner, certain personal property belonging to said Copeland, to wit, machinery connected with a woolen factory, consisting of looms for weaving, carding machines, bands, water-wheel, fulling stocks and boilers, together with other personal property generally found in a woolen factory.

As the report is to be recommitted for reasons already stated, it is considered proper to discuss the question presented in the last ground of objection to its acceptance, and to decide the rights of the parties to the property referred

to, so that the commissioners may be enabled to make their report in accordance with those rights.

It appears that one of the buildings upon the land described in the petition and the commission, was a "woolen factory," in which were certain machines, such as are common in such a factory, consisting of cards, looms, jacks, spooler, picker and dresser, sitting upon the floor. The frames of the looms were fastened by cleats, to prevent their moving. There were fastenings made *into* the floor, and the jacks and cards were fastened *to* the floor. And, as we understand from the report, this machinery was put in operation by means of water power connected with the factory.

On the question, whether such machines, so situated, are fixtures, so that they constitute a part of the real estate, the authorities are far from being uniform, and no rule of universal application can be deduced from them, without conflicting with the doctrines found in some of the decisions upon the subject.

It was held in a leading case in England, *Elwees* v. *Mawe*, 3 East, 38, after much consideration, that there was a distinction between annexations to the freehold, for the purposes of trade and manufacture, and those made for the purposes of agriculture, and that the right of removal by the tenant, of the former, was much stronger than of the latter. And it may be regarded as well settled, that an article may constitute a part of the realty, as between vendor and vendee, which would not under similar conditions and circumstances be so treated as between landlord and tenant. 2 Kent's Com., Lecture 35.

The same distinction exists between the rights of the heir and executor, in favor of the former; and between the tenant for life and the remainder-man, or the reversioner. The rights of the mortgagee to such additions made by the mortgager, during his possession have been equally favored with those of a vendee. *Winslow & als.* v. *Merchant's Ins. Co.* 4 Met. 306. The same rule will apply to fixtures

under the levy of an execution, as it does between vendor and vendee, passing them as parcels of the inheritance in one case as in the other. *Powell & ux.* v. *Monson & Brimfield Manf. Co.* 3 Mason, 459.

The case before us, differs in some respects, from the classes of cases referred to, as this concerns the power and duty of commissioners in making division of real estate owned in common and undivided, by the parties. By the judgment of partition each party is equally the owner of the premises, and has equal rights therein, in the proportion, determined thereby. Whatever was in the "Woolen Factory," situated upon the land described, and used in the appropriate business thereof, could not have been considered by the commissioners, to be temporary for one party more than for the other, and therefore cannot fall within the principle applicable, as between landlord and tenant. Hence it is a case, where the doctrines, which govern, as between vendor and vendee, are to have their most extended influence.

Still, if one party had placed in the factory certain articles, which were clearly personal in their nature, and under no rule, became part of the realty, the commissioners were not at liberty to regard them in the division, which they undertook to make.

It has been held necessary, in order to constitute a fixture, that the article should be let into, or united to the land, or to substances previously connected therewith. Ames & Farrard on Fixtures, 2. In *Walker* v. *Sherman*, 20 Wend. 636, it was held requisite, that the article be actually affixed or annexed to the realty, to become parcel thereof. By other authorities, it has been regarded necessary, in order to give to chattels the character of fixtures, and deprive them of that which they had before the relation to the realty commenced, that they be so firmly fixed, that they cannot be moved without injury to the freehold by the process of removal. *Farrar* v. *Chaufette*, 5 Denio, 337.

It cannot be denied, that the physical attachment of cer-

tain articles to the freehold, is a very uncertain and unsatisfactory criterion. We have seen, that it is well settled, that the same attachment will not change the character of the article, when made under one species of tenancy, when under another, with much less of a permanent connexion, it will cause the article to become a part of the real estate. Millstones, the gear of the mill, and the water-wheel to which the power is applied, and the articles connected, which are universally conceded to be fixtures, and to pass with the realty, may be taken from their appropriate places, without the withdrawing of a spike, a pin, or a nail, or the displacement of a cleat, their own weight often keeping them in their intended position, and no injury whatever arise to the building from which they are taken. Many articles, constituting essential parts of the most permanent dwellinghouses, and without which the buildings could not be comfortably occupied, may be entirely removed with the greatest facility, and no injury be occasioned to the portions remaining.

Mr. Dane remarks, "it is very difficult to extract from all the cases as to fixtures, in the books, any one principle on which they have been decided, though, being fixed and fastened to the soil, house or freehold, seems to have been the leading one, in some cases, though not the only one." "Not the mere fixing or fastening is alone to be regarded, but the use, nature and intention." Abridg. of Amer. Law, vol. 3, p. 156.

In *Winslow & als.* v. *Merchant's Ins. Co.*, before cited, the Court say, "as to what shall be deemed fixtures, and part of the realty, when the question does not arise between landlord and tenant, or tenant for life and remainder-man, in regard to improvements made by the tenant, it is difficult to lay down any general rule, which shall constitute a criterion. The rule, that objects must be actually and firmly fixed to the freehold, to become realty, or otherwise to be considered personalty, is far from constituting such a criterion.

In *Teaf* v. *Hewett & al.*, from the Ohio Reports, cited in

the argument, where the Court came to the conclusion that machines in a factory are not parts of the realty, the learned Chief Justice in a very elaborate opinion says, "after a careful review of all the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture. 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Application to the use and purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation, to make the article a permanent accession to the freehold; this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the party making the annexation, the *structure* and *mode* of annexation, and the *purpose* and *use*, for which the annexation has been made."

The intention is here held essential in the determination of the question, and so far the rule is not in conflict with the views entertained by the Court in 4 Met. The same Judge seems to consider the want of the first requisite, as not entitled to controlling influence in all cases, for he remarks, that "the doors, windows, shutters, &c., of a mansion house may be raised and removed without any actual physical injury, either to the building or the article removed; so also, in a mill with the millstones, hoppers and belting apparatus, as usually fixed in a mill, yet it has never been questioned, that these articles are fixtures."

It is undoubtedly true, that the second requisite quoted is important. It will not be contended, that a machine, fitted to be moved by water or steam power, portable in its character, when placed in a building, (having such power for other and distinct objects) with the mere purpose of testing the capacity of such machine to perform the contemplated operations, by the application of the power by the belts in previous use, would become a part of the realty, by such experiment. Such was not the design, and such cannot be the legal effect.

But it is true undoubtedly, that the building, the water-

wheel and the gear designed for a grist-mill, has peculiarities, and is often very different from the water-wheel, the gear, as well as the building intended to constitute parts of a woolen factory. And the machinery in the former, consisting of the millstones, the cleansing apparatus, the bolts, the belts with their appendages, to carry the grain to the cleanser and the meal to the bolts, all of which are believed sometimes, if not generally, to be moved by means of the belts connected with the gear of the mill, together with the hoppers, the hoops, troughs, &c., are as easily removed as are the cards, the looms and the pickers, in the latter. If the building is designed for a woolen factory, the wheels and gearing to which the motive power is applied, constructed in a manner suited to promôte the intended object, after the machines are placed in the building, it is only another step in the prosecution of the design; and it is not easy to understand wherein the latter fail to have the properties of the former; or how one can have distinguishing characteristics from the other, so that one is to be treated as personal property, while the other is real estate. A wheel in the gearing is moved by corresponding cogs in that wheel, and the water-wheel. The wheel of a carding machine is caused to move by means of a belt connecting the wheel of the gearing therewith, or by means of another set of corresponding cogs. By what rule is it, that the dividing line between the realty and the chattels shall be at one point or the other?

It is the supposed intention of a tenant for a limited time, in placing articles, which if made by the absolute owner would become part of the realty, to remove them at the expiration of his term, because such would be for his interest. This intention might be inferable, if the articles placed in a mill, which was rented for a term less in duration, than that of the supposed existence of the articles themselves. But when the same articles are placed therein by the owner of the mill, to carry out the obvious purpose for which it was erected, and which are in all respects suited therefor,

and may be unsuited for another mill, it is difficult to see the reason of the proposition, that these articles are still chattels in the hands of him who is the common owner of all, when in fact, they are more permanently attached to the freehold than many things universally admitted to be parcel of the realty.

This Court have repeatedly held, that certain articles, not differing materially in their general character in reference to the question which we have considered, ceased to be personal property, when used in connection with the real estate for the purpose designed, in an appropriate manner. *Farrar* v. *Stackpole*, 6 Greenl. 154; *Trull* v. *Fuller*, 28 Maine, 545; *Corliss* v. *McLagin*, 29 Maine, 115. No reason is perceived for withdrawing the present case from the doctrines of those previously decided, especially as authorities in other States fully sustain the views here taken, although in others, Courts of the highest standing have come to different conclusions.

Report of the commissioners recommitted.

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

CHAMBERLAIN *versus* GARDINER *& als.*

By the second mode of foreclosing a mortgage, the mortgagee may enter into possession and hold the same, by consent in writing, of the mortgager; but no such entry shall be effectual, unless such consent in writing shall be recorded, within thirty days after such entry.

To render a foreclosure in this mode effectual, an *entry* must be proved. A consent to enter is not evidence of an entry.

The *possession* required to be held by the mortgagee, is equivalent to an *actual* possession.

Such possession is not provable from the consent in writing by the mortgager that he *may* enter, and that possession is *thereby* given.

Of the admissions of the mortgager.

BILL IN EQUITY to redeem an estate mortgaged.

The defence was, that the mortgage had been foreclosed.

The complainant being seized in fee of a tract of land in Carmel, on Oct. 9, 1847, mortgaged the same to A. K. Gardiner of New York, to secure certain notes which have not been paid.

On Nov. 20, 1852, A. K. Gardiner conveyed the same premises to Elias Dodge of Carmel, by deed of warranty, who then mortgaged the same to A. K., Mary B. and Charlotte Gardiner, all of New York, to secure certain notes given to them.

A demand in writing for an account was made upon said Gardiners and Dodge and refused, who are all made parties to this bill.

On October 29, 1849, the complainant, at Bangor, executed, acknowledged and delivered an instrument, consenting that the mortgagee might enter into possession of said premises.

After describing the mortgage, the paper read thus: — "Now know all men by these presents, that I, George W. Chamberlain, of Carmel aforesaid, hereby consent that the said Gardiner may enter into possession of said premises and hold the same from this day for the purpose of foreclosure of said mortgage, and the time for procuring said foreclosure commences from this time, and possession is hereby given. Dated at Bangor, this twenty-ninth day of Oct. 1849."

The above paper was recorded in the registry of deeds for Penobscot on Nov. 1, 1849.

After this paper was executed the complainant occupied the premises, mowing a part of it, and paying the taxes for the three years following. And no actual possession was taken by the mortgagee or his agent. No agreement was made with complainant as to his occupation.

It was proved, that after the three years from the date of said paper, the agent of mortgagee met the complainant and informed him that the foreclosure was out. Chamberlain denied it, but on finding the paper, and looking at it, said it was so.

Upon so much of the evidence as would be admissible for either party, the Court were authorized to render a legal judgment.

Peters, for defendants.

The complainant has lost his right to redeem. The three years after possession was taken, run out before he sought to redeem. His right is therefore barred.

The plaintiff cannot say, that no actual possession was taken. He is not permitted to say so here. He has said otherwise. The law will not allow him to seek of mortgagee this mode of foreclosure, to acknowledge in writing an entry made, rather than have it published to the world in a newspaper, and then deny such an entry in the face of his acknowledgment. He is estopped to deny an actual entry. *Lawrence* v. *Fletcher,* 10 Metc. 344; *Oakham* v. *Rutland,* 4 Cush. 172.

Our entry to foreclose was an eviction and was the commencement of a new title in us. But again, the statute must have a reasonable construction. What is the object of the mortgagee's holding possession? Simply, that the mortgager may not be misled, that he shall have notice that the foreclosure is going on. Has he been overreached here? He knew all about it, and after the time had elapsed acknowledged it. This branch of the statute is considered in the case of *Thayer* v. *Smith,* 17 Mass. 429.

A. Sanborn, for complainant.

The foreclosure set up fails, because the mortgagee did not actually enter into possession and hold the premises for three years, according to the mode prescribed by statute. The paper is not conclusive evidence, that possession was taken and held for three years. This may be disproved by testimony. *Pease* v. *Benson,* 28 Maine, 336. The words in the paper, "I hereby give possession," do not prove the fact, that an actual entry was made or possession obtained.

There is no difference, in effect, as to the kind of possession, between R. S, c. 125, § § 3 and 4, and the statute of

1821, on the same subject. Although the word "actual" is omitted in R. S., the possession contemplated is, nevertheless, *actual*. If any doubt can exist as to the meaning in § § 3 and 4, § 7 of the same chapter shows that an *actual* possession is only intended.

TENNEY, J. — It was decided in *Ireland* v. *Abbott*, 24 Maine, 155, that a mortgage could not be foreclosed, except by pursuing one of the modes provided by the statute for that purpose. C. J. WHITMAN, in delivering the opinion of the Court, says, "the language of the statute seems to be plain and unambiguous, and we cannot hesitate in coming to a conclusion, that the defendant, in order to avoid the plaintiff's right of redemption, must bring himself within one of the provisions named.

In *Pease* v. *Benson*, 28 Maine, 336, it is held, that a foreclosure cannot be made according to the second mode provided by statute, c. 125, § 3, without an actual entry into possession for condition broken, by the consent in writing of the mortgager, or those claiming under him; but that the written consent is of no effect, but to make such entry lawful.

The statute, under which proceedings in the cases just referred to, took place, that were relied upon as sufficient to work a foreclosure in three years therefrom, was that of 1821, c. 39, § 1. But that statute is not materially different from the one in force on October 29, 1849, R. S., c. 125, § 3, so far as it treats of taking possession for condition broken, in order to foreclose the mortgage. By the former, when any mortgagee, &c., shall lawfully enter and obtain actual possession, &c., for condition broken, &c., provided that the entry shall be by consent in writing of the mortgager, &c., the mortgager, or person claiming under him, shall have the right to redeem the same in three years, and not afterwards. By the Revised Statutes, after breach of the condition, if the mortgagee, &c., is desirous of obtaining possession for the purpose of foreclosure, he may enter into

possession and hold the same, by consent in writing, of the mortgager, &c.

But, by the R. S., such written consent shall be recorded, and no such entry shall be effectual, unless such consent shall be recorded. c. 125, § 3. Such possession, obtained as above described, being continued for three following years, shall forever foreclose the right of redemption. § 4.

The provision in the R. S., that no such entry shall be effectual, unless such consent in writing shall be recorded, implies, that if the written consent shall be so recorded, such *entry* shall be effectual. This was not intended to dispense with the proof of the entry, for if so, all that would be necessary to show, would be the written consent, duly recorded, that the mortgager, &c., had given permission for the entry, and thereby dispense with evidence to prove the entry itself, and consequently authorize the omission in fact of that which the statute has made indispensable, to effect a foreclosure in this mode. The statute has provided, that as preliminary to the entry, the mortgager shall give his written consent, that it shall be made; and to prove this, the writing itself, duly recorded, is the evidence required.

The writing, signed and sealed by the complainant, under date of Oct. 29, 1849, as proof of possession taken, fails to establish such fact. It is a consent, that the defendant, Augustus K. Gardiner, *may* enter into possession, and that possession was *thereby* given. This paper is dated at Bangor, and the land is in Carmel. No possession could be given by the paper alone in fact, and no other is proved.

The possession required by the R. S., to be taken and held, is not intended to be different from that to be taken under the statute of 1821, although that last named was to be actual. The possession required under the statute now in force, cannot be less than that which is actual, as is manifest from the case, cited for the defendants, of *Lawrence* v. *Fletcher*, 10 Metc. 344.

The report of the case shows, that no actual possession was taken by and in behalf of the mortgagee or those claim-

ing under him; and consequently, the mortgage is still open for redemption.

The admission of the complainant that "the foreclosure was out," can have no effect whatever. There having been no proper steps taken to effect a foreclosure, the admission of the complainant was entirely nugatory. But it is manifest, that all that he intended was, that three years had elapsed from the time the paper was executed. And even his belief that the written and recorded consent would constitute a foreclosure in three years, being erroneous, would be without effect.

There must be a decree, that the complainant may redeem the premises, on paying such sum as may be found due in equity and good conscience, and unless the parties agree upon the sum, a master must be appointed to report the amount to be paid in order to redeem the premises from the mortgage.

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

BANCHOR *versus* CILLEY, *Executrix.*

Two persons keeping a public house together, making bills and purchases in the management of their house in the name of both, are not necessarily *partners.*

Where the owner of goods living and having his place of business in Massachusetts, sends his clerk into this State to obtain orders, and a memorandum is here given to him for goods of a greater value than thirty dollars, which he agrees shall be supplied, and which are subsequently sent by the owner, the *sale* is not perfected until the owner has put them up and actually parted with their possession.

Under such circumstances, the sale is in Massachusetts, and whether the articles could be lawfully sold, must be tested by the laws of that State.

ON FACTS AGREED.

ASSUMPSIT, on account annexed for sundry liquors and cigars, amounting to $134,00.

The plaintiff resided and kept a store in Boston, Massa-

chusetts. The defendant's testator kept a public house in Corinth in the county of Penobscot, with one Alanson Carey.

In March, 1849, a clerk of plaintiff's was at their public house soliciting orders for liquors and other goods, and Cilley, defendant's testator, there, in presence of Carey, made a memorandum of the kind and quantity of goods to be sold by plaintiff, and sent to Corinth, for and on account of said Cilley and Carey. They were the same as charged. The clerk took the order and agreed that plaintiffs should sell them to Cilley and Carey. The goods were subsequently sent by plaintiff and received by them.

Both Cilley and Carey, in the management of their public house, made bills and purchases in their name.

Cilley is dead, and defendant is his executrix. Carey is still living.

If the action can be maintained, defendant is to be defaulted; otherwise plaintiff is to be nonsuited.

A. Sanborn, for defendant.

1. A co-partnership existed between Cilley and Carey, and the action should have been brought against the latter.

2. The sale was made in Maine, and was illegal, being in violation of c. 205, § 10, of statute of 1846.

3. Carey alone is liable, Cilley having died before the sale was perfected.

Ingersoll, for plaintiff.

TENNEY, J. — The executrix of the last will and testament of Jacob Cilley is called upon in this action for the payment of the account annexed to the writ, a part of which is for spirituous liquor of domestic manufacture. The defence is upon two grounds; 1st, that the purchase was made by the defendant's testator and one Carey, as co-partners in the business for which the goods were obtained; and 2d, that a part of the same goods were sold in violation of the statute of 1846, c. 205, § 10.

It is very clear, if such co-partnership between Cilley and

Carey did exist at the time of the purchase, and the purchase was made by that firm, that no action can be maintained against the defendant as the representative of Cilley, the deceased partner. Story on Part. § 361, and cases cited. On the other hand, if the goods were purchased by the testator alone, or by him and Carey not as partners, but in a joint contract of both, the plaintiff is entitled to recover, if the action is sustainable on other grounds. R. S., c. 115, § 23.

It becomes important therefore to determine, whether the defendant's testator and Carey were co-partners in the purchase. "Partnership is a contract of two or more persons, to place their money, effects, labor and skill, or some or all of them in lawful commerce or business, and to divide the profits and bear the loss in certain proportions." 3 Kent's Com., Lecture 43, pages 2 and 18 in 1st ed. "There must be a communion of profit to constitute a partnership, as between the parties. They must not be jointly concerned in the purchase only, but jointly concerned in the future sale." *Ibid.* 3. "The communion of profit and loss, is the true test of partnership," *Cooper* v. *Eyre*, 1 H. B. 37, and there must be a community of interest in the subject matter of it. *Dwinal* v. *Stone*, 30 Maine, 384.

The statement of facts on this point, show only, that Cilley and Carey were keeping a public house; that the former in the presence of the latter made a memorandum or order for goods, in quantity and quality specified in the account upon which the suit is brought, with the request, to one Bayden, the plaintiff's clerk, who was soliciting orders for liquors and other goods, that they should be sent to Cilley and Carey, and that both Cilley and Carey made bills and purchases in the management of their house in the name of Cilley and Carey. If Cilley and Carey can be considered as the purchasers of the goods, they are not by these facts brought within the definition of a co-partnership as between themselves. And as the plaintiff does not assume, that a co-partnership did exist between

them, it is immaterial to inquire, whether they can be treated as partners with third persons.

2. Statute of 1846, c. 205, § 10, provides "that no action shall be maintained, on any claim or demand, made, had or given, in whole or in part, for any wine, brandy, rum or other strong or spirituous liquors, or mixed liquors, a part of which is spirituous, in violation of the provisions of this Act." To prevent a recovery, the sale must have been made in a place, in which the parties were affected by this Act. "When a bargain is made and rendered binding, by giving earnest, or a part delivery, or by a compliance with the requisites of the statute of frauds, the property, and with it the risk, attaches to the purchaser." "Delivery of goods to a carrier or master of a vessel, when they are to be sent by a carrier or master, is equivalent to a delivery to a purchaser." "A delivery by the consignor of goods, on board of a ship, chartered by the consignee, is a delivery to the consignee; and the rule is the same, if they were put on board a general ship for the conveyance." 2 Kent's Com. 292, 293. "A merchant in America orders goods to be purchased for him in England; in such a case the law of England ought to govern, for there the final assent is given by the person who receives and executes the order of his correspondent. And when the purchase is made by an agent, without orders, and is ratified afterwards, the ratification is of the purchase, and relates back to the time of the purchase." Story's Conflict of Laws, § § 285 and 287. To make it a sale, there must be a delivery and an acceptance, actual or constructive; and it is not perfect, when any thing remains to be done to constitute a parting of the property by the vendor, and an acceptance by the vendee. In *Carter & al.* v. *Toussaint*, 5 B. & A. 855, BAYLEY, J., says, "there can be no acceptance or actual receipt by the buyer, unless there be a change of possession, and unless the seller divests himself of the possession of the goods, though but for a moment, the property remains in him." The case here cited was one where the value of the goods was

above the value of £10, and the statute of frauds was applicable.

Bayden, though the clerk of the plaintiff, did not profess to act as his agent, and if it had been otherwise, the value of the goods being more than thirty dollars, on no principle was a sale perfected, when the order was taken at Corinth. The testator gave him a memorandum or order for the kind of goods, in quantity and quality specified in the account, *to be sold by the plaintiff;* and Bayden agreed, that the plaintiff *should sell* the goods, put them up in Boston, and send them to Cilley and Carey at their risk. The goods were afterwards sent by the plaintiff, and received and accepted.

Until the plaintiff had consented to sell the goods, had put them up, and actually parted with them, by sending them, he could not be regarded as having sold them; and before all that was done he was under no obligation to part with them. When they were sent the sale was perfect, the goods being such as were ordered. And this consummation was in Boston, which must be regarded in law as the place of purchase. *Torry* v. *Corliss*, 33 Maine, 333.

The sale of the goods having been made out of this State, it was not a violation of the law invoked in defence. *Torry* v. *Corliss*, before cited.

The point taken in defence, that Cilley died before the sale of the goods was made complete, is not supported by the facts of the case, the time of his death not appearing.

Defendant defaulted.

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

PERLEY *versus* DOLE.

Where the plaintiff was jointly interested with another in a bond for the conveyance of real estate, the conditions of which had been fulfilled, and his assignee in bankruptcy, under a license, had sold his interest to defendant, who had obtained a deed from the obligors, and plaintiff claimed that his interest in the bond had been previously assigned as security to a creditor, (from whom he derived a subsequent title,) and that no right in the bond had vested in his assignee in bankruptcy; unless his *bill*, seeking to compel a conveyance of such half, sets forth the assignment to his creditor to have been perfected *before* his petition to be decreed a bankrupt, *it* cannot be maintained.

BILL IN EQUITY. The substance of the bill appears in the opinion of the Court. A general demurrer was filed.

Rowe & Bartlett, in support of the demurrer.

J. H. Hilliard, in support of the bill.

TENNEY, J. — The bill states, that some time in the year 1842, Nahum Mitchell and Seth Bryant gave to the plaintiff and one Abraham Perley a bond to convey to them certain real estate, on the payment of sums of money, as provided therein; that afterwards the conditions of the bond were fulfilled on the part of the obligees, so that they were entitled to a conveyance; that soon after the bond was executed, and before March 6, 1843, the plaintiff assigned to Allen Perley, his father, all his interest in said bond, as additional security to that which he had before given in a mortgage of real estate, for a note of hand for the sum of $10,000, on which, at the time of filing the bill, was still due and unpaid the sum of $4,800, and interest thereon; that on March 4, 1843, the plaintiff filed his petition in bankruptcy in the District Court of the United States for the District of Maine, to be declared a bankrupt, and on June 13, 1843, he was so declared, and J. W. Carr was appointed by said Court his assignee; that on June 24, 1843, said Allen died, leaving a will dated March 6, 1843, which was duly proved, approved and allowed on the first Tuesday of August, 1843; that the first clause in said will is, "I give and bequeath to my son, Daniel Perley, the sum of $200, to be paid, &c." "I also

give and bequeath said son Daniel all notes of hand I may hold against him, at the time of my decease;" that after said Allen's death, the plaintiff delivered said bond to the executor of his said will, to be retained and to be disposed of according to the provisions thereof; that the assignee obtained an order to sell all the plaintiff's title and interest in the bond, and some time in the year 1844, did pretend to sell the same; that by and through which sale, the defendant obtained the bond of said Allen's executor, and procured a deed to be made to himself according to the stipulations therein, without any other or further consideration, than had been paid by the plaintiff; that at the time of receiving the bond, and of obtaining the deed, he well knew that the plaintiff had a just right to one-half of the land described in the bond, and was justly entitled to a deed of the same; and that said defendant holds one-half part of said land, for the benefit of, and in trust for the plaintiff; and that the defendant has been requested by the plaintiff to release to him his proportion of said land, which the defendant refuses to do, fraudulently pretending to have title thereto, by virtue of said pretended sale. And he asks, that the defendant may be decreed and compelled to convey to him, by a sufficient deed, one undivided half of the premises described in the bond. To this bill, the defendant files a demurrer.

It is contended by the plaintiff, that by the will of Allen Perley, not only the note holden by the testator against him, but also the mortgage and the bond, became his property unaffected by any proceedings in bankruptcy, and did not vest in his assignee; and that the plaintiff stands in the place of the testator, and the defendant in the place which the plaintiff occupied before the death of the testator and after the assignment of the bond; and the plaintiff claims to hold the land conveyed to defendant for the security of the money due to the testator and bequeathed to him.

Does the bill show, that the testator acquired any interest in the bond? It is alleged in the bill, that the plaintiff as-

signed all his interest in the bond to Allen Perley, his father. But it appears further, that after the death of Allen, he delivered the bond to the executor of the will of Allen to be retained and to be disposed of according to the provisions of the will. To make the assignment effectual, it must have been made with the knowledge of the assignee, and accepted by him constructively at least. The form of the assignment may have been made by the obligee in the bond and may have been signed, yet this would be ineffectual, so long as the whole remained in the hands of the assignor, if nothing further was done. But upon another ground, even supposing the assignment to have passed the interest to Allen Perley, the bill does not show that any interest passed by the assignment. "All property, &c., of every bankrupt, except, &c., who shall, by a decree of the proper court, be declared to be a bankrupt within this Act, shall be deemed to be divested out of such bankrupt, and the same shall be vested in the assignee." Bankrupt Act of U. S. of 1841, § 3. "Property which the bankrupt had at the time of the filing of the petition will vest in the assignee, after the decree, declaring him a bankrupt and the appointment of the assignee." § 1.

According to the allegation in the bill, the bond may have been executed and delivered to the plaintiff as late as the last day of the year 1842, and may have been assigned to the testator after the plaintiff filed his petition to be decreed a bankrupt. These may have been the facts and every allegation in the bill be true. If so, the plaintiff's interest in the bond vested in the assignee in bankruptcy, and the testator never acquired any interest therein. It follows, that the plaintiff obtained, on his own construction of the law, no greater rights under the will, than Allen Perley himself had.

The plaintiff not having by his bill presented a case, which entitles him to the interposition of a court of equity, the

Bill must be dismissed with costs.

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

TITCOMB *versus* WOOD.

A sale of personal property in exchange for that which is *stolen*, is not *ipso facto* void, but is voidable at the option of the vendor, as between him and the fraudulent vendee, and those claiming under him with notice.

But when *such fraudulent vendee* has transferred *the property* to a *bona fide* purchaser for a *lawful consideration*, the vendor can no longer reclaim it or its value from such innocent purchaser.

And when the consideration of such subsequent sale, was in part for a pre-existing debt, and *in part* for the value of property which had been previously *stolen* by the *fraudulent vendor*, it cannot be impeached.

ON FACTS AGREED.

TROVER for a watch of the value of $25.

The plaintiff was a dealer in watches and jewelry, and in Dec. 1852, was the owner of the gold watch alleged to be converted by defendant.

On that day, one M'Clure, representing himself to be the owner of a silver watch, proposed an exchange for the *gold* one with one of plaintiff's clerks. The trade was perfected.

The silver watch had been stolen by M'Clure, and the owner subsequently obtained it of plaintiff.

M'Clure turned out the *gold* watch to defendant in payment for goods which he had formerly purchased of him, and in part for goods stolen from him.

The parties to this suit were ignorant of the fraud of M'Clure.

Defendant refused to give up the gold watch to plaintiff.

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

Morrison & Humphrey, for defendant.

1. The vendor could have annulled the sale and reclaimed the watch while it remained with the vendee; but not after it had passed to a *bona fide* purchaser. 15 Mass. 156; 2 Pick. 184; 12 Pick. 307; 2 Fairf. 227; 33 Maine, 202.

2. Was the defendant an innocent purchaser? This is made certain by the facts agreed.

3. The consideration of the purchase was legal. It was not for an antecedent debt *alone*; though that may be good

where there is no collusion. Am. Lead. Cases, vol. 2, p. 154. That was only a part of the consideration. M'Clure had previously stolen goods from defendant. Such goods were the absolute property of defendant. And these were in effect sold to M'Clure. The defendant parted with his *property* in them, for the watch. Neither part of the consideration is *illegal*, and if one part should be deemed insufficient, the sale must still be allowed to stand. *Gilbert* v. *Hudson*, 4 Greenl. 345.

J. E. Godfrey, for plaintiff.

A purchaser of goods from one who has obtained them by fraud has no title against the party defrauded, unless he pays for them at the time of the purchase. It cannot be upheld if the consideration is an *antecedent debt*. 20 Johns. 651; 13 Wend. 570; 4 Mass. 404; 15 Mass. 156; 4 Maine, 345.

When one of two innocent persons must suffer, the loss must fall on him who would suffer least in the whole transaction. In the case at bar *no value was paid for the watch at the time defendant received it.*

HOWARD, J.—M'Clure acquired the gold watch by exchange of watches with the plaintiff's clerk, whose authority is not disputed. The transaction was consummated by a transfer of goods for goods, and constituted a sale of the property in question. But, as the watch then delivered to the plaintiff's clerk by M'Clure, had been stolen by him from another person, neither he, nor the plaintiff, acquired any title to it; and it remained the property of the true owner from whom it had been feloniously taken. A felon has no right to stolen property, and can transmit no right to it to another.

The stolen watch was represented by M'Clure to be his property, but it was subsequently reclaimed and taken by the owner. The attempted sale of it was fraudulent, and rendered the purchase of the gold watch from the plaintiff a fraudulent transaction. Yet the sale to M'Clure was not

void *ipso facto*, but was voidable at the option of the vendor, as between him and the vendee, and those claiming under him with notice of the fraud. *Parker* v. *Patrick*, 5 T. R. 175; Poth. on Oblg. Pt. 1, c. 1, § 1, Art. 3, No. 29; *Ditton* v. *Randall*, 33 Maine, 202; *Mowrey* v. *Walsh*, 8 Cow. 238; *Rowley* v. *Bigelow*, 12 Pick. 307; *Oriental Bank* v. *Haskins*, 3 Met. 332.

It appears that the defendant, ignorant of the fraud upon the plaintiff, purchased the gold watch of M'Clure, *bona fide*. The consideration for the purchase was the discharge at the time of a prior indebtedness, and the value of goods previously stolen from him by M'Clure. The discharge of a preëxisting debt, if it existed prior to the fraudulent purchase, it has been held, would not constitute a sufficient consideration to sustain the sale to the second purchaser, as against the first vendor who had been defrauded in the sale of the property. Whether such doctrine can now be maintained, without qualification, is not material in the view taken of the case before us. Here the defendant, being the owner of stolen property, with his right and title unimpaired by the felony, transferred it to M'Clure for the property in question, in part payment, at least. This constituted a valuable consideration for his purchase, given at the time. Thus it appears that he was a purchaser of the gold watch, *bona fide*, for a valuable consideration, and without notice of the fraud by which his vendor acquired it. This gives him a superior equity, and a better right, and enables him to hold the property against the defrauded vendor. *Buller* v. *Harrison*, Cowp. 565; *Root* v. *French*, 13 Wend. 570, 572. *Plaintiff nonsuit.*

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

CHANDLER *& al. versus* MCCARD *& al.*

In a conveyance by monuments, distances and *quantity*, the latter, being the most uncertain *description*, must yield to the former.

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

TRESPASS *quare clausum.*

The parties are owners of the north and south portions of the same lot. A four rod strip between them was claimed by both parties, and on this strip was the alleged trespass.

The title of the plaintiff through mesne conveyances, was derived from John Amory to one Thomas Allen, by his deed of March 19, 1832. The description in that deed was thus: "beginning at the north-east corner of said lot, on the town line; thence running south two degrees west on the town line, ninety-six rods, to a stake; thence west two degrees north, two hundred and twelve rods, to the east side of a town road; thence northerly by said road to the north line of said lot; thence east two degrees south on said north line, one hundred and forty rods, to the boundary first mentioned, *containing seventy-five acres, however otherwise they may be bounded.*"

Evidence was introduced by defendants, subject to objection, tending to show that it was the intention of the parties to Allen's deed, that he should have just seventy-five acres; and that Allen said he was to have that number only; that in 1837 the proprietors run off his land and the surveyor made a mistake in his running; it was discovered by him, but it was too dark to correct it; that Allen asked if he might not have the overplus, to which inquiry was answered, that the deed had been made, and could not be altered.

The plaintiff introduced evidence tending to show his occupation of the greater part of the land in dispute down to 1849, when the defendant run a fence about four rods further north across the lot, taking into his possession the tract now in dispute.

It appeared that if the plaintiff was limited to seventy-five acres, he had no complaint against the defendants.

The Court were authorized to render a legal judgment on the evidence admitted, and if a default was entered, the damages were agreed to be $10,00.

Ingersoll, for defendants.

A. Sanborn, for plaintiffs.

SHEPLEY, C. J. — The question presented is, whether the plaintiffs have acquired title to the tract of land described in the conveyance made on March 19, 1832, by John Amory to Thomas Allen, being part of lot numbered one, in the fourth range of lots in the town of Exeter, or to seventy-five acres of the north-east part of it.

After a description of the lot conveyed, by monuments, lines and distances, the deed contains these words, "containing seventy-five acres, however otherwise they may be bounded."

When in addition to such a particular description, the quantity of land is named, the whole is to be considered as descriptive; and the quantity being the less certain part of the description, must yield to the more certain, and the description by boundaries becomes conclusive. *Powell* v. *Clark*, 5 Mass. 355. This rule is too well established to be affected by considerations that the parties to a conveyance may in their ignorance of it, have supposed that the less certain description would prevail over the more certain. In the recent case of *Pierce* v. *Faunce*, 37 Maine, 63, this rule was enforced against considerations of more weight than are presented in this case.

If the stake named in the deed from Amory to Allen as standing at the termination of the first line is found, that will determine its length; and if it be not found its length will be determined by the number of rods named in the deed. *Heaton* v. *Hodges*, 14 Maine, 66.

The acts of the parties and their declarations are not suf-

ficient to destroy or vary their legal rights, as exhibited by the deed.

Defendants defaulted.

Judgment for $10 *damages.*

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

McCRILLIS *versus* HAWES.

A settlement made by one of two joint trespassers for *one-half* of the property taken, will not preclude the owner from maintaining an action against the other to recover the balance.

Where property was wrongfully taken by *partners* and sold, a subsequent settlement with the owner for one-half by one, will interpose no defence for the remaining value, in an action against the other.

Instructions requested upon a branch of the defence which is *controverted*, and which assume, that it is not so controverted, are properly rejected.

And *immaterial* instructions furnish no ground for disturbing a verdict.

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

TROVER, for the conversion of "one hundred sticks of pine timber, to wit, thirty tons."

No question arose as to the title or conversion.

One Lewis was the partner of defendant at the time the cause of action accrued, and was the principal actor and jointly liable for the conversion. Lewis settled with plaintiff and paid $60, for his half of the damages claimed, and was thereupon released in full by plaintiff from all further liability to him on account of the cause of this action.

The plaintiff claimed sixty tons to have been cut.

The defendant's counsel requested the instruction, that Lewis having been fully discharged by paying for one-half of all the damages claimed, it operated as a discharge of the defendant; *that*, the plaintiff having proved a contract entered into with him by Lewis and the defendant for a settlement of the trespass, he could not recover in this form of action, but must resort to his action on the contract; *that* the payment by Lewis for one-half of the trespass

timber, passed to said Lewis an undivided half of the property in said timber, and gave to Lewis the right of possession of the whole timber; *that*, by said Lewis' settlement, one undivided half of the timber became partnership property and gave defendant the right of possession, and *that*, the plaintiff having declared but for thirty tons, he could recover, if any thing, only for one-half of thirty tons.

This request was denied, but the presiding Judge instructed the jury, *that* the settlement with and payment by Lewis, being but for one-half of the timber claimed, discharged only Lewis; *that*, though there was a contract entered into to settle, yet if it was not performed, it was not an extinguishment of the *tort*; *that*, though Lewis might have acquired a title to half of the timber cut, by his settlement after the conversion, it could not enure to the benefit of defendant, except so far as to relieve him from liability to the amount of one-half of the whole damage claimed, and so far it did, and that he was liable for half of the whole damages whatever they might be; and *that* the jury might consider, that the thirty tons declared for, was the plaintiff's half of the whole undivided quantity of lumber.

A verdict was returned for plaintiff, and defendant excepted to the instructions and refusals to instruct as requested.

Brett, in support of the exceptions.

Rowe & Bartlett, contra.

1. The money paid by Lewis was not paid in satisfaction of the *tort*, but as compensation *pro tanto* for the damages. No receipt was given for the *tort*, but simply a receipt for the money and not to sue Lewis. It can be no bar to a several action against the defendant. It can only be used by him as evidence of a partial satisfaction. *Snow* v. *Chandler*, 10 N. H. 92.

2. The instructions asked for were properly refused. The instructions given were unobjectionable save the last, and that was immaterial. That remark was called out by the last request of defendant's counsel, and was founded on a

misapprehension of the declaration. And as this has not misled the jury to the injury of defendant, it is immaterial and constitutes no ground for disturbing the verdict. *Howard* v. *Miner*, 20 Maine, 330; *French* v. *Stanley*, 21 Maine, 516; *Cummings* v. *Chandler*, 26 Maine, 453.

SHEPLEY, C. J. — The settlement made with Lewis, one of the joint trespassers, does not appear to have been for the whole trespass but to have been expressly limited to a compensation for one half of the property taken. He does not appear to have been released from the whole trespass, but only from further liability after payment of the one half. The case of *Gilpatrick* v. *Hunter*, 24 Maine, 18, was an action of trespass for an injury to the person, incapable of exact estimate or of division, and the settlement appeared to have been made with one of several joint trespassers for the whole trespass.

This is an action of trover to recover for the value of certain timber. The cases are very unlike, and the settlement for part of the property converted, will not prevent a recovery for the other part. *Benbridge* v. *Day*, 1 Salk. 218.

Another ground of defence presented appears to have been, that by paying for one half of the timber, Lewis and the defendant being partners, became owners of that half, and thereby tenants in common of the whole with the plaintiff, who cannot therefore maintain an action of trover against either of them.

The whole timber appears to have been sold, and to have passed from the possession of all the parties before any adjustment was made by Lewis with the plaintiff. The right of the plaintiff to maintain this action does not rest upon the demand for the timber made upon the defendant, but upon an appropriation of it to his own use by a sale of it before the action was commenced.

It was further contended, that the plaintiff could recover for one half only of thirty tons of timber.

The cause of action alleged in the declaration is not, as

the argument supposes, for the conversion of thirty tons of timber only. It is for "one hundred sticks of pine timber, to wit, thirty tons," which came into the possession of the defendant. The property claimed is the sticks of timber; the thirty tons is but an estimate of its quantity. The plaintiff might recover for the value of the one hundred sticks of pine timber, or for so many of them as he could prove that he owned, deducting the value of one half, for which he had already received compensation.

The request for instruction "that the plaintiff, having proved a contract entered into with him, by Lewis and the defendant, for a settlement of the trespass, he could not recover in this form of action, but must resort to his action on the contract," was properly refused. It assumed, that such a contract had been proved, and a compliance would have withdrawn from the consideration of the jury any testimony respecting it. The remarks made by the presiding Judge respecting such contract, appear to have been made from a reliance upon the statement made in the request and to have been immaterial, assuming its existence without any sufficient testimony.

The request for instructions "that the plaintiff having declared for but thirty tons, he could recover, if any thing, only for one half of thirty tons," was also properly refused.

This request appears to have been made, as well as the remarks of the presiding Judge respecting it, upon a misapprehension of the legal effect of the declaration. By a correction of that error the whole becomes immaterial.

Exceptions overruled.

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

DOAK *versus* WISWELL.

By the common law, fixtures and permanent improvements of the freehold, made by a tenant for life, or for years, are part of the realty, and descend to the heirs of the estate.

But when made for his own use, by a tenant at will, or for a term certain, by *consent* of the landlord, they remain the *personal* property of the *tenant*, and at his decease, constitute a part of his estate.

A tenancy by curtesy is created by operation of law, and no buildings erected upon the estate by *such tenant* by consent of the wife, will thereby become personal property. The law takes away her power to contract with her husband.

And fixtures erected by *such tenant* become part of the realty.

ON FACTS AGREED.

TROVER, for the conversion of a dwellinghouse and barn.

Plaintiff, in 1831, married one Irena Wiswell, who died in 1845, without issue, leaving six brothers and sisters, the heirs at law of her real estate, of whom the defendant is one.

The house and barn sued for were erected by the plaintiff in 1839, on the land of his wife, which she inherited. The house has a cellar and is underpinned with stone, and the barn is not connected with the house.

Samuel, a brother of defendant, brought a writ of entry against plaintiff and recovered judgment for seizin and possession of one-sixth of the premises in 1848, and took possession of the same.

The defendant moved into the house in October, 1845, and has resided there and had possession of the house, barn, and the premises on which they stand ever since. The first year he had a verbal lease from plaintiff; since that time, he has held the premises as one of the heirs at law of said Irena, and as purchaser from Samuel and others, being the owner of five-sixths, undivided.

Before commencing this suit the plaintiff demanded said house and barn of defendant, who replied, that he had no rights there.

The plaintiff some time before the present action commenced a suit against said Samuel, declaring upon a count for money laid out and expended in the erection of the said buildings, in which suit a nonsuit was ordered by the Court.

The Court were authorized to render judgment by nonsuit or default, as the law required.

Kent, for plaintiff, argued the right of plaintiff to recover: —

1. Because the buildings were erected on the land of another, with her consent, and not adversely or against her will. This made them the personal property of plaintiff. *Osgood* v. *Howard*, 6 Maine, 452; *Russell* v. *Richards*, 10 Maine, 429; *Wells* v. *Bannister*, 4 Mass. 514. The consent of the wife is to be presumed from the relation of the parties. Besides, it is unnecessary to show consent. The language in one of the cases cited sustains that view.

2. The fact that the husband during the life of his wife had an interest in the land, does not affect the principle.

3. Though the statute of 1843, c. 6, does not include the plaintiff in terms within its provisions, still he is within the equity and intent of that statute.

4. If the case is viewed simply as a question at common law, and between tenant for life and heirs and reversioners, and merely one of fixtures and the right to remove, then it will be necessary to determine whether these erections were fixtures. As to the barn, it had no connection with the house, and in the absence of any other description, it is to be considered as resting on sills on the ground; and as they are usually built.

It is not stated, that it is attached to the freehold, and no inference to that effect can be drawn. What buildings may be removed by a tenant are set forth in *Dean* v. *Allaby*, 3 Esp. 11; *Benton* v. *Roberts*, 2 East, 88; *Austin* v. *Stevens*, 22 Maine, 528.

W. Fessenden, for defendant, contended, that this action has already been decided in *Doak* v. *Wiswell*, 33 Maine, 355. The plaintiff was estopped by that judgment.

But if not, then the defendant had the legal possession as heir and as purchaser of the interests of the co-heirs; that the buildings when erected became part of the real estate and descended to the heirs; *that* although it had been decided in this State and Massachusetts, that buildings erected upon land of another by the consent of the owner, re-

main the property of the builder, it was only when there was an *express consent* or a *bargain* for the possession of the land; *that* the wife has no power by the common law to make such a bargain with her husband, and none could be presumed. He cited, as decisive of this case, *Washburn & al.* v. *Sproal, adm'r,* 16 Mass. 449.

HOWARD, J.—By marriage, the husband acquires a life estate in the freehold of his wife. If he survive her, and they have no issue, or none which can inherit the estate, his tenancy ceases with her life, and the estate of which she died seized descends to her heirs.

Fixtures, and permanent improvements of the freehold generally, made by a tenant for life, or for years, by the common law, go with the estate and descend to the heirs of the owner. But where made by a tenant at will, or for a term certain, and for his own use, by consent of the landlord, they remain the personal property of the tenant, and, upon his decease, constitute a part of his estate. *Russell* v. *Richards,* 10 Maine, 429; *Osgood* v. *Howard,* 6 Maine, 452; *Tapley* v. *Smith,* 18 Maine, 12; *Van Ness* v. *Packard,* 2 Peters, 137, 147.

The statute of 1843, c. 6, which gives to the assignee or grantee of a tenant for life, or to his heirs or legal representatives, a right to compensation for buildings and improvements made by him, is an invasion upon the rule of the common law, and gives a right to betterments, not conferred by prior enactments. But that statute must receive a strict construction. In terms it does not apply to a case like this, at bar, where the suit is brought by the tenant for life, after the termination of his estate, for the conversion of buildings erected by him during his tenancy. He stands as he did before the statute was enacted, and his rights remain as at common law, in respect to improvements upon the inheritance. *Austin* v. *Stevens,* 24 Maine, 520. The Legislature seem not to have contemplated that he might survive the *cestui que vie.*

The husband's interest in the real estate of his wife is acquired by operation of law, and not by contract. He is invested with rights in her estate, over which she has no control at common law. He might commit waste upon her lands with impunity, because she could not restrain him. Under her general disabilities arising from the marriage, she was not competent to restrict or enlarge his rights over her property, or to contract with him in reference to it; and she could not, therefore, consent to his erecting buildings or making improvements upon her property. He must be regarded as making the improvements as tenant for life, in his own right, and irrespective of any contract with his wife. The Acts of 1844, c. 117, 1847, c. 27, 1848, c. 73, and 1852, c. 227, designed to secure to married women their rights to property, have no application to the merits of this case.

The dwellinghouse, constructed as the case finds, was attached to the freehold, and would belong to the inheritance. "The barn is not connected with the house," as stated in the report; and it does not appear in what manner it was constructed. But the plaintiff, in a former suit against one of the heirs of his wife, claimed compensation for the buildings, barn and house, as we understand the statement; (*Doak* v. *Wiswell*, 33 Maine, 355,) and this action is brought for conversion of the same buildings, regarding both as constituting the same kind of property. As no distinction is shown between them, in this respect, and as the house is clearly a fixture, we cannot treat the barn in any other light than as a permanent structure, attached to the land. It is well known that barns are, not unfrequently, as strongly affixed to the soil, as are dwellinghouses, and we have no authority for concluding that it was not so in the case presented.

Plaintiff nonsuit.

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

STATE OF MAINE *versus* BURKE *& als.*

Before trial it is matter of *discretion* in the Court whether an indictment shall be quashed for alleged defects.

After verdict a *nolle pros.* may be entered as to any part of the count in an indictment, whereby the charge is made *less* criminal.

Judgment will not be arrested because *some* of the counts are bad for duplicity.

Several and distinct offences of the *same nature* may be set forth in different counts of the same indictment.

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

INDICTMENT, in which were three counts.

The first count charged the defendants with a riot, and an intent to *maim* certain persons, also to *rescue* a prisoner.

The second count alleged a riot, and an assault upon a police officer and his assistants in the discharge of his duties, and an high and aggravated assault.

The third count was in common form for a riot.

Before the trial a motion was made to quash for causes apparent upon the indictment, which was overruled.

The defendants, with one exception, were convicted upon the indictment.

After the verdict the attorney for the State, by leave of the Court, entered a *nolle pros.*, as to the *intent to maim*, set forth in the first count, against the objection of defendants.

A motion was made in arrest, which was overruled; the grounds of which sufficiently appear in the opinion.

Exceptions to the rulings were taken by defendants.

Blake, in support of the exceptions.

1. The first count charged a felony, R. S., c. 167, § 2; the other a misdemeanor only; the two offences could not be joined. 20 Pick. 362.

The *nolle pros.*, as to the intent to maim, was objected to. Such a proceeding cannot make the indictment good. *Amendments* are not allowable in this way.

2. The counts are severally bad. The first for duplicity. It alleges an assault with intent to maim, to rescue and a rescue, also a common assault and battery and an unlawful assemblage. *State* v. *Montague*, 2 McCord, 257; 2 Mass. 163.

3. The second count charges a common assault, an aggravated assault and an unlawful assemblage.

4. The third count is defective in attempting to charge a riot. It avers no unlawful act done, or lawful act done in an unlawful manner. The statute as well as the common law require this. c. 159, § 3; 4 Black. 147; *Commonwealth* v. *Hunt*, 4 Met. 111.

Evans, Att'y Gen., contra.

APPLETON, J. — The indictment, as found by the grand jury, contained three counts. A motion was made to quash it, because different offences were charged therein. But nothing is better settled, than that the Court are not bound to quash an indictment alleged to be defective before trial. *State* v. *Stuart*, 21 Maine, 341. The party accused may demur or move an arrest of judgment.

The jury returned a verdict of guilty on all the counts, and a motion in arrest was then filed. The attorney for the government then entered a *nolle pros.* as to the intent to maim, which was alleged in the first count. The defendants have no just cause of complaint, because the charge, as set forth, was reduced in its degree of criminality.

It is alleged that the first count is defective for duplicity. It is liable to that objection, but judgment is not to be arrested for that cause. Where one of two or more counts is bad, and a general verdict is rendered, it is not the subject of a motion in arrest of judgment. The judgment may be several, though the verdict is general. 1 Arch. Cr. Pr., 179. Judgment may be rendered on such counts as are valid. *Jennings* v. *Commonwealth*, 17 Pick. 80.

It is true, it was held by the English House of Lords, in *O'Connell & al.* v. *The Queen*, 11 Clark & Fenelly, 155,

that an indictment containing two counts, either of which is bad, and where the punishment is not definitely prescribed by law, could not be sustained. But this opinion was adverse to that of the majority of the English Judges who had been consulted. The law seems fully settled in this country that in a criminal case, one good count is sufficient to support a general verdict of guilty, however defective the others may be. *The People* v. *Stien*, 1 Parker's Cr. Cases, 202. The "general verdict of guilty," says WILLS, J., in *Baron* v. *The People*, 1 Parker's Cr. Cases, 246, "proves that all the counts are true, the good as well as the bad ones, and it is presumed the Court in rendering judgment, measured the punishment upon the good counts alone." The same doctrine is held in *State* v. *Miller*, 7 Ire. 275.

It is further alleged that several and distinct offences are set forth. But as the indictment now stands there are none within the statute definition of a felony. R. S., c. 167, § 2.

It is well settled, that there is no objection to stating the same offence in different counts, though the judgment be different, if they all be for felonies or misdemeanors. 1 Arch. Cr. Pr. 93. It is no objection, either on demurrer or in arrest of judgment, that separate offences of the same nature are joined against the same defendant. The Court may compel the prosecutor to elect on which charge he will proceed, if in the exercise of a sound discretion, they judge it necessary for the promotion of justice. "Even in felonies," says DUNCAN, J., in *Com.* v. *Gillespie*, 7 S. & R. 469, "there is no objection to the insertion of several distinct offences of the same degree, though committed at different times, in the same indictment against the same offender; and it is no ground of demurrer or motion in arrest of judgment, and where offences are of the same nature, counts at common law and on a statute may be joined." In misdemeanors several and distinct offences may be joined and tried in the same indictment. *Burk* v. *The State*, 2 Har. & Johns. 426; *Kane* v. *The People*, 8 Wend. 211. Indeed the multiplicity of offences committed would seem to afford

but an ill reason for the discharge of the guilty from the penalties attached to violations of the law.

Motion overruled. — Judgment on the verdict.

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

BOYNTON, *in Equity, versus* BRASTOW *& als.*

The rules of this Court in chancery practice, require the bill to set forth clearly, succinctly, and precisely, the facts and causes of complaint.

Without compliance with this rule the cause cannot proceed, but amendments may be allowed on terms.

BILL IN EQUITY. The nature of it sufficiently appears in the opinion.

A general demurrer was filed to the bill, and the causes assigned were; — 1. That it was multifarious. — 2. The statute gave no jurisdiction in such cases, and 3, That no facts were stated which shew it to be one of trust.

The causes of demurrer were fully argued by —

Fessenden, for defendants, and

J. E. Godfrey, for plaintiff.

HOWARD, J. — This case is presented on demurrer to the bill, by two of the defendants. At the hearing, the causes for demurrer were stated and fully discussed. Upon inspection of the bill, however, it is apparent that it does not "set forth clearly, succinctly, and precisely the facts and causes of complaint," as required by the rules for the regulation of practice in chancery cases.

It would seem to have been the intention of the plaintiff to allege that the respondents, as executors, had fully administered upon the estate of the testator; that the mortgages of his real estate to Billings Brastow had been paid, or extinguished, for the benefit of those interested in the estate; that the respondents had accepted the trust provided in the

will, and executed it in part, at least; that they still hold in trust a portion of the estate of the testator, or the avails of it, belonging to the plaintiff, as one of the heirs of the testator, and a *cestui que trust*, under the terms and provisions of the will, which they refuse to assign or convey to her; and that she claims a discovery as to the amount, and that the same, or so much of it as belongs to her by appointment of the testator, be assigned and transferred to her by the trustees. When, therefore, these and other material facts stated in the bill, shall have been set forth clearly and precisely, with proper allegations, it will then present, *prima facie*, a case of trust, where the plaintiff has not a plain and adequate remedy at law, and requiring the intervention of a court of equity.

We do not understand from the statement in the bill, that the plaintiff claims an equity of redemption, or seeks to redeem the estate mortgaged; but that a demand of the mortgagee for an account, and his refusal, were stated historically, as a part of the details of transactions relating to the supposed trust. The bill, on that account, is not rendered multifarious, as assumed by the defendants, who demur.

The demurrer is overruled; and the case is remanded, with liberty to amend the bill, upon payment of costs to the defendants.

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

STONE *versus* REDMAN.

Where the plaintiff claims title to personal property under a mortgage, and introduces the testimony of the mortgager to sustain it, the defendant may prove his declarations made subsequent to the execution of the mortgage to contradict his testimony; and the jury may rightfully consider *such declarations*, with the other testimony, in determining the issue, whether the mortgage was fraudulent.

A party cannot complain, that instructions were not given as to the effect of certain testimony in the case, without any request concerning it.

Stone *v.* Redman.

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

TRESPASS.

The defendant, as sheriff, attached certain goods upon a writ against one E. H. Swett. The plaintiff claimed them by a mortgage duly recorded, before the attachment.

On the trial, plaintiff used the deposition of said Swett, and defendant called two witnesses as to the declarations of Swett, after the mortgage was recorded, that it was only made for a cover to keep his business along; that it was only a sham. This testimony was received *only* for the purpose of contradicting Swett.

Other testimony was produced as to the validity of the mortgage.

Among other instructions, the presiding Judge gave the following: — that with regard to the question whether said mortgage was *bona fide*, and therefore valid, the jury should take into consideration, with the other testimony in the cause, the testimony of said witnesses as to what Swett said as to said conveyance.

To which ruling and instruction the plaintiff excepted.

Fessenden, in support of the exceptions, cited *Bridge* v. *Eggleston*, 14 Mass. 245. The evidence of these witnesses could not be considered as having any bearing on the point whether the mortgage was *bona fide* or fraudulent. It could only be considered as bearing on the credibility of the witness. The utmost effect would be to set aside his testimony. But setting that aside, it would not follow that the jury were to conclude the mortgage was fraudulent, for the presumption was against it.

It is true the evidence was not received for this purpose; but the jury cannot know for what purpose testimony is admitted without being instructed by the Court. It was the duty of the Judge to have limited the effect of the testimony to the purpose only for which it was admitted.

Peters, contra. The testimony was received for some purpose; the defence was, that the mortgage was fraudulent. Swett swears that it was not fraudulent. This was the

question to be considered. If the instruction was in any sense correct, and other instructions should have been given and were not, a party cannot avail himself of the omission, unless the Judge was thereto specially requested. *Hatch* v. *Spearin*, 11 Maine, 354.

SHEPLEY, C. J. — One question presented for decision by the jury appears to have been, whether a conveyance of certain goods in mortgage from E. H. Swett to the plaintiff was made to defraud the creditors of Swett. The deposition of Swett having been introduced as testimony for the plaintiff, testimony to affect its credibility was introduced from witnesses called for defendant, that Swett after making the mortgage, had declared to them, that it was only made for a cover to keep his business along.

The complaint is, that the jury were instructed "with regard to the question whether the mortgage was *bona fide*, and therefore valid, they should take into consideration, with the other testimony in the cause, the testimony of said witnesses as to what Swett said as to said conveyance."

If the testimony of those witnesses had not been regarded by the jury, when the character of that conveyance was under consideration, it could have had no effect to impair the credibility of the testimony of Swett. Other instructions, not stated, were given. It may be, that in them the jury were informed, that the declarations of Swett, so made, should not be considered as proof, that the mortgage was received by the plaintiff to defraud creditors.

If not, and more particular instructions were desired respecting the effect of such testimony, a request for them should have been presented. It does not appear, that any incorrect instructions respecting the effect of it were given, or that any improper use was made of that testimony.

Exceptions overruled.

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

SARGENT *versus* INHABITANTS OF HAMPDEN.

An attorney at law is not permitted to disclose the communications made to him by his client, without his consent.

And declarations made to an attorney with reference to his employment in the cause fall under the same privilege, although the attorney declines the engagement.

The declarations of a person, competent to be a witness, assigning the reasons for not doing a certain act, are no part of the *res gestæ*, and inadmissible.

Where an action was commenced and referred to referees, and their proceedings were set aside as void, in a subsequent suit for the same cause, the records of the proceedings under the referees are immaterial and may properly be rejected.

The *date* of a writ is *prima facie* evidence of the time it was actually made.

In an action against a town for an injury caused by a defective highway, no interest can be added by the jury to the sum found as damages.

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

CASE, to recover damages for an injury alleged to have been received for want of proper repairs of an highway, which defendants were bound to keep safe and convenient, &c.

The writ was dated Jan'y 2, 1852. The alleged injury was sustained on Jan'y 28, 1846.

The general issue was pleaded, and statute of limitations, with a brief statement of former proceedings and an adjudication thereon.

The matters in the brief statement referred to, are reported in 29 Maine, 70; and in 32 Maine, 78.

After the plaintiff had introduced testimony tending to sustain the action, the defendants called *Joshua Hill*, a Counselor at Law, as a witness, who testified that he had a conversation with plaintiff about this case; *that* it was when he was called upon to act as an attorney in taking a deposition in relation to it; *that* the witness refused to act or be retained by the plaintiff; *that* he could not distinguish what part of the conversation was before, and what after his refusal to be employed; *that* all the conversation was made by plaintiff, to induce him to act as counsel.

The defendants proposed to show by the witness, declarations made by plaintiff at that interview, that the writ in this case was not made until more than six years after the injury complained of.

Objection was made on the ground that he was not obliged to disclose the same, which was sustained by the Court.

The writ was served on April 24, 1852, and the officer who served it, being called by defendants, testified that he was requested by Mr. Briggs, of the law firm of Knowles & Briggs, to call at their office and take the writ, about the last of March or the first of April, 1852, at which time he went there, and Mr. Briggs looked for and procured the writ, excepting the fly leaf which contains the declaration; that it at that time had no declaration; that he did not take it then, but did subsequently. The counsel for defendants then inquired what reason was given by Mr. Briggs at that time, why he should not take the writ, and why he did not take it.

To these inquiries the plaintiff objected and they were ruled out.

The plaintiff called Mr. Knowles, of the firm of Knowles & Briggs, to testify, but objection was made, that having this claim to sue in season, if they had deferred making the writ till after the six years, they would be liable to plaintiff for negligence. He was admitted, and testified that the writ was made on the day of its date.

The records alluded to in the brief statement were put into the case by defendants.

As to them, the Court instructed the jury that they were of no avail, and they would disregard them.

The jury were further instructed that they might determine what damages the plaintiff had sustained, and allow him interest by way of remuneration for the detention of the amount thus found, if they should consider it reasonable.

Defendants requested the instruction, that when the statute of limitations is pleaded, and the writ is served more than six years after the cause of action has accrued, that the mere date of the writ is not sufficient evidence that the

action was commenced, or that the writ was made in season to save said limitation. This was refused.

A verdict was returned for plaintiff, and defendants excepted to the rulings, instructions and refusal.

Mudgett, with whom was *Peters*, in support of the exceptions.

1. The declarations made by plaintiff to Hill were not privileged communications. *Jones* v. *Lowell*, 35 Maine, 541; *Barnes* v. *Harris*, 7 Cush. They come not within the rule laid down in those decisions.

But if the communications were made before Hill's refusal to act, they are not within the rule of exclusion. Greenl. Ev. vol. 1, § 237 and 239.

The counselor, to be excused from disclosing, must be actually *employed*. Same vol. § 244; *Foster* v. *Hall*, 12 Pick. 98.

The communication must be made during his employment and *not before*; Buller's N. P. 284; *nor after*; *Cobden* v. *Kendrick*, 4 T. R. 432.

The declarations to Hill are not protected because they were made to a man, who was not and could not be what he tried to make him, his *legal adviser*. *Hutton* v. *Robinson*, 14 Pick. 416; *Bramwell* v. *Lucas*, 2 Barn. & Cress. 745.

The declaration of Briggs should have been admitted as part of the *res gestæ*. Greenl. Ev. vol. 1, § 108. The authorities for this are too numerous to be cited.

3. Knowles was not rightfully admitted to testify. We contend the writ was not seasonably made. If not, Knowles was liable for neglect. His testimony would release himself. The interest was direct. 1 Greenl. Ev. § § 391, 394, 396.

4. The judgment should not have been ruled out; can a submission once entered into be annulled?

5. The date of the writ ought not to be *prima facie* evidence of the time it was made under this issue; if so, it

works a hardship, for we were not allowed to prove by admissions of the plaintiff that it was wrong.

6. Our objection to the ruling of the Judge upon the matter of interest for detention is, that the statute allows nothing.

Kent, contra.

HOWARD, J. — Public policy, and the better administration of justice require, that the professional intercourse between clients and their legal advisers should be free and unconstrained. And to this end, it is regarded so far confidential and privileged, that attorneys, counselors and solicitors are not obliged, nor permitted to disclose it, without the consent of their clients.

The reasons upon which this time honored rule of law is founded, may apply with equal force, where one makes application to counsel for professional services, although the relation of client and attorney, between them, do not, in fact, subsist. As where the latter may not be able to determine, and may not conclude whether to withhold or render his professional aid, until the applicant has disclosed the merits of his case. Then, if he should decline to act professionally in the matter, on account of previous engagements and prior obligations to others, or from necessity or choice, the disclosures and communications thus made should be privileged. As they were committed to him in his professional character, the spirit of the rule would require, that they should not be divulged, without the assent of the party by whom they were made. The protection justly extends to all communications made to legal advisers with a view to obtain professional aid, and in reference to their employment in legal proceedings pending or contemplated, or in any other legitimate professional services. *McLellan* v. *Longfellow*, 32 Maine, 494, and cases there cited and noticed.

It appears, that the plaintiff applied to a counselor of this Court to act as his attorney in this case, and that his

whole conversation with the counselor was with a view to induce him to render professional services, in the prosecution of this suit. The declarations of the plaintiff in that interview, were, therefore, privileged, and were properly excluded.

The reasons given by Briggs, one of the plaintiff's counsel, why the officer should not take the writ for service, on the last of March, or first of April, 1852, formed no part of the transaction to be investigated, and were irrelevant, and were not admissible. And besides, they were, at most, but the declarations of a third person, who was competent to testify in the cause. The reasons why the officer did not take the writ at that time were inadmissible upon the principles stated.

The testimony of Knowles, also of counsel for the plaintiff, was properly admitted. It does not appear that he was interested, or liable, in any event of the suit.

There was nothing in the records offered by the defendants, affecting the rights of the parties in this suit. The proceedings under the reference were invalid, and the suit upon the award, consequently, failed. *Sargent* v. *Hampden*, 29 Maine, 70; *Same* v. *Same*, 32 Maine, 78. The instructions on this point were unobjectionable.

The time when a writ is made with an intention of service, is deemed the commencement of a suit, in respect to the limitations prescribed by the Revised Statutes, c. 146, § 17. In the absence of all evidence to the contrary, a writ is presumed to have been made, when it purports to be dated. The defendants' request was, therefore, properly refused.

The jury were instructed "that they might determine what damages the plaintiff had sustained, and allow him interest, by way of remuneration for the detention of the amount thus found, if they should consider it reasonable." The statute under which the plaintiff proceeds, provides for the recovery for injuries to the person or property, suffered through defects in ways, "the amount of the damage sus-

tained thereby;" but not for probable or speculative loss, nor for detention of damages, as we apprehend. Damages may be assessed according to the injury sustained; and may in some cases include a sum equal to the interest, for detention. As in trespass for taking and converting goods, the measure of damages is, in general, the value of the property at the time of the taking, with interest. And so is the measure of damages in actions of trover. But while it is allowable in those and other cases, to include as damages, a sum equal to interest; yet interest is not recoverable, and cannot be added by the jury to the damage which they have found or assessed. In this case, the plaintiff's claim is restricted, by statute, to "the amount of the damage sustained" from the injury received, as found by the jury.

The instructions on the subject of damages, as stated in the bill of exceptions, cannot be sustained, to their full extent, and on that ground, and that only, the *exceptions are sustained* unless the plaintiff will remit a sum equivalent to the interest.

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

ROUNDS *versus* MANSFIELD.

In c. 17, § 4, of Acts of 1853, it is provided, that each city or town, shall be responsible in damages to the party injured, for all illegal doings or defaults, of its pound-keeper.

Notwithstanding this provision, for *such doings or defaults*, the pound-keeper is *also* liable.

Before acting as pound-keeper, the person chosen, must give a bond with sufficient sureties, approved by the aldermen, or selectmen, for the faithful performance of his duties.

In a suit against him, without showing that his bond was *approved*, before the acts complained of were done, he cannot justify as *pound-keeper*.

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

TROVER, to recover the value of thirteen swine.

The defendant pleaded the general issue, and filed a brief

statement justifying the acts complained of, as pound-keeper of the city of Bangor.

The defendant offered in evidence, the *register* kept by himself, subject to objections; also his official bond, dated June 7, 1853, with surety, and the names of four of the aldermen of the city, on the back of it, approving it, but the approval bore no date.

The records introduced show, that the defendant was chosen and qualified as city pound-keeper for 1853.

The greater number of the swine, according to the register, were taken up in the highways of the city between the 9th of June and last of July, 1853, and were sold by defendant, and the proceeds placed in the county treasury after deducting the costs.

The plaintiff proved, subject to objection, that the names of the aldermen were written on the bond on August 9, 1853.

It was stipulated, that if upon the evidence admissible, the Court should be of opinion, that the action is not maintainable, a nonsuit is to be entered; otherwise a default, and the damages to be assessed by Judge APPLETON.

Wakefield, for defendant, relied on the following points:

1. If the proceedings were illegal the defendant is not liable in this action. If the plaintiff has been damnified, the city should have been made defendant. c. 17, § 4, of Acts of 1853.

2. The bond was required merely for security of the city; the plaintiff has no concern with it. It was not given for his benefit, for he can look to the city.

3. The bond required was actually given and approved in writing by a majority. *Jackson* v. *Hampden*, 20 Maine, 37.

4. The statute does not require the approval in writing; it may be by parol. It was seasonably filed with surety, and the approval had reference to the time it was filed.

5. The statute does not require the bond to be approved before the pound-keeper can act. When he had filed a good

bond he had done all that was required. *Eustis* v. *Kidder*, 26 Maine, 100. Neither does the statute nullify his proceedings, if the bond is not given.

6. It is not competent for plaintiff to prove, that the bond was not approved at the date of it. Being duly filed and approved, the presumption is, it was so done at its date.

A. Sanborn, for plaintiff.

SHEPLEY, C. J. — The plaintiff claims to have been the owner of certain swine sold by the defendant during the year 1853.

The defence presented is, that the acts alleged to have been illegal were performed as pound-keeper of the city of Bangor.

The first objection to the plaintiff's right to maintain the action is, that the city and not the defendant, is liable for "all illegal doings or defaults of its pound-keeper," by the Act approved on March 22, 1853, c. 17, § 4.

While the city is by that Act made responsible to the party injured, the Act contains no provision, that the pound-keeper shall not remain liable, as is usual, when the intention is that the corporation alone should be liable. The mere act of making a principal liable for the acts of an officer acting as an agent or deputy, does not deprive a party injured of his right to proceed against the person committing the injury.

In the second place it is insisted, that the defendant was duly authorized to act as pound-keeper.

The fourth section of the Act of 1853, provides that the pound-keeper shall give a bond with sufficient sureties, "to be approved by the aldermen or selectmen, for the faithful performance of the duties of his office, before he shall be entitled to act as such pound-keeper." Being prohibited from acting before he has given an approved bond, to enable him to act in that capacity, he must show that he had complied with the provisions of the Act. There is no proof

presented of an approval of his bond, before August 9, 1853.

The provisions of this Act are not like those noticed in the case of *Eustis* v. *Kidder*, 26 Maine, 97.

In that case, the language requiring an approval by the selectmen, of a bond of a constable, was regarded as directory; for the penalty was incurred by the service of process "before giving such bond." In this case, the title to act is made dependent upon giving a bond approved.

Defendant defaulted,— to be heard in damages.

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

CUSHING *versus* WYMAN *& al.*

Where the plaintiff sold property to defendants and received payment by an unnegotiable note against third persons, before he can maintain an action on the original sale on account of fraud in the vendee in relation to the note, he must first return the note to the vendee.

Upon a note thus negotiated under fraudulent representations, the party is liable on an implied guaranty.

It seems, that where the plaintiff received such a note under fraudulent representations, and it was larger than the value of the property sold, and he paid the balance in money, he cannot recover for the money thus paid without returning the note.

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

ASSUMPSIT, on account annexed for two horses, and for a note paid by plaintiff.

There was also a count for money had and received.

The defendants purchased of plaintiff a span of horses, and paid therefor by an unnegotiable note running to one of defendants, which was represented to be due and that it would be paid at maturity. The note being larger than the sum due for the horses, plaintiff gave his own note for the excess, and subsequently paid it.

It appeared, that defendants had been furnished with supplies for a logging operation, by the makers of the note turn-

ed out to plaintiff, on their agreement to turn it in to them, and the makers refused to pay it to the plaintiff.

During the trial of this action notice was given to defendants, that the note was in Court, and plaintiff offered to give it up to them.

The cause was submitted to the full Court, to render such judgment on nonsuit or default as the law required.

Kent, for defendants.

1. Before a suit can be maintained, the note must be returned. *Cushman* v. *Marshall*, 21 Maine, 122; *Norton* v. *Young*, 3 Maine, 30.

2. The offer made at the trial was too late. Where that has been held sufficient, it was where they were the *notes* of the party *sued*, and not notes of a third party. Such are *Ayers* v. *Hewitt*, 19 Maine, and *Thurston* v. *Blanchard*, 22 Pick. 18. The reason is obvious. The sale being revoked, the note falls with it.

3. The action is wrong. Although the note was not negotiable, it was transferred by writing and amounted to a *guarantee*, and the action should be on that contract.

4. Plaintiff should have pursued the remedy by suit against the parties to the note to final judgment, before suing us; or show by competent proof, that there was a legal defence to it. He has done neither.

Paine, for plaintiff.

There is no question about the general principle, that property received in exchange, if the contract would be avoided for fraud, must be returned. But in such case it must be of *value*. There is here no danger of losing any thing by defendants by not receiving this note. The whole reasoning of the case cited is upon the ground that the note was *negotiable*. Here it was not.

The evidence showed, that defendants had received the full amount of supplies, so that it is of no consequence whether given up to them or not.

There is no guarantee upon the note; if any liability is incurred by the indorsement, the plaintiff may avail himself

of it under the count for money had and received. Such count is sufficient between the indorsee and indorser.

The fact that defendants had otherwise appropriated the funds by the note to be paid, relieves the holder from the necessity of demand and notice. 22 Maine, 495; 3 Met. 434.

The plaintiff was induced to pay money and part with his horses by the false representations of defendants and can maintain this action to recover back the money. *Wells* v. *Waterhouse*, 22 Maine, 131.

APPLETON, J. — If a party would rescind a contract of sale, on the ground of fraud on the part of the vendee, it is his duty to return what he has received in payment, before he can maintain an action for the goods sold. *Norton* v. *Young*, 3 Greenl. 30. The plaintiff cannot retain the note of Brown & McCrillis, which he received of the defendants, and at the same time enforce his claim for the horses, which he has admitted to have been paid by that note. The defendants were liable to the plaintiff, on an implied guaranty that the amount purporting to be, was actually due. The note was of value to them, as evidence of indebtedness on the part of the makers, and should have been returned or the offer to return should have been made, before instituting the present suit. The case of *Cushman* v. *Marshall*, 21 Maine, 122, is decisive of the one now before us.

Plaintiff nonsuit.

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

STATE OF MAINE *versus* CITY OF BANGOR.

A motion in *arrest* of judgment, can only be entertained, for matters apparent on inspection of the record.

Where *proof* is required to support the *motion*, it cannot prevail.

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

INDICTMENT for neglect of keeping highways in repair.

A verdict was rendered against the defendants, and before judgment, they moved in arrest, for the reason that another and different indictment for similar neglect was found against them at the same term when the present indictment was found.

The motion was overruled and defendants excepted.

A. Sanborn, in support of the exception.

Evans, Att'y Gen'l, *contra*.

SHEPLEY, C. J. — After verdict a motion was made in arrest of judgment, for a cause not apparent from a record of the case, but requiring proof to be made by the introduction of the record of another case.

A motion in arrest of judgment can be entertained only for matters apparent upon an inspection of the record. *Bangor Bank* v. *Treat*, 6 Greenl. 207; *Root* v. *Henry*, 6 Mass. 504; *Watt's case*, 4 Leigh, 672; *State* v. *Heyward*, 2 Nott & McCord, 312; *Gardner* v. *The People*, 3 Scam. 83; *Steward* v. *The State*, 13 S. & M. 573.

It is not therefore necessary to consider, whether the objection would have been effectual, if it had been properly and seasonably presented. *Exceptions overruled.*

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

STINSON, *Appellee, versus* STINSON, *Appellant.*

If the owner of land execute a lease of it for a series of years, and die, the accruing rents, *after* his death, descend to his *heirs*.

APPEAL from a decree of the Judge of Probate, allowing the appellee, as the widow of one James Stinson, $2300, from his personal estate.

The facts in the case were agreed.

James Stinson, being the owner of certain real estate, on Jan. 21, 1853, leased a portion of it, under seal, for the term of ten years, the rent thereof to be $3200, payable yearly, in payments of $320, the first payment to be made Aug. 1, 1853.

In March of that year the lessor died. His personal estate, as inventoried, was valued at $3105. Among these items was the above lease, appraised at $2048.

The appellee is the administratrix, and the appellant one of the *heirs* of said James Stinson.

If the lease and income thereon is rightfully inventoried as part of the personal estate, the decree is to be affirmed; otherwise the allowance of the widow is to be reduced to the amount of the personal estate, after deducting the appraisal of this lease.

Ingersoll, for the appellant.

By the common law, the rents not due at the time of the decease descended to the heirs. 1 Saund. 238; 3 Cruise's Dig. 296; Coke on Lit. 47, (a.)

The law is the same in New York. 3 Kent's Com. (5th ed.) 464, and cases there cited. The same doctrine prevails in Massachusetts under a statute similar to ours. *Gibson* v. *Farley,* 16 Mass. 279; *Jennison* v. *Hapgood,* 14 Pick. 345.

Our own State has also recognized the same doctrine in *Heald* v. *Heald,* 5 Greenl. 387.

Our statutes on this subject are in affirmance of the common law.

The widow has her right of dower in this estate, and one-third of the income, and this is her only right in the premises.

Kent, for the appellee.

APPLETON, J. — It appears in this case that James Stinson, on January 21, 1853, leased to John W. Veazie, the shore of his farm for the term of ten years at an annual rent of three hundred and twenty dollars, payable on the first day of August of each year; that he deceased the March following the date of the lease; that the appellee, his widow, was duly appointed administratrix; that the lease and the income therefrom was inventoried as personal property, and as such formed a part of the allowance made to the widow.

The question presented for determination is, whether or not the forthcoming rents belong to the heir or the administratrix.

The appellant, who is the heir at law of James Stinson, is entitled to the estate out of which the rent issues. But being entitled to the land, the right to the rent follows. "The right of rent service is real property, and descendable to the person entitled to the reversion of the land out of which it issues." 3 Cruise, 282. "If A seized in fee grant an estate tail, or a lease for life or years, reserving rent, such rent as accrues after his death being incident to the reversion, shall go to the heir, and not to his executors although they are named in the covenant." Toller on Executors, 176. The administrator or executor is entitled to rents accruing before the demise of the lessor, but cannot distrain for the same. *Prescott* v. *Boucher,* 3 B. & A. 839. "Rents accruing after the decease," says PUTNAM, J., in *Gibson* v. *Farley,* 16 Mass. 286, "cannot be said to be the goods, chattels, rights or credits of the deceased. They are incident to the reversion." The doctrine of *Gibson* v. *Farley,* was affirmed in this State. "If," says MELLEN, C. J., in *Heald* v. *Heald,* 5 Greenl. 387, "the estate is sol-

vent, they, (the heirs,) are entitled to the estate itself and its income; if insolvent, the creditors are only entitled to the estate of which the intestate died seized, and not to the rents and profits after his death, for those belong to his heirs." The effect of the decree below would be to convert the forthcoming rents of real estate into personal property and transfer them from the heir at law, to whom they descend, to the administratrix, to whom they do not belong, and who, if she had collected, would be held to account for them to the heir. According to the entire weight of authority, the rents belong to the heir, and should not have been included in the inventory.

The decree of the Judge of Probate, from which an appeal was taken, is reversed, and it is ordered and decreed that ten hundred and fifty-seven dollars be allowed the widow, and that the cause be remanded to the Probate Court.

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

BRAY *versus* KELLEY *& als.*

A poor debtor's relief bond becomes forfeited, if he discloses a demand due to him, and does not cause it to be appraised.

But, if on such disclosure he is permitted by the justices to take the oath prescribed by the statute, the damages on such forfeiture must be assessed according to the provisions of c. 85, of the laws of 1848.

ON FACTS AGREED.

DEBT, on a poor debtor's relief bond.

The principal defendant cited the plaintiff before two justices and disclosed one clock, and an execution in his favor of $20; and no appraisal was made of the demand. No oath was administered to the debtor to make true answers, until after the disclosure was reduced to writing and signed by him. Objections were made by the creditor, that the

debtor should not be permitted to take the oath prescribed by R. S., c. 148, § 28; but the justices administered it.

Morrison & Humphrey, for defendants.

Wilson, for plaintiff.

HATHAWAY, J. — The principal debtor disclosed property which he did not cause to be appraised as the statute requires.

According to the *facts agreed,* a default must be entered. But he was allowed to take the poor debtor's oath by two justices, &c., and the damages must be assessed according to the provisions of the statute of 1848, c. 85.

Defaulted, — the damages to be assessed as provided by statute of 1848, *c.* 85.

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

APPENDIX.

STATEMENT OF FACTS, AND QUESTIONS.

STATE OF MAINE.

COUNCIL CHAMBER,
Augusta, Feb. 15, 1855.

To the Honorable Justices of the Supreme Judicial Court:

The opinion of the Justices of the Court is respectfully solicited upon certain questions arising out of the following statement of facts:—

The last Governor and Council, as required by the several Acts to regulate the election of county officers, counted the votes which had been returned from the county of Sagadahoc for county commissioners for said county. Upon comparing and counting said votes, said Governor and Council declared William Hutchings, Alfred Cox, and Abel C. Dinslow, duly elected to said office, and issued commissions accordingly. At the proper time for said board to organize, but two of them, viz: Hutchings and Cox appeared to claim their places. It subsequently appeared that there was no such man in the county as Abel C. Dinslow, but there is one whose name is Abel E. Dinslow, and for whom, there is good reason to suppose, the voters intended to throw their votes instead of Abel C. Dinslow.

First, Upon the foregoing statement, is it competent for the present Governor and Council, so far to revise the

doings of the last Governor and Council as to receive proof of the elegibility to said office of such a man as Abel C. Dinslow?

Second, If the present Governor and Council find there is no such man as Abel C. Dinslow, but that the voters intended their votes for Abel E. Dinslow, is it competent for them to issue a new commission to said Abel E. Dinslow?

Third, If not competent to issue a new commission to Abel E. Dinslow upon the supposition aforesaid, is it competent for the present Governor and Council to throw out the votes for Abel C. Dinslow, and issue a new commission to such person who is elegible to said office, as shall appear to have the highest number of votes?

Fourth, In case the second and third questions should be answered in the negative, is there a vacancy in said office so as to authorize the present Governor to make an appointment thereto.

ANSON P. MORRILL.

OPINION OF THE COURT.

THE undersigned, Justices of the Supreme Judicial Court, respectfully present their opinion on the facts stated in answer to the questions proposed to them by the Governor in his communication bearing date on February 15, 1855.

By the first section of the Act approved on February 22, 1842, it is provided, that the votes for county commissioners "shall be received, sorted, counted, and declared in like manner as the votes for representatives; the names of the persons voted for, and the number each person had, shall be recorded by the clerk in the city, town or plantation books; and true copies of said records, attested in the same manner as the returns of votes for senators, shall be transmitted to the office of Secretary of State." And by the

second section, that the Governor and Council "shall open and compare the votes returned as specified in the first section."

No other duty is thereby confided to the Governor and Council than to "open and compare" the copies of the records of the votes given in the several cities, towns, and plantations of the county, and so attested and transmitted, and from such comparison to ascertain and determine who have been elected.

When this duty has been performed, and the persons thus determined to have been elected, have been commissioned, the whole power conferred upon the Governor and Council for this purpose has been exhausted. The persons commissioned have become legally entitled to their offices, and they cannot be deprived of them by a revision of the former comparison and decision, made by the same, or by any subsequent Governor and Council.

If this were not so, county commissioners duly commissioned and qualified, might at any time be deprived of their offices by a new comparison and decision, not made as the statute requires within a prescribed time, but at any subsequent time during their official term.

This would not be in accordance with the letter or spirit of the statute.

The Governor and Council are not authorized by the Act to receive any other evidence of the number of votes, or of the names of the persons voted for, than what is contained in the copies of the records so attested and transmitted.

If they might enter upon such an investigation from other evidence, they might overrule or disregard the decisions of the officers presiding at the elections, and set aside all their records as erroneous; and might do this upon any such testimony as it might please them to receive and to act upon.

No such authority appears to have been intended to be conferred.

On November 6, 1845, the Governor presented two questions having reference to a construction of the statute, to be answered by the Justices of the Supreme Judicial Court.

Their answer to them was communicated in an opinion published in the Maine Reports, volume 25, pages 568, 569, 570, to which, for additional reasons, reference is respectfully made.

It is not perceived that any subsequent legislation has in this respect materially enlarged or varied the power or duty of the Governor and Council. While, by the Act approved on February 22, 1844, they are authorized to fill any vacant office of a county commissioner, whether it happens "by death, resignation, or otherwise."

The undersigned, therefore, answer the first, second and third questions in the negative; and the fourth question in the affirmative.

ETHER SHEPLEY,
JOHN S. TENNEY,
J. W. HATHAWAY,
JOSEPH HOWARD,
RICHARD D. RICE,
JOHN APPLETON,
JONAS CUTTING.

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1. A covenant by the vendee of certain bank shares, that he would indemnify and save harmless his vendor from any and all liabilities he may have incurred as *stockholder*, or from any loss or damage he may sustain from or on account of *that capacity*, is limited to such liabilities for damages as are recoverable *by law* of his vendor. *Merrill* v. *Shaw*, 267.
2. For costs incurred and for time employed by the vendor in defending a groundless suit, in consequence of having been such stockholder, no action can be maintained upon such *covenant*. *Ib.*
3. An individual stockholder has no authority to defend an action against the banking corporation, after the charter has been repealed and the effects have gone into the hands of receivers. *Ib.*
4. Where the plaintiff had sold to defendant certain *shares* in the Frankfort Bank, and took his covenant against loss or damage on account of having once owned them; and when the charter was repealed was appointed and acted as one of the receivers of the bank, and in a suit against it after such appointment had *wrongfully* agreed to a judgment against the bank, upon which judgment his own property was taken in part satisfaction for having owned *such shares*; for all expenses by him incurred in obtaining a reversal of *such judgment*, and expenses and time in defending judicial proceedings growing out of such illegal judgment, he has no claim upon the covenants of his vendee. *Ib.*

BARGAIN AND SALE.

1. Where the owner of goods living and having his place of business in Massachusetts, sends his clerk into this State to obtain orders, and a memorandum is here given to him for goods of a greater value than thirty dollars, which he agrees shall be supplied, and which are subsequently sent by the owner, the *sale* is not perfected until the owner has put them up and actually parted with their possession. *Banchor* v. *Cilley*, 553.
2. Under such circumstances, the sale is in Massachusetts, and whether the articles could be lawfully sold, must be tested by the laws of that State. *Ib.*

BILLS AND PROMISSORY NOTES.

1. If a person, not the payee, writes his name without date upon the back of a promissory note, it is presumed to have been done when the note was made. *Lowell* v. *Gage*, 35.
2. And *such person* is holden as an original promisor, although over his name was also written "without demand or notice." *Ib.*

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1. Things personal in their nature, such as belts, looms, carding machines, pickers, jacks, spoolers and dressers, suited and designed for a woolen factory, and placed therein by the owners, although they may be taken away without detriment to the freehold, are, nevertheless, fixtures which appertain to the realty, and in a partition ordered among tenants in common, may be divided as real estate. *Parsons* v. *Copeland*, 537.
2. By the common law, fixtures and permanent improvements of the freehold, made by a tenant for life, or for years, are part of the realty, and descend to the heirs of the estate. *Doak* v. *Wiswell*, 569.
3. But when made for his own use, by a tenant at will, or for a term certain, by *consent* of the landlord, they remain the *personal* property of the *tenant*, and at his decease, constitute a part of his estate. *Ib.*
4. A tenancy by curtesy is created by operation of law, and no buildings erected upon the estate by *such tenant* by consent of the wife, will thereby become personal property. The law takes away her power to contract with her husband. *Ib.*
5. And fixtures erected by *such tenant* become part of the realty. *Ib.*

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1. In foreign attachment, the supposed trustee is under no obligation to disclose transactions disparaging his title to real estate. *Moor* v. *Towle*, 133.
2. Although in such process he may declare that he has no goods, effects or credits of the principal in his hands, yet if he state *facts* which are inconsistent with the truth of that declaration and outweigh it, he is lawfully chargeable. *Ib.*

FORCIBLE ENTRY AND DETAINER.

1. By c. 128, § § 1 and 2, R. S., any justice of the peace and of the quorum in the county where he resides shall have jurisdiction in all cases of forcible entry and detainer, except those arising within a city or town therein, in which a municipal or police court is or may be established; and on complaint made to him, in writing and on oath, &c., he shall issue his warrant, &c. *Labaree* v. *Brown*, 482.
2. Under this chapter, a magistrate has no authority to issue a warrant, unless he receives the complaint on oath. *Ib.*
3. Where the judge of a police court issued a warrant, under this chapter, upon a complaint directed to him, but sworn to before a justice of the peace and of the quorum of another county, the proceedings before him were unauthorized and void. *Ib.*

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1. A sale of personal property in exchange for that which is *stolen*, is not *ipso facto* void, but is voidable at the option of the vendor, as between him and the fraudulent vendee, and those claiming under him with notice.

Titcomb v. *Wood*, 561.

2. But when *such fraudulent vendee* has transferred *the property* to a *bona fide* purchaser for a *lawful consideration*, the vendor can no longer reclaim it or its value from such innocent purchaser. *Ib.*

3. And when the consideration of such subsequent sale, was in part for a pre-existing debt, and *in part* for the value of property which had been previously *stolen* by the *fraudulent vendor*, it cannot be impeached. *Ib.*

SUPERINTENDING SCHOOL COMMITTEE.

1. The *parent* of a child expelled from a public school, by order of the superintending school committee, can maintain no action against *them* for such expulsion. *Donahoe* v. *Richards*, 376.

2. The duties imposed upon the superintending school committee, as to expelling scholars from a public school, partake of a judicial character, and for an *honest* though *erroneous* discharge of them, they are not liable in a suit for damages to the person expelled. *Donahoe* v. *Richards*, 379.

3. With such committee, the Legislature have reposed the power of directing the general course of instruction, and what books shall be used in the schools; and they may rightfully enforce obedience to all the regulations by them made, within the sphere of their authority. *Ib.*

4. For a refusal to read from a book thus prescribed, the committee may, if they see fit, expel such disobedient scholar. *Ib.*

5. No scholar can escape or evade such requirement when made by the committee, under the plea that his *conscience* will not allow the reading of such book. *Ib.*

6. Nor can the ordinance be nullified, because the church of which the scholar is a member, hold, and have so instructed its members, that it is a *sin* to read the book prescribed. *Ib.*

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